ROUNDTABLE

EFFECTIVE DISPUTE RESOLUTION

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ROUNDTABLE

EFFECTIVE DISPUTE RESOLUTION

Disputes are a fact of corporate life. Conflicts emerge from a combination of factors, and when an international element is added to the mix, further challenges arise. Understanding disputes and developing a comprehensive resolution strategy is imperative. While disputes are often unavoidable, litigation is not, and companies can consider arbitration, mediation and other forms of dispute resolution as a viable option. They should also draft contract clauses from the outset that deal specifically with potential future conflict. ▸▸

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FW: Could you outline some of the current market challenges at the centre of commercial disputes? What recurring themes are you seeing?

Friedman: One of the continuing challenges for commercial parties is the expense and length of time required to resolve a dispute. In US courts, this challenge is amplified by broad discovery, extensive motion practice, the possibility of civil juries, and the general absence of fee shifting. Even in international arbitration, commercial parties express concern that the process is getting to be too long and costly, and may have lost some of its efficiency edge over court litigation. Fortunately, to some extent the courts, and to a greater extent arbitration practitioners, have attempted to respond to these concerns.

Henein: There has definitely been increased financial pressure on companies. I think the largest shift occurred when the recession hit in North America. At that point we saw more litigation; rather than the recession slowing things down, it sped things up. More companies started asserting their rights, enforcing their contracts more aggressively and following the terms of their contracts by the letter. When the market is healthy, regardless of the sector, companies are more likely to provide indulgences and work with other parties to allow their relationships to continue. In such circumstances they may vary contracts or even ignore actual breaches of terms in order to resist applying those contracts in a draconian fashion.

Horrigan: Many of the disputes that we see, particularly in the CIS, CEE, and Greater China, arise out of failed joint venture projects. Often, the parties have entered into the project with different understandings and expectations, and the project documentation was either not fully understood by one of the parties, or failed to cover all of the promises and agreements made during the course of the negotiations. In other scenarios, particularly in ventures in newer economies, the commercial bargaining power of the parties has changed over time, leading one of the parties to seek to renegotiate or amend the project's terms either through discussions or unilateral action. With the volatility of natural resources prices over the last several years, we have also seen a number of disputes in the energy sector.

Venegas: The challenges we are facing in Mexico are the lack of liquidity to pay outstanding debts; problems in enforcement due to the lack of assets; and fraudulent strategies of debtors to hide assets. Due to these recurring obstacles we recommend clients follow preventive strategies, rather than try to resolve the problems once they arise. First, it is advisable to have in place good contracts supported, if possible, with enforceable guarantees. In general it is believed that a promissory note granted in Mexico would benefit the creditor, but this type of document simply does not translate into good strategy when the debtor is not in a good financial position.

Portwood: The key market challenge that we have been seeing in commercial disputes relates to enforcement. Claimants or potential claimants are focusing on their ability to make good any judgment or award that may be rendered in their favour with defendants facing financial difficulties. Apart from this it is difficult to say that we have been seeing any recurring themes. The financial environment has become so uncertain again that parties or potential parties to litigation often lack the foresight needed to be able to cast the sorts of solid litigation strategies that they would otherwise wish.

No matter what the market, we continue to see parties arriving at a dispute situation and then finding that they haven't provided an adequate dispute resolution procedure in their contract documents because they did not consider it to be a business priority at the time.

JOHN L. OBERDORFER

Oberdorfer: No matter what the market, we continue to see parties arriving at a dispute situation and then finding that they haven't provided an adequate dispute resolution procedure in their contract documents because they did not consider it to be a business priority at the time. Poor or ambiguous contract drafting with respect to both the substantive obligations and the dispute resolution process multiplies issues between commercial parties, leading to increased uncertainty and greater expense associated with resolving them. These problems are only exacerbated by the economic and financial volatility of our times. Liquidity of one or more of the parties, particularly the ability to fund full and complete contract performance to the contract specifications, remains one of the recurring root causes of large commercial disputes.

Rosengard: After an economic downturn, such as the US experienced in 2008, and with the recent debt crises both in the US and the EU, litigators usually see an uptick in commercial disputes. Apart from bankruptcy filings, however, many commentators have noted that the expected increase in commercial litigation has not occurred. Tightening credit markets, substantial increases in accounts receivable, and the presence of bad debts may discourage companies from entering into high stakes litigation because that course often involves taking on great risk and expense. Companies are instead looking for better, more efficient ways to resolve disputes, such as engaging in mediation and arbitration as an alternative to in-court litigation.

FW: Time is a critical factor in any dispute. Is it important for companies to properly assess risks and liabilities as soon as a conflict surfaces? What key points need to be evaluated?

Henein: From the lawyer's perspective, the speed needed for the response and the specific tasks which need to be dealt with depend on the type of claim at issue. With a larger type of claim, such as a class action or sizeable commercial dispute, often there is immediate work needed in managing publicity and expressing a consistent message to customers, clients and the world at large. Other types of actions need a quicker substantive response in the context of the litigation itself. It is important that companies in those situations have a strong reporting structure and that officers, directors and employees are swiftly mobilised and understand the need to cooperate with the lawyers, such as providing information, documents, background and contacts that would not other- ▸▸

wise be evident from the company's records.

