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ADR Trends For 2008

The Editor interviews ***The Hon. William A. Dreier****, Partner, Norris, McLaughlin & Marcus, P.A.;* ***The Hon. H. Curtis Meanor****, Member, Podvey Meanor Catenacci Hildner Cocoziello & Chattman;* ***Lee Rosengard,*** *Stradley Ronon Stevens & Young;* ***Peter J. Smith****, Connell Foley LLP;* ***Eric Tuchmann****, General Counsel and Corporate Secretary, American Arbitration Association.*

Editor: What factors should corporate counsel consider when establishing an ADR agreement with a business partner?

Dreier: Do not forget that the other party is, and hopefully will remain, a "business partner." There are three resolution stages: negotiation, mediation and arbitration. Most disputes are resolved by negotiation. If negotiation is unsuccessful, a neutral third-party mediator can assist parties to recognize their long-term interests. Corporate counsel can help with advice and the assembly of relevant information. Only if mediation is unsuccessful should the parties proceed to arbitration.

Corporate counsel should negotiate an ADR agreement that will: avoid time consuming and expensive litigation; agree in advance to meaningful documentary discovery; dispense with unnecessary interrogatories, depositions and lengthy motion practice; choose an arbitrator to resolve issues quickly, and choose arbitration counsel who will share the company's goal that the process does not cost more than the dispute.

Meanor: *Governing Law:* Under the Federal Arbitration Act it is certain that the grounds for attacking an award are extremely narrow. By specifying the governing law, an award is much less likely to be a compromise, irrational, arbitrary, unreasonable or otherwise of the "split the baby" variety.

Rules of Evidence. It might be a good idea to specify that the Federal Rules of Evidence shall apply. Exceptions can be made, such as direct testimony being presented by affidavit with the right of the opponent to require that the affiant be produced for cross-examination; hearsay would be acceptable if corroborated by otherwise admissible evidence and, if the *Daubert* case is to be applicable, then it would perhaps be wise to specify that a *Daubert* hearing be held in advance of the arbitration so that in case of an adverse ruling, the parties and their counsel would be prepared to proceed in light of the ruling.

Scope of Review. The U.S. Supreme Court has granted certiorari in a case to resolve the circuit court split concerning whether parties to an arbitration agreement may expand the grounds upon which a court can interfere with arbitration award beyond those narrow grounds set forth in the governing statute. In light of this, it might be appropriate for an arbitration agreement to include that an award may be set aside for being contrary to law, arbitrary or unreasonable and without evidentiary support in the record and any such provision should be limited to district court review.

Rosengard: Corporate counsel should consider the question of arbitration versus litigation when entering into an ADR agreement with a business partner, rather than just opting for arbitration. While it is assumed that an ADR agreement in a commercial transaction includes a three-step process for resolving disputes: negotiation between principals, mediation and then arbitration, the latter might not be in the best interest of a particular party. It should be carefully considered whether the final dispute-resolution ought to be litigation instead of arbitration. Indeed, as arbitrators become more inclined to permit greater discovery in the arbitration process, and arbitration becomes more costly and less expeditious, litigation over arbitration might be better generally.

Smith: Consider your business needs for efficiency and speed in the ADR process. Designation of knowledgeable industry mediators and/or arbitrators within the dispute resolution provision of a contract can save valuable time in the resolution of disputes.

Consider establishing strict periods of limitation for filing written notices of claims that may be submitted to mediation or arbitration.

Address locale for the arbitration and mediation in your agreement. Consider designating recognized rules for the conduct of those proceedings even if you do not appoint the entity issuing those rules.

Tuchman: Corporate counsel should tailor their ADR agreements so that disputes are resolved in a manner that is fair, quick, economical, and with the least amount of disruption to the organization. These goals are commonly achieved through the inclusion of an arbitration agreement, such as the standard arbitration agreement suggested in the American Arbitration Association's Commercial Arbitration Rules. Additional matters for consideration include the scope of issues to be submitted to the ADR procedure, the applicable law, number of arbitrators, confidentiality concerns, and the background and experience of appointed arbitrators or mediators. Counsel must also give consideration to the extent to which it is important to maintain an ongoing business relationship with the other parties to the transaction. In such cases it is particularly helpful to include a stepped ADR clause, such as one that requires negotiation and then mediation before resorting to arbitration.

Editor: What trends in ADR will have

the most impact on corporate counsel in 2008?

Dreier: A current trend is to write mandatory arbitration into many corporate agreements. In many areas, the arbitrators or the supervisory organization is pre-selected. Corporate counsel should seek truly neutral arbitrators and supervisory organizations such as the American Arbitration Association, CPR, or even private arbitrators with impeccable reputation. Avoid attempting to influence the arbitrator by an implicit promise of reselection if decisions are favorable to the selecting party.

Meanor: It might be a good idea for agreements made now to include an expanded scope of review at the district court level.

There is a trend to have mediation precede arbitration and this might well be a good idea for most cases. The most pressing question in the mediation and arbitration agreement is whether the same person or the same panel shall function in both capacities.

Some arbitration drags on far too long. It probably is a very good idea for counsel to consider requiring a decision within 30 or 60 days following the close of the hearing. The hearing should not be considered closed until any post-trial paperwork is finalized.

Counsel drafting an arbitration agreement should consider, very seriously, the question of limiting discovery. Depositions should only be provided of witnesses who cannot be compelled to attend the hearing. Limitations should be placed on the number of questions contained in interrogatories. Extensive e-discovery should not be allowed. A carefully drawn arbitration agreement may cover many issues and raise many questions. If a quick agreement cannot be achieved on the issues that are raised concerning the extent of the arbitration clause, it is probably advisable to forget such issues and complete the contract.

Rosengard: ADR providers consistently warn their constituent arbitrators that a ground for overturning an arbitration award is the failure of the arbitrator(s) to allow a party to fully present its case, thereby depriving it of process. Finality, the ADR providers continue, is one of the features that they are selling in their promotion of arbitration as a desired dispute-resolution modality. The competing interests of speed and cost savings, on the one hand, and a full exposition of the facts, on the other, is resulting in arbitrators permitting significantly broadened discovery. As this trend continues, corporate counsel will want to consider including in their ADR agreements some limitations on the number of depositions that any party to an arbitration may conduct. This will help keep costs in check and will preserve the distinction between arbitration and litigation.

Smith: As parties become more sophisticated consumers of ADR, the number of ADR providers increases, and the law encouraging use of ADR evolves, creativity in drafting and negotiating ADR provisions is essential. There is a real opportunity to agree on details of the dispute resolution process before performance of the contract begins, when the parties are looking forward to full performance of their obligations in good faith. It is at that time, when disputes are viewed in the abstract, that the parties may best be able to fix a prompt, efficient, and cost-effective process.

Tuchman: There is little question that corporate counsel are increasingly attuned to the costs and speed of ADR. As a result, there is a trend toward focusing on ensuring that mediation, and arbitration in particular, continue to deliver on their stated goals of providing flexible and less formal methods of resolving disputes. From the American Arbitration Association's view, there has been a trend toward litigation-style advocacy and procedures being brought into the arbitration process. Nonetheless, and despite these perceived trends, the median timeframe for a regular AAA arbitration is 284 days, or 9 1/2 months, from filing to award based on 2006 commercial case statistics. By comparison, the median case from filing to disposition in federal court is over 22 months. In 2008, the AAA plans to address this issue head on, for example, through possible amendments to our AAA/ICDR International Rules to give arbitrators greater authority to direct document production in international arbitrations.