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ADR in business

ADR as a risk management tool for business

John Weingarth

'Most importantly, the engagement of an independent ADR specialist provider at an early stage can often inject fresh and creative thinking and a new perspective into a dispute, which stimulates settlement breakthroughs.'

ADR options should be viewed as a risk management tool to be built into sound business and legal planning and as an aspect of sound corporate governance.

If properly designed and developed for an organisation, an ADR system can be effective in reducing unnecessary disputes, enhancing corporate reputation and compliance and substantially reducing legal costs and executive time in handling disputes.

A study conducted in 1997 by Cornell University of the general counsel of 528 large and medium sized US corporations revealed a high utilisation of ADR in commercial disputes. At the ADR Super Conference in 1997 in Washington DC, it was reported:

Careful analysis of the survey results suggests corporations also use ADR techniques to gain greater control over the process and outcome of dispute resolution ... The respondents dislike the risk and uncertainty of litigation and especially view mediation as a means of managing control over potentially risky disputes.

Eighty one per cent of respondents to the survey said companies use mediation because it provides, 'a more satisfactory process' than litigation. Sixty six per cent said it provides more 'satisfactory settlements' and 59 per cent said it 'preserves good relationships'.

The following ADR options can be used, either alone or in combination as appropriate to the nature of the particular dispute, to resolve a wide range of commercial and employment related disputes:

- assisted negotiation;
- mediation;
- arbitration;
- facilitation;
- intermediation for more complex disputes;
- neutral appraisal;
- expert determination;

- expert recommendation;
- independent fact finding investigation and report;
- med-arb; and
- partnering.

The flexibility and range of ADR options are usually conducive to quick and realistic solutions to many disputes, in contrast to the inflexibility, delay, complexity and cost of litigation. Experiences of my own company, Mediate Today, indicate a success rate of around 90 per cent in resolving commercial disputes using the correct ADR method.

Most importantly, the engagement of an independent ADR specialist provider at an early stage can often inject fresh and creative thinking and a new perspective into a dispute, which stimulates settlement breakthroughs. The selection and application of the most appropriate ADR option at the right time will prevent disputes escalating and can substantially reduce legal costs and executive time allocated to a particular dispute.

Business organisations using ADR as part of their risk management programs will also be promoting ADR as the primary method of dispute resolution for their organisation, instead of litigation, for commercial disputes.

When you think about it, disputes are only problems waiting to be explored and solved by creative thinking. ADR provides that creative, multi-faceted approach to solving such problems in a practical and cost effective manner.

At the ADR Super Conference referred to earlier, the President of the US National Association of Manufactures said:

ADR is important not because it's a magic bullet, but because of its capacity to change, innovate and improve the quality of operations. It leads to better solutions.

The President of the prestigious American Arbitration Association concluded that:

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➤ practice. Dispute resolution is not after all a didactic process, and the mediator or other dispute intervenor discovers that it is about complex action and reaction among three or more consenting adults. Lists tend to be of rather limited use in this dynamic and organic process.

It also reminds us that dispute resolvers in their reflective moments tend sometimes to indulge in what appears to be circular logic — for example (at p 29):

For collaborative problem-solving to work well depends on the parties having, or developing a reasonable level of trust in each other. It is also helpful if the parties have interdependent interests and there is not a great disparity of power between them. Chances of success are also improved if there is motivation to reach mutually satisfactory outcomes.

Hmmm. I wonder how often there would still be a dispute where these conditions applied.

Conclusion

What about my first two questions? Neither, it must be said, is convincingly

answered, though to be fair neither is squarely addressed by the authors. There still seems to be a gap between writing about designing systems and actually convincing decision-makers to develop and operate them. And unfortunately they need to be convinced on the economics.

Are these books still of value? My response is yes, because they both, in different ways, give useful and logical frameworks for thinking about, and doing something about, conflict and disputes in groups and organisations. They contribute to the 'science' of conflict management and move it away from the realms of being considered a rather fluky art. At the moment it is rather like theoretical physics, with not enough application to test its assumptions. But then Stephen Hawkings' theories are being tested and partly vindicated all the time. ●

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ADR is a risk management tool for all parties and a set of options to be built into sound business and legal planning.

By integrating ADR into a corporate risk management program, there will be a 'front-ending' of ADR options. This will have significant beneficial effects in terms of the early intervention of the appropriate

ADR option into a dispute with concomitant cost and time reductions (around 90 per cent), better solutions and improved commercial relationships and reputation. ●

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