Horrigan: It is critical for companies to properly assess risks and liabilities as early in a dispute as possible. Companies must evaluate whether a valid and enforceable dispute resolution clause exists. Absent a valid arbitration clause or other ADR mechanism, the dispute may only be heard in the local courts, where there may be concerns about lack of impartiality, lack of experience with international transactions, and inability to take any resulting award into other jurisdictions for enforcement. All of these factors may cause a company to be more open to settlement options than might otherwise be the case. Whether the counterparty has assets that can be identified and attached must also be assessed. If the counterparty is only an assetless shell, a company in dispute with that counterparty will need to evaluate whether pursuit of an action against that counterparty makes sense, or whether there are any grounds for pursuit of action against a parent or other party in interest that may hold assets. Finally, companies must examine any defences that may be available to the counterparty, and the strength of those defences.

Venegas: First, a complete investigation of the debtor must be carried out, including the state of its facilities – leased or owned; its commercial reputation; outstanding agreements with governmental agencies; ownership of other lines of businesses; and integration of its shareholdings. In addition, we also recommend holding, as soon possible, meetings with the debtor representatives and attorneys to evaluate their attitude regarding the dispute and their willingness to negotiate a possible solution. In this regard, the seriousness of their approach and the sophistication of their attorneys always provide a good hint in assessing the situation and designing a fitting strategy.

Portwood: Two matters must be identified and investigated at the outset. The first is the competent jurisdiction to hear the case and the law applicable to the dispute. The second is the identification of the key facts of the potential case and an assessment of the ability to gather the evidence necessary to be able to make out that case at trial. Once the key facts have been established, the legal theory of the case needs to be developed ensuring that it is consistent with the key facts that can be proved with convincing supporting evidence. Once these two steps have been accomplished, the existence of any need to protect the ability to take the case to the final hearing and to make any favourable judgment or award effective needs to be evaluated and if so the steps that should be taken to achieve that end. This will require an investigation into the vulnerability of any evidence or sources of evidence and what steps need to be taken to preserve that evidence and the risk that the potential defendant may become judgment proof.

Once the key facts have been established, the legal theory of the case needs to be developed ensuring that it is consistent with the key facts that can be proved with convincing supporting evidence.

TIM PORTWOOD

Oberdorfer: Companies need to assess risk at the outset of a dispute, but they also need to do so at the negotiation and drafting stages. Continual assessment of the evolving risks and liabilities associated with a project is essential to effective contract management and dispute resolution. Doing so effectively, however, can be a challenge. When a dispute arises, crystallising the points of dispute between the parties is one of the first and most important steps. What are the exact issues in dispute and what are the actual points of difference between the parties as to each of those issues? Other questions that must be assessed are where those points of difference fit within the rubric of the contractual obligations and allocations of risk, and what the larger issues at stake are. Answering these requires synergy and effective communication between a company's legal team, management and front-line people.

Rosengard: Speed commends a technique called early case assessment (ECA). The process involves identifying and marshalling the key facts that drive the dispute; the significant players in the organisation whose input is necessary to evaluate the claim; the company's business issues that impact on responding to the claim; the costs and risks of continuing with the dispute; and the options moving forward, whether they be taking steps to reach an early settlement or litigating the matter to conclusion. The goal is to see disputes in the context of the enterprise's overall business. One cannot identify the core strategies of ECA within the separate contexts of ADR and litigation, however. Rather, the decision to use ADR or, alternatively, resort to litigation, is the outcome of an ECA process. ECA brings structure to the case assessment analysis by informing decision makers of the options available to them at the earliest stages of the conflict.

Friedman: In general, it is very important to get a handle on a matter at the earliest possible opportunity. A company cannot make good decisions if it does not have good information; a corollary is that if it does not have good information it will often make poor decisions. I have seen a lot of instances where a company has at an early stage missed opportunities, fumbled away possible advantages, or committed itself to some categorical but ultimately untenable position because it has essentially shot first and asked questions later. Getting a handle on a matter typically requires identifying potential sources of information, learning critical facts, understanding the applicable legal framework, identifying and prioritising the various issues that arise, and defining the client's real objectives so that a strategy can be developed to achieve them.

FW: Although the nature of the process will change depending on the circumstances of each case, what are the main considerations for companies when gathering background information on a dispute?

Horrigan: The main considerations for companies when gathering background information on a dispute would include whether the company has previously made any admissions or assertions concerning the subject matter of the dispute; the anticipated amount in dispute in the action; and whether there are any counterclaims that might be raised. Companies must also find out who the individuals are within the company – or external to the company, such ▸▸

as external financial advisers, companies providing reserve calculations for oil and gas companies, and the like – who are aware of or have information about the facts and circumstances of the dispute. They must also determine whether those individuals are willing to testify on the company's behalf, and if so whether they are likely to be good witnesses; whether the company has internal documentation which might be detrimental to its claim and that might be the subject of a disclosure order; and whether the claim is still within any relevant statute of limitation provisions.

Venegas: You have to divide the process depending on the nature of the information you should gather. Public information should, and can be, obtained without alerting the other party, if done properly. Therefore, we recommend being careful in obtaining it. However, in general terms, the nature and amount of public information on average is never enough to evaluate a potential dispute. Consequently, in order to obtain more sensitive information, the hiring of a private investigator may be advisable. In this regard, it is important to emphasise the fact that the private investigator must come from a reputable private agency which guarantees the legality of its methods, in order to avoid obtaining information which may not be used in an actual litigation.

