

Alternative Dispute Resolution The Options for Financial Executives

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Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) refers to any means of settling commercial disputes outside of the courtroom. The two most common forms of ADR are mediation and arbitration. Mediation and arbitration are alternatives to traditional litigation. Many company executives are attracted to mediation and arbitration due to a lack of confidence in the public civil litigation system. The perception among executives is that the civil courts are saturated with cases and the process is slow and expensive.

Executives comparing mediation vs. arbitration vs. litigation should keep in mind that traditional litigation judges are paid for by the tax payer while mediators and arbitrators are paid for by the parties in dispute. The major problem associated with traditional litigation is not so much the cost but the time factor in coming to a final decision. Executives entering into litigation in good faith may not have a desire to face the almost inevitable appeal and ‘amparo’ scenarios. Also, as traditional litigation is paid for out of the public coffers, its content is publicly available information. Company executives may not have any desire to see their dispute aired on television news programs. On the other hand, financial executives can be taken by surprise when informed they have no choice but to foot a hefty arbitration bill. To fully realize the cost benefit of ADR, CFO’s should be involved in the decision making process from the beginning. This article addresses the financial implications of taking the ADR route and how to avoid excessive costs down the road.

Mediation

Mediation involves facilitating an agreement between disputing parties. Mediators are individuals who bring opposing parties together to negotiate a settlement between them. The parties in dispute are free to decide whether or not they accept their chosen mediator’s proposed agreement. Mediation’s principal attribute is that the process is speedy. Its principal defect is that it requires the goodwill of the parties in dispute to come to an agreement. Most commercial disputes involve money. If one of the parties to a dispute is unwilling or unable to come up with the money then they may use mediation to further prolong the dispute in order to buy time. A financial executive will need to measure the risk of this occurring when requested to approve an agreement to send a commercial dispute to mediation. If each party in dispute considers their adversary’s opposition is in good faith in that they wish to come to a speedy solution then mediation is very likely the optimum road to take.

Arbitration

Arbitration involves an independent arbitrator or a panel of three independent arbitrators gathering the commercial dispute evidence together and then deciding on an outcome to the dispute. It is like a trial but without the formal legal trappings. An arbitration decision is binding on the parties in dispute and it is non-appealable. Therein lies its great attraction. It is not as speedy as mediation but it is much speedier than traditional litigation. The arbitration process is more expensive than mediation but it avoids mediation's principal defect due to the compulsory nature of the arbitration judgment. The legal basis for arbitration in Mexico and most countries of the world is the agreement by the parties to undergo the process. **That agreement allows for an impartial arbitration judgment to have the same binding legal force as a judicial sentence.** If no such agreement exists there is no alternative to traditional litigation. If one of the parties can demonstrate that such an agreement exists then arbitration can go ahead even if the other party does not wish to participate. As in mediation, there is also the risk that one of the parties to an arbitration agreement is unable or unwilling to settle as instructed by the arbitrator and they may go through the process only to buy time. Their real intention may be to find legal loopholes in the arbitration process in order to later contest the arbitration decision in the courts. CFO's need to address this risk from the outset if they wish to minimize costs. The worst case cost scenario that could occur would be a dispute where a company has to first foot a mediation bill, then an arbitration bill and then, to cap it all, a litigation bill.

What are the Costs of ADR?

Mediation costs include fees and expenses of the mediator, fees and expenses of any expert called by the mediator and agreed upon by the parties, expenses of any witnesses called by the mediator and agreed upon by the parties and facility expenses of the mediation provider if such facilities are used. The cost of arbitration will depend on whether the process is ad hoc or administered by an institution. An ad hoc arbitration is administered by independent arbitrators applying their preferred arbitration rules. The daily cost of an ad hoc arbitration will include the same concepts as mediation but the process frequently takes longer so its overall cost will be higher. The cost of an institutionally administered arbitration frequently depends on the amount of money in dispute. The institution chosen by the disputing parties to administer the arbitration process will charge an administration fee percentage plus an arbitrator's fee percentage of the disputed amount.

Who pays the ADR bill? The bill is frequently divided equally among the parties. An exception to this could occur when an arbitrator decides in a judgment that one of the parties is liable for costs. It may be stating the obvious that the ADR bill is divided equally among the parties but when taking a mediation vs. arbitration vs. litigation cost/benefit decision it should be kept in mind that traditional litigation is paid for by the public taxpayer and not by the parties in dispute. The major cost factor associated with arbitration will be the decision on having one or three arbitrators. Arbitration literature usually recommends three arbitrators if the issue in dispute is technically complicated. However, from a financial point of view a panel of three arbitrators will result in the cost of the arbitrator's time being triplicated. A justification from a cost point of view for the three heads are better than one argument is when expert opinion is considered necessary within arbitration. The cost of outside expert opinion could be avoided if one of the

arbitrators already is an expert. Another cost factor to be considered will be the language of the arbitration process. If the disputing parties decide that the process will be bilingual, the cost of translating witness testimony and documentary evidence should be taken into account. A third cost factor to be considered is the location of the arbitration proceedings. From a cost point of view the ideal location will be that which minimizes arbitration travel expense.

Ideal Arbitrators

The ideal arbitrator is a person who has integrity, is impartial when making a judgment decision, is totally independent of the parties in dispute and is a person who will maintain the confidentiality of the arbitration proceedings. Arbitrators are obligated to give a fair hearing to all sides in a dispute. Arbitrators are obliged to come to a fair decision even if one of the parties in dispute decides not to participate in the arbitration proceedings. If one of the parties decides not to participate though obliged to do so by prior agreement, the arbitrator must provide that party with sufficient notification of the proceedings. An arbitrator has to have a thorough knowledge of arbitration proceedings. Although devoid of legal formalities, arbitration does have its rules and regulations. **An arbitrator has to apply the rules strictly in order to provide a balanced hearing to both sides and to ensure that the arbitration judgment will have the same binding legal force as a judicial sentence.**

Arbitrators can come from any walk of life. The profession of the ideal arbitrator will depend on the issue in dispute. A party in dispute may go into arbitration looking for legal loopholes in order to buy time. If this is the case, the other party to the dispute may be well advised to seek a seasoned attorney as arbitrator. A dispute may involve complicated technical questions, within an information technology environment for example. In this case a systems engineer may be the best candidate. A civil engineer or architect may be called for as arbitrator within a construction dispute. All disputes finally involve money. If calculating value is the major issue, an accountant may be considered best arbitrator candidate. If the issue in dispute is considered to be legally, technically and financially complicated then a panel of three arbitrator experts in their respective fields may be the optimum choice.

Ideal ADR Agreement

If a commercial dispute is already active it will be difficult to get the parties together in the heat of battle to agree on ADR. Ideally an agreement to follow ADR principals should be built into the commercial relationship from the outset, prior to a dispute developing. The following mediation agreement is guided mainly taking the cost factor into account:

The parties agree that any dispute arising in connection with this (contract, engagement letter, purchase order, proposal) that cannot be settled through direct discussions between us shall be sent to mediation in the Mexico City Federal District under the rules of mediation of the (mediation service provider). The parties further agree that while the mediation efforts take place, they will not send the matter in dispute to arbitration or litigation.

If a party to a commercial agreement considers mediation will not satisfy its needs due to

it's non-binding nature and it considers its potential commercial dispute adversary will act in good faith in defending itself (2), the following cost influenced arbitration agreement is offered:

Any dispute arising in connection with this (contract, engagement letter, purchase order, proposal) shall be settled by one arbitrator carrying out the arbitration proceedings in the Spanish language in the Mexico City Federal District under the rules of arbitration of the (arbitration service provider).

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