Portwood: The sorts of matters that companies should consider are the recovery of all key documentary evidence; the identification of the individuals with direct knowledge of the facts; and the likelihood that they will be prepared to make a witness statement and give evidence at trial and their credibility as a witness. Companies should also consider the likelihood of obtaining evidence held by third parties to the dispute; the true identity of the defendant and its location; the risks that the defendant may take steps to become judgment proof; the competent jurisdiction to hear the dispute; and the nature of the procedural system applicable.

Oberdorfer: It is important for legal counsel to get involved as soon as possible to ensure proper scope and protections for the information collected. Depending on the governing law and where the dispute ultimately will be decided, a party's discovery obligations can vary and dictate the scope of information that at least must be identified and preserved, if not collected. For example, in the US, electronic discovery is wide-ranging and preservation obligations begin essentially the moment a party is aware there is a dispute. Again, depending on where the dispute arises and the law governing it, involving counsel early on can also help to protect the privileges and other protections that may cover the knowledge transfers, particularly interviews, in turn ensuring that the company obtains candid and full information from those with the most knowledge of the facts.

Rosengard: Litigation is protracted, thus, over time, a litigator comes to understand the varying internal interests of the client's business units. ADR is different, and, by design, less protracted. This presents a challenge to the ADR practitioner, who must learn about the client and its business in a shorter time frame. This can require early consensus among all representatives of the client whose agreement is required to achieve a mediated result, for example. There can be internal cost allocation disputes, which can be difficult to resolve. Where the mediated result involves more than just money, the varying interests of the affected business units can be diverse. Counsel must therefore move quickly to discern what directions to take, and from whom, to develop an acceptable ADR strategy. Forging cooperation among managers within a client's different business units is essential in ADR.

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PETER HENEIN

Friedman: The main substantive consideration when gathering information is that the company gather the information that it requires to achieve its objectives. Sometimes this may be accomplished with a narrowly focused review of a small collection of documents and a few interviews; in other matters, extensive data collection from dozens or even hundreds of custodians may be required, along with scores of interviews, consultations with outside experts, and other steps. There are also many complicated and important procedural considerations: is the evidence gathered admissible? Is the evidence lawfully obtained? Are there data privacy or state secrets limitations on information gathering? What legal or ethical obligations does the lawyer have to ensure the thoroughness of a search for potentially relevant material? Could information gathering interfere with some other process like a criminal investigation led by prosecutors and therefore potentially risk an obstruction of justice charge? Getting the information you need often turns out to be a lot more complicated and time consuming than many people would expect.

Henein: To quote Douglas Adams, "don't panic". The company needs to be level headed. When focusing on gathering background, it is important that key decision makers concentrate on the merits of the case and avoid becoming emotional; the longer the relationship the more likely that there is bad blood between the parties which has festered, and which will infect how companies respond to the litigation. In concentrating on the merits parties should consider the type of claim, which will inform what issues that need to be addressed. For example, if it is a contractual dispute, obviously you want to ensure you have copies of the contract itself, as well as other key documents – which, perhaps surprisingly, is not always the case. With intellectual property disputes you want to make sure that if you have registrations of that intellectual property, you collect them, that you make sure they are all current, and that you update or re-register those properties if necessary – before you start focusing on how to respond to the litigation itself.

FW: What is your advice to companies on implementing an effective dispute resolution strategy, taking in the pros and cons of in-court versus out-of-court methods?

Venegas: Everything depends on the nature of the companies' commercial activities. We would say that a simple commercial business should be handled through in-court litigation. In this re- ▸▸

gard, the main advantage of court litigation in Mexico is that no court fees need to be paid, since litigation in Mexico is free of governmental charges. In addition, the average time for a procedure is within the international standard of three to five years. Finally, there are some specific legal procedures before courts which allow the creditor to secure assets from the debtor from the beginning. The disadvantage of litigation is that if the other party implements a 'blocking strategy' a litigation may take up to 10 years and the litigation expenses may become too high by the end of the dispute. In connection with out-of-court methods, mediation is not often used in Mexico, but it has slowly started to gain reputation as a good resolution method mainly because of the saving in time and expenses associated with it. However, it will take time to build a new culture around it.

Portwood: The key advice is that in general an average settlement is better than a difficult, long and often expensive litigation. How that settlement may be achieved is of less importance provided that a strategy to achieve it is developed early on in the proceedings to ensure the benefit of avoiding the time, cost and energy of pursuing the litigation. This could be direct negotiation, mediation, conciliation or some other form of out-of-court dispute resolution method. It is important, however, to involve persons in the out-of-court resolution strategy who are independent of the dispute itself. Settlement is far more difficult to achieve when negotiations are run by those close to the dispute itself. An objective view of the strengths and weaknesses of the case and the benefits of an average settlement is essential.

Oberdorfer: An effective dispute resolution strategy starts during the contract negotiation and drafting stage. Contrary to popular belief, a dispute resolution provision should be a business term that is negotiated by the parties, not left to lawyers to plug in after the business terms have been agreed to. While many arbitral institutions now have optional rules for the provision of interim relief, parties must specifically consent to the use of those rules and, in the event of non-compliance, a party may find itself in court anyway to enforce an arbitrator's award of interim relief. In the US, courts also have the added benefit of predictability, assessment based on precedent, and full discovery if you need it, such as when there is an imbalance between the parties with respect to information relevant to a dispute.

Rosengard: What ADR has to offer is well known. Parties who elect to resolve their disputes in arbitration, rather than in court, are able to proceed at their desired pace, and not that dictated by a judge; to ensure that the decision-maker has special expertise, where needed; to keep their dispute confidential as appropriate, and so on. Consideration of these advantages at contract formation time can ensure that, if a dispute arises between contracting parties, it is resolved quickly and efficiently so as to minimise disruption of business. Companies exist to do things other than litigate; disagreements are inevitable, however, and ADR offers a more informal and less adversarial means of dispute resolution that can allow businesses to continue to operate while their disagreements are worked out.

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LEE A. ROSENGARD

Friedman: An effective dispute resolution strategy recognises that different strategies might be appropriate for different cases. There is no one-size-fits-all approach. For some disputes, resolution in court may be preferable, while others are better suited for arbitration or mediation. For example, if a bank is seeking to enforce a standard commercial loan in its home jurisdiction, the best option may be to go to a local court. The law is likely to be straightforward, and enforcement is likely to be effective. However, if the same bank has invested proprietary assets in a project in another country, via a shareholder agreement with a party from a third country, international arbitration may be the best option as it may offer a more neutral forum and superior international enforceability compared to a court judgment.

Henein: A key question in many commercial disputes is whether to arbitrate privately or litigate publicly in the courts. There are certainly pros and cons to both. When negotiating contracts and entering into other relationships, that is usually an opportunity to consider whether you wish to arbitrate or leave issues to the public court system. Companies should consider the question of publicity, their ability to control the timing of the process, and the cost. While arbitration is not always cheaper in the long run, the initial costs are higher because parties are paying a decision maker to work on the case, whereas the court process usually involves filing court papers at minimal cost.

Horrigan: The most important element of an effective dispute resolution strategy is to ensure, at the transaction structuring and drafting stage, that the contract properly reflects the full understandings of the parties, with no undocumented side arrangements that might change the parties' deal. In the event the parties wish to avoid local courts, the parties should include in the contract a valid and effective arbitration clause calling for arbitration in an arbitration-friendly jurisdiction. Also, the real parties in interest in the transaction – those with real assets – should be bound by its terms. If the contract is signed by a shell entity for tax or other reasons, it is nevertheless important to have access to suit against the real party in interest in the transaction through a guarantee or other mechanism – otherwise, the contract is nothing but a piece of paper that provides little real protection in the event of breach.

FW: Are there any dispute resolution approaches which seem to work more successfully when applied in specific industries or sectors?

Portwood: The short answer is no. In certain industries, there may be a custom to use certain specific types of dispute resolution approach – I am thinking here of commodity disputes particularly in London and construction disputes on account of the framework agreements typically used – but apart from this, litigation is driv-

en more by the character of the parties than the particular industry or sector.

Oberdorfer: Dispute resolution boards (DRBs) and dispute adjudication boards (DABs) are two approaches that have obtained traction in the construction industry over the past several years. Both provide parties with a faster route to a decision while performance continues, thus avoiding delays to the project and saving money. DRBs are standing boards of impartial professionals that are formed at the beginning of a project to follow construction progress, encourage dispute avoidance and assist in resolution of disputes for the duration of the project. DRB members are tasked with staying informed about a project and its progress, visiting the site regularly and making themselves available on short notice to facilitate resolution of disputes as they arise. A DAB is a five-tiered process that removes the engineer from any decision-making role. In a DAB process, the parties refer their dispute to the DAB, again an impartial panel of professionals, which then provides a reasoned decision on the dispute, usually in less than three months after referral of the dispute.

Rosengard: The Financial Industry Regulatory Authority (FINRA) is the largest independent regulator for all securities firms doing business in the US. FINRA operates a dispute resolution forum for the securities industry in order to assist in the determination of monetary and business disputes between and among investors, securities firms and individual registered representatives. FINRA's arbitration approach to customer disputes with brokerage firms is particularly successful. For customers, it provides an expedited process to resolve their disputes. It also provides customers with a forum to resolve their grievances without resort to the court system. FINRA arbitration gives securities firms and brokers a streamlined, cost-effective process that minimises costs while promoting fair and prompt decisions on the merits.

Friedman: In general, for international transactions, arbitration often tends to be a desirable option. A number of industries have adopted specific approaches to arbitration with great satisfaction. For example, international disputes over internet domain names can be resolved by a highly efficient arbitration procedure administered by the World Intellectual Property Organization. Securities, commodities, maritime and sports enterprises all benefit from special and often expedited arbitration procedures. Parties engaged in a long-term relationship, such as a large-scale construction project spanning several years, have had success with procedures that permit a quick interim presumptive resolution of disputes so that the project can continue without interruption, subject to a more robust process down the road when time is less critical. What characterises these examples is that by choosing a voluntary process like arbitration the parties, or an industry organisation, affords itself more flexibility than courts typically allow, and that can open the door to all kinds of innovation and adaptation.

Henein: Arbitrations and private dispute resolution processes are more common in pure contractual disputes. Class actions are, almost by definition, part of the public process; they are deliberately designed to include class members who are not themselves active litigants in the proceeding, and therefore class actions are always going to be brought in the public realm. Similarly, intellectual property disputes are often brought through the public court process because litigants are claiming rights to certain intellectual properties against the world at large.

Cross-border investment into newer economies is generally best served through arbitration, given the limited possibility of international enforcement of judicial awards and concerns about unequal treatment in a party's domestic courts.

BRENDA HORRIGAN

Horrigan: Cross-border investment into newer economies is generally best served through arbitration, given the limited possibility of international enforcement of judicial awards and concerns about unequal treatment in a party's domestic courts. In construction matters, arbitration is often preceded by a determination by a DAB or similar body with specialised expertise.

Venegas: Particularly in infrastructure related disputes, arbitration has proven to be the best possible dispute resolution method in Mexico. Arbitration has also become a much sought-after resolution method for international commercial disputes in which the real intent of the parties and facts of the case play a relevant role for understanding a dispute, since those aspects are not usually analysed in detail in litigation before courts. Disputes arising from complex franchise agreements have also been successfully resolved in arbitration.

FW: If a commercial dispute is unavoidable, how can alternative dispute resolution (ADR), such as mediation, help to steer companies away from costly and time consuming litigation?

Oberdorfer: Litigation is not always more costly and time-consuming than ADR options. In some instances, particularly where preservation of the status quo among the parties is essential or the parties can avail themselves of a 'rocket docket' such as the District Court for the Eastern District of Virginia, it can be the fastest and most economical choice. Recall, too, that as a general matter, filing fees in court are nominal, particularly when compared to filing fees for most arbitral bodies and arbitrator's fees, which are in addition to counsel's fees. Many US courts have magistrate judges who are very adept at mediating settlements. Most require the presence of principals at conferences and impress upon them the costs of continuing litigation versus a negotiated settlement. That said, there are many types of ADR which have merits.

Rosengard: As a non-binding, voluntary process in which the parties determine the outcome, mediation affords parties vastly more control and flexibility than litigation. At the outset of any dispute, key decision-makers work with counsel to identify their needs and goals in light of the known facts and law. In litigation, this assessment often leads to full-scale discovery and motion practice before trial commences or a settlement is reached. Mediation, in contrast, discourages a paper war in favour of direct communications between the parties concerning their needs ▸▸

and goals in an effort to achieve a mutually agreeable resolution. For instance, litigating a breach of a long-term supply contract would result in a monetary award – or not, depending upon the fact-finder's decision; in mediation, however, the parties might explore the component business functions underlying the alleged breach and renegotiate the contract to strengthen and improve the parties' business relationship.

Friedman: Mediation is a great idea in theory and makes sense where parties have the will to settle a dispute but are having difficulty communicating directly with each other. Having an impartial person assist the parties in such circumstances can pave the way for a successful resolution. However, where there is little interest in settling a dispute, mediation may only serve to prolong the process. In my experience, a surprisingly large number of clients have resisted mediation. Mediation may be kind of like religion – there are some very devout believers in it, but also a considerable number of people who rely on it only very rarely, along with a healthy number of agnostics and sceptics.

Henein: ADR will depend on the type of dispute. Mediation can work quite well with a limited number of issues on the table that need to be addressed. It is truly a negotiation process; parties are not advocating their positions in the same adversarial manner as they would in court or even in arbitration, so you need to approach mediation with the expectation that both sides are going to have to compromise. I often hear lawyers say that a successful settlement is one in which neither side is happy with the result. The more complicated the matter and the more complex the legal issues, the more likely parties will need to look to a judicial officer to arbitrate or act as the decision maker.

Horrigan: If the parties are willing to agree to mediation, the services of a skilled mediator can significantly assist in the resolution of the dispute. Often each party's interpretation of the facts and circumstances of the dispute is coloured by emotion; a skilled mediator can recognise and legitimise these emotional reactions while refocusing the parties back on the underlying strengths and weaknesses of factual and legal claims at issue. Once each party is confronted with an external, neutral perspective on the strengths and weaknesses of its respective case, it may become more likely for the two sides to reach agreement on resolution of the dispute.

Venegas: The main advantage of potentially saving time and costs is one of the main factors favouring the growth of ADR. However, a change in the mindset of businessmen in Mexico must occur for mediation to really become a factor. The general distrust of new methods which do not result in an enforceable ruling permeates the business market in Mexico and is one of the greatest obstacles that must be overcome. Seminars and continuous practice, however, would provide an incentive in the long run to the role of mediation in Mexico.

The general distrust of new methods which do not result in an enforceable ruling permeates the business market in Mexico and is one of the greatest obstacles that must be overcome.

MARCO TULIO VENEGAS

Portwood: To be successful, these ADR methods need the involvement on each side of an independent objective view of the strengths, weaknesses and enforcement risks of the case by a person who has the authority to govern the strategy. Whilst this person could be a legal adviser, he or she will need to have the authority over all those involved in the matter to take the key decisions. Otherwise, the person should be someone from inside the litigant party who has the necessary authority over those involved to take key decisions.

FW: How would you describe arbitration facilities and processes in your particular region, or regions, of focus? Are there any obstacles or challenges to the arbitration process that companies should bear in mind?

Rosengard: Arbitrations have begun to morph into litigation-like processes, with protracted discovery and robust motion practice. The biggest challenge to the ADR community is to not let arbitration, which is supposed to be faster and more cost-effective than litigation, become its cumbersome and unwieldy surrogate. An effective arbitrator can limit discovery, where appropriate, and require parties to make pre-motion submissions designed to allow the arbitrator to make informed decisions on whether to accept a motion. But parties need not rely on an arbitrator to ensure that their arbitration does not become litigation-like; in the first instance, they can draft these limitations into their arbitration agreements. Parties can often reach agreement on future discovery and motion practice at the contract formation stage, while such agreement is almost never possible once a dispute has arisen.

Friedman: New York is an excellent place for arbitration, and I don't believe there are any significant challenges or obstacles to arbitrating here. While there is no dedicated arbitration facility headquartered in New York, such as the LCIA in London or the SIAC in Singapore, New York offers a lot of advantages to arbitrating parties. The law in New York regarding arbitration is relatively stable and predictable and favours arbitration. Logistically, New York has plentiful accommodation, ample transportation connections, great restaurants, and is so compact that it is easy to see part of the city even when in the midst of an arbitration. To the surprise of many, in part due to the persistently weak dollar, it is also comparatively cheaper than many other alternatives.

Henein: Ontario is well served. We have a plethora of arbitration and ADR facilities. The challenge with arbitration is that if parties fail to choose the right person they can end up being in a worse situation than if they had gone through court. For smaller companies, one caution is that arbitration may not work as well because if you are up against a larger company or person with more money, they can make the process much more expensive. While that is always true with all types of litigation, in the case of a private arbitration, the parties have more control over the process and so a litigant can push the litigation forward more aggressively, forcing the smaller company to respond quicker than through the ordinary court process. Even though the parties chose the arbitra-

tor, the smaller party may find itself scrambling to keep up with the litigation, which can draw its energies away from managing its business effectively.

Horrigan: In mainland China, arbitrations between two Chinese entities – even if both are subsidiaries of foreign companies – must, with limited exceptions, be heard within mainland China before a Chinese arbitral institution. In practice, this means that the majority of such disputes are heard pursuant to the CIETAC Rules, although the Beijing Arbitration Commission (BAC) is becoming increasingly active. Disputes with a 'foreign element', i.e. those involving a foreign party or a subject matter that is located outside of mainland China, may be heard either before a Chinese institution within mainland China, or outside of mainland China before an institution or ad hoc. Hong Kong is considered 'foreign' for this purpose. As with arbitration under the rules of any institution, the most important element is the selection of the tribunal – if the parties choose an experienced, neutral arbitration panel, they are more likely to obtain an arbitral award that is comprehensible and seems fair.

Venegas: In Mexico arbitration facilities and processes are, on average, very good. Particularly after NAFTA the growth and success of arbitration has been outstanding and many domestic arbitral institutions have shared this success. Currently, however, there are challenges ahead since the increase in arbitration requires more sophistication not only in the domestic centres of arbitration, but also in the Mexican regulations and the attorneys of the parties. Knowledge of the basic notions and concepts of arbitration is no longer enough; updating the recent developments in the field and adapting them to the Mexican practice have become a priority. Companies, therefore, should be very careful in selecting their attorneys and the arbitration institutions they would like to use for their particular disputes in order to avoid potential complications.

Portwood: Western Europe poses few problems and obstacles to an effective arbitration process. The laws of the different jurisdictions are arbitration friendly – many being based on the UNCITRAL Model Law – and the courts have in general a favourable attitude to arbitration. In the Near and Middle East, great strides are being made to render arbitration far more effective than in the past, and the courts are becoming more and more ready to take measures to assist arbitrations. In sub-Saharan Africa, local interests continue to prevail such that it is often difficult to render arbitration effective.

Oberdorfer: Over the last several years, the Persian Gulf has seen the creation of several well-respected, evolving arbitral institutions. At the Dubai International Arbitration Centre, for example, the number of cases handled annually has more than tripled since 2007. The Qatar International Arbitration Center, was established in 2006 and as of spring 2010 had a case load of 125 arbitrations and 60 mediations. In Abu Dhabi, the Abu Dhabi Commercial Conciliation and Arbitration Centre has been operating for over 17 years and last year it had a significant number of cases, a handful of which were international in nature. These arbitral bodies present a viable option for arbitrating disputes locally, which can be significant, particularly where key personnel are located onsite and parties wish to resolve disputes with as little impact as possible on ongoing work.

FW: In terms of complex international, multi-jurisdictional disputes, what steps can companies take to manage the process and its associated costs to improve their chances of a positive outcome?

For complex international, multi-jurisdictional disputes, it is critically important to have a centrally coordinated strategy and an effective leader of the process.

MARK FRIEDMAN

Friedman: For complex international, multi-jurisdictional disputes, it is critically important to have a centrally coordinated strategy and an effective leader of the process. Such disputes often proceed concurrently in different jurisdictions involving different courts, tribunals, witnesses, facts and applicable law. If someone is not coordinating and ensuring consistency of message, strategy and position throughout, it is very easy to make mistakes and score 'own goals'. I recall many instances where a party has taken a position in one proceeding that came back to bite them in another.

Henein: The most important thing to do is communicate. Depending on the number of jurisdictions, you want to retain local counsel and coordinate with them. Counsel from different jurisdictions need to work together effectively. Litigation is more geographically specific than, for example, corporate law. So you need to be working with a professional who has understanding and expertise of the type of court or ADR process in that specific region. When you look at the US, there are differences between state courts, federal courts and also the procedures from state to state. The same is true of Canada.

Horrigan: In terms of multi-jurisdictional disputes, it is important to have one team leader who is coordinating all of the actions in all jurisdictions, to ensure that consistent positions are being taken and that a consistent strategy is being pursued.

Venegas: For us, it all starts with two key elements: first, evaluating the best chances for enforcement considering the financial status of the adversary and time and cost expenses related to a particular forum; and second, designing an overall legal strategy with specific targets and tasks. In addition, in order to be successful, the evaluation, design and implementation of these two elements must be carried out by an experienced and trusted in-house or outside counsel. In this regard, we recommend avoiding the usual practice of some companies of entrusting these matters to high level officers who are not lawyers, since it has proven in the past that when facing a complex legal dispute the lack of a leading lawyer always results in a waste of time and costs, and in many cases it seriously affects the likelihood of success.

Portwood: It is important to place management of the dispute in the hands of someone in-house who was not involved in the ▸▸

underlying facts and who has authority over those who were. Outside counsel, who has experience in the relevant jurisdiction, should be appointed early on. A detailed timeline with a cost assessment for each step should be established by outside counsel with the assistance of the person in charge of the litigation in-house early on to guide the process. The legal theory that is consistent with the background facts that can be proven at trial needs to be established as soon as possible, recognising that such theory may have to be modified as new facts are established, to remain consistent with the factual matrix of the case. Any enforcement risks need to be identified and an analysis of the steps that can be taken to avoid them should be carried out.

Oberdorfer: Especially in the context of international disputes, positive outcomes are increased by attention to the dispute resolution process during the negotiation and drafting stages. In addition to anticipating and continuing to monitor likely points of disputes, parties should assess at the outset the best location for resolution of the dispute, particularly with respect to where key personnel will be located and what the judicial and arbitral infrastructure are in place to support resolution of a dispute. Location of an arbitration and that country's arbitration law are going to be particularly relevant to whether the parties' chosen dispute resolution process is going to be subject to interference from local courts and whether an award ultimately will be enforceable.

Rosengard: Cross-border disputes can bring many uncertainties, including questions about the language applicable to the dispute, governing law, and recognition and enforcement of awards, among others. Outside the US, individuals and companies may be wary of American-style litigation with its attendant discovery rights and the potential for massive damages awards. For Americans doing business in other countries, there is the possibility of an unwelcome political and economic climate in the forum, which can affect business relationships and which can add uncertainty to the dispute resolution process itself. Selecting arbitration as an alternative to local courts thus makes even more sense in the international context, as the parties can ensure that, when a dispute arises, it can be resolved efficiently and without recourse to unfamiliar judicial surroundings. For the same reasons, mediation plays an important role in cross-border transactions, especially where a US entity faces the prospect of delay that often confronts litigants in foreign courts.

FW: Are you seeing an increased use of expert witnesses to resolve complex disputes? What benefits can they bring to the process and how is their knowledge being applied?

Henein: In product liability cases, for example, experts are always key in resolving the case and much will depend on the strength of their evidence, especially if it is a niche technical issue. In class actions, both sides often inundate the court with expert evidence. However, there are too many moving parts in those cases for liability questions to rise or fall purely on the strength of one particular expert report. In terms of intellectual property disputes, these cases often come down to factual or legal questions rather than technical expert evidence. If you have an intellectual property registration, for example, you have certain statutory rights to the exploitation of that intellectual property, and that is more of a legal question. With securities litigation or other general disputes, expert evidence frequently goes to valuation questions, which are certainly an important part of the case.

Horrigan: Nearly all of the international arbitration cases in which we have been involved have included testimony from expert witnesses. Most frequently used are damages experts, who evaluate the losses suffered or alleged to be suffered as a result of the actions by the counterparty, and who then calculate the monetary compensation to be awarded to compensate for those losses. Such experts are often looking at DCF calculations and risk factors to come up with the net present value of the loss. In many complex cases, technical experts can also play an important role; examples include evaluation of available reserves and costs of production in oil and gas cases, or evaluation of defect claims in construction disputes. Some tribunals also like to hear from legal experts where the governing law is not the law of the site of the arbitration; however, we are finding that this is becoming less common, and that counsel are increasingly arguing these points themselves.

Oberdorfer: I'm not sure I would characterise it as increased use, but I think we are seeing how effective use of expert witnesses can facilitate resolution of complex commercial disputes, including in a mediation setting. A good expert has the ability to identify and crystallise – both for the parties and a mediator or adjudicator – points of agreement and points of difference as to what went wrong. Even when the parties are not listening to each other, they are usually able to listen to what a credible, well-respected expert has to say. Professional experts also have the benefit of being able to provide bigger picture insights into the problems that are driving disputes within their industry, such as recurrent problems of contract administration failures or funding issues in the construction industry.

Venegas: The use of expert witnesses has become increasingly important. However, the level of success of these experts varies depending on their role. When used as experts in arbitration and litigation tutored by experienced lawyers, we have seen great benefits and positive results. In complex construction, IP, mining and even production agreements, the synergies obtained from complementing the legal arguments with technical opinions has proven to be the key for success. Notwithstanding the above, it is always important to limit the role of the expert witnesses and prevent them from overstepping the terms of their opinion and giving 'legal opinions'. Unfortunately, when experts channel their 'inner lawyers' in a dispute, we have seen dramatic failures which affect the credibility of a highly technical opinion.

Portwood: I am not aware of an increase in the use of expert witnesses other than in the area of quantum analysis where there is a trend towards the use of experts to help establish or attack the damages aspect of the case. If the services of a quantum expert are to be used, it is important to involve him or her early on in the process. All too often litigants leave the damages aspects of the case to the last minute only to find that their analysis of the case is inconsistent with their ability to prove their loss. The benefits of a quantum analyst can therefore be significant.

Rosengard: We see two growth areas when it comes to experts. First, parties are using experts more in complex commercial arbitrations, as arbitrators, more than juries, are familiar with this convention and are well-equipped to process and weigh information from expert sources. In appropriate cases, expert testimony can provide a shorthand for lengthy technical testimony, offering concise references to the necessary underlying facts and drawing targeted conclusions for the decision-maker's consideration. Second, judges are increasingly calling upon law firms' intellectual ▸▸

property lawyers to serve as special masters to assist the court in understanding complex processes where the competing parties before the court each have their own experts. The use of a 'neutral expert' helps judges digest opposing, often highly technical submissions, particularly in high-stakes cases where the judge is the finder of fact.

Friedman: The use of expert witnesses has been widespread for quite some time and continues to be vitally important to the resolution of complex disputes. Expert witnesses are often essential for a variety of reasons, from the quantification of damages to explaining the standard of care operative in a particular context to the explication of foreign law that may be applicable. In the international arbitration field, there is the possibility for some greater flexibility about how experts contribute to resolving the dispute. For example, there are some avid proponents of expert witness conferencing, in which expert witnesses for opposing parties take the stand together and present evidence before the arbitral tribunal together. The idea is that professional colleagues, although engaged by opposing parties, will tend to temper unnecessary disagreement and act more responsibly when sitting side by side and reflecting on the reputational costs of taking absurd positions.

FW: Would you suggest that companies introduce dispute resolution mechanisms in contract clauses to reduce the impact of conflict that may arise in the future? What risk protection solutions might they consider when negotiating a new venture or deal?

Portwood: It is difficult to answer this question in the hypothetical. Each case depends on the identities of the parties, the jurisdictions in question, and so on. My advice is to keep dispute resolution clauses in contracts as simple as possible. Two tier clauses requiring parties to embark on ADR before they can begin a final and binding dispute resolution procedure such as arbitration or court litigation often are ineffective and can create more problems than they solve.

Henein: Companies should introduce dispute resolution mechanisms in contract clauses to reduce the impact of conflict on the operation of the company. Consider what you need. When you are dealing with multijurisdictional issues you want to consider what law should apply, whether one area of law should apply across the board to all disputes, or whether certain aspects should be dealt with in certain specific legal arenas or jurisdictions. You want to consider what needs to be public versus what needs to be private and so you should turn your mind to carve outs: are there things that you want to address specifically in the clause, do you want to address everything or limit certain aspects?

Friedman: Parties negotiating a deal can make all kinds of choices up front about the dispute resolution process they want to have. At the outset, the parties to some degree stand behind what the philosopher John Rawls called the "veil of ignorance", where they do not yet know about a particular dispute and how it might affect their interests. It is the optimal time to work out a dispute resolution process, before the existence of a dispute makes it less likely that the parties will agree and more likely that they will take positions opportunistically that suit them in the context of a particular dispute.

Rosengard: As a general matter, companies should include dispute resolution clauses in their contracts, with particular consideration given to stepped-up clauses. Stepped-up clauses offer parties an escalating set of dispute processes – for example, negotiation; then mediation; then arbitration or litigation – providing more opportunities to resolve conflicts earlier. Courts and arbitrators alike routinely enforce such conditions precedent because they are terms of the contract. When drafting a dispute resolution clause, the parties should state clearly their agreement to binding alternative dispute resolution, identify which disputes may require fast-track resolution, avoid being one-sided, and include as many details as possible, including locale, means of selecting the arbitrator, which rules are to apply, and the like. The contract formation stage is the best opportunity for parties to identify the type and scope of disputes that will be subject to the nominated ADR processes, as this is a frequent source of contention once a controversy arises.

Horrigan: Most complex cross-border transactions would benefit from inclusion of an arbitration clause in the transaction documents, since in such cases it is generally preferable to avoid local courts. In addition, at the transaction structuring stage the parties should ensure that a real party in interest is bound by the clause, and not just a shell entity. With the substantial increase in investment treaty cases in recent years, it is often also useful for an aspiring investor to structure the investment to take advantage of available investment treaty protections – which may entail making the investment through a holding company established in a country that has a favourable treaty with the country in which the target is located. Even more important than ensuring that the transaction documentation includes a dispute resolution clause, however, is ensuring that the transaction itself makes sense and that the parties have taken into account and planned for commercial risks.

Oberdorfer: Being realistic about the risks associated with a new venture or deal and thoughtful about the likely points of disputes go a long way to diminishing the ultimate impact of a dispute. Particularly in a long-term contract or complex, time-sensitive project, parties should consider specifying a dispute resolution process just for those issues that they know are going to arise from time to time. For example, if materials that are going to be required in a contract have a history of wide fluctuations in price, the parties might consider a price-escalation/de-escalation scale that resets the price according to an agreed-upon index. Parties should be cautious about using a gross inequities clause to protect against market changes. For large projects, particularly those in developing countries, political risk insurance from MIGA or OPIC can provide access to dispute resolution services that accompany such policies.

Venegas: We suggest including clauses containing at least two dispute resolution mechanisms and a term to negotiate any dispute beforehand. When the parties have the opportunity to talk and evaluate the time and costs related to a dispute, we have seen that in many cases a settlement has been reached, or at least many of the disputes have been resolved leaving only the more complex for litigation or arbitration. In connection with the risk protection solutions, in addition to the dispute resolution clauses, an exhaustive preventive due diligence should always be carried out. In addition, when it is feasible, obtaining a real estate guarantee to secure payment is the best way to protect a business deal. Finally, including in the agreement a right to 'monitor' the financial status of the debtor is always a good way to continuously evaluate the risk of a venture. ■