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MANAGING DISPUTE RESOLUTION STRATEGY AND PROCESS

REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
JUL-SEP 2013 ISSUE



www.corporatedisputesmagazine.com

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CRA Charles River
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Published by Financier Worldwide Ltd
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HOT TOPIC

MANAGING DISPUTE RESOLUTION STRATEGY AND PROCESS

PANEL EXPERTS



Caroline Duclercq

Counsel and Arbitrator

Altana Law

T: +33 (0)1 79 97 93 00

E: cduclercq@altanalaw.com

Caroline Duclercq acts as counsel and arbitrator in domestic and international arbitral proceedings. She has developed an experience at all steps of the dispute process, the pre-arbitral phase, the arbitration proceedings and the enforcement or annulment of the award. She assists clients in commercial arbitration, under the aegis of several arbitral institutions as well as in *ad hoc* proceedings.



Dr Gregory K. Bell

Group Vice President

Charles River Associates

T: +1 (617) 425 3357

E: gbell@crai.com

Dr Gregory K. Bell, group vice president at Charles River Associates, is a testifying expert witness on damages issues in a variety of contexts and venues. He also consults extensively on competitive strategy issues. Dr Bell has appeared in antitrust, intellectual property, transfer pricing, financial markets, valuation, and general commercial damages matters in courts and arbitration proceedings in North America, Europe and Australia.



Erik Bos

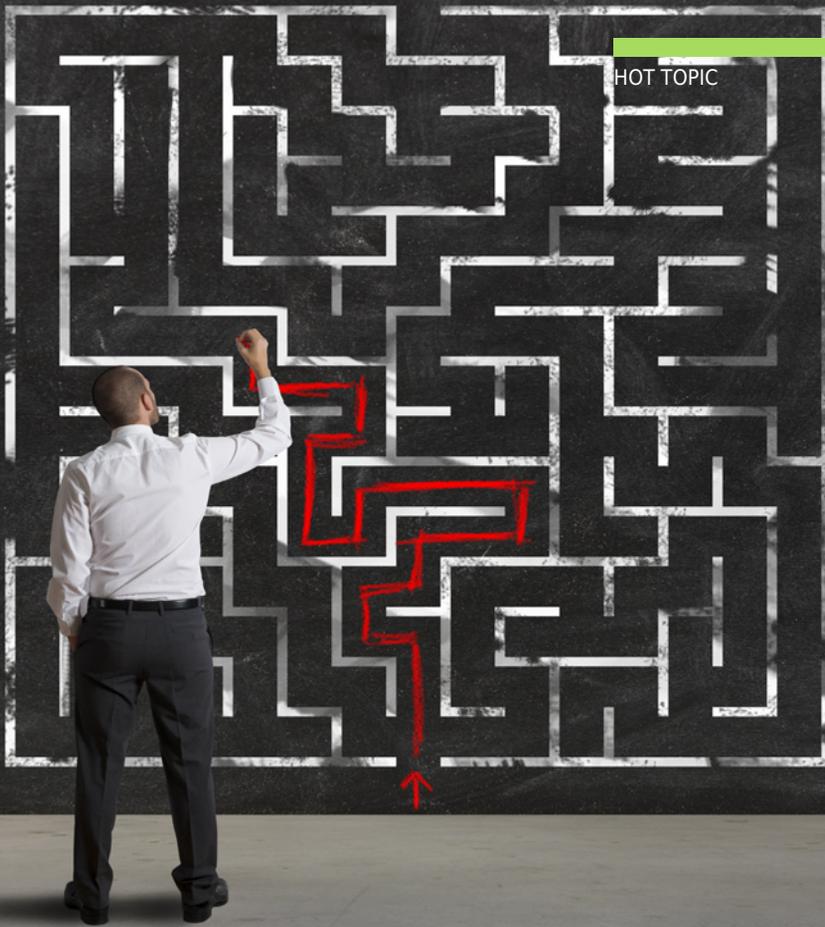
Director

PricewaterhouseCoopers Advisory N.V.

T: +31 88 792 76 56

E: erik.bos@nl.pwc.com

Erik Bos is a director in PwC's Amsterdam office. With a background as an auditor, he has extensive experience in all aspects of disputes, in many industries. Mr Bos has supported clients as a party-appointed expert witness in many cases involving litigation, arbitration and mediation. He also has broad experience in independent expert engagements, appointed by parties, the court or an arbitration panel.



CD: What are some of the key considerations for parties entering into a dispute resolution process in today's business environment? What factors should influence the choice of dispute resolution method?

Duclercq: Today's business environment – and especially the financial crisis – has increased the parties' concern for the efficiency and costs of international dispute resolution. Although it was a concern prior to the crisis, parties now tend to assess even more thoroughly the costs and risks of commencing litigation or arbitration, and to favour prior amicable resolution methods such as

negotiation, mediation or conciliation before bringing a formal action. As to the factors influencing the choice of dispute resolution method, one should keep in mind that it might often be the case where there is in fact no choice of dispute resolution method – for instance, if the contract is unbalanced, the stronger party might impose the method. In the event there is a real choice, several factors have to be taken into account, including whether the parties are used to alternative dispute resolution; whether they are from different countries – a neutral institution might be preferable; the location of the facts of the case; whether a public entity is involved in the dispute; the potential need for provisional measures; and the difficulty of language barriers. An

essential factor is also the probability of enforcement and location of the assets of the other party should the case be won.

Bell: From an expert and a business consultant's perspective, negotiations are preferable to escalating a dispute to more formal means of resolution. This tends to be particularly true when the two sides involved in the dispute are partnering or cooperating in support of some larger goal, such as bringing a new product to market or exploiting the opportunity for a new product or technology. Often, it seems that escalating matters to a formal dispute resolution process places a damper on any ongoing business efforts between the two parties to continue to make progress on the commercial opportunity. The result could be that both parties are worse off because the commercial opportunity is ineffectively pursued. Nonetheless, in some situations, there may be no alternative other than a formal means of dispute resolution.

Bos: A decision about which dispute resolution process will be followed, if required, should preferably be taken 'in good times'. It is therefore recommendable to agree on the process to be followed in case of a dispute when starting a relationship – for instance, by including a dispute resolution clause in the agreements underlying the relationship. The preferred process is dependent on a number of considerations, such as confidentiality,

costs and the possibilities each process offers in respect of accessibility of information. Furthermore, the level of influence parties would like to have on the procedures to be followed during the dispute resolution process are relevant, as well as the question of whether an opportunity for appeal is desirable.

CD: To what extent are the cost saving benefits of arbitration being eroded by evolving processes, such as the cost of expert witnesses, detailed discovery, and management of the arbitral process?

Bell: We don't really see the cost-saving benefits of arbitration being eroded by the cost of expert witnesses and more detailed discovery. From our perspective, these are required elements of arbitration in order to achieve an appropriate result. As arbitrations involve more technical issues, experts and increased discovery should become the norm in order to reach an informed decision. With respect to increasing costs, we have seen panels become almost too deferential to the parties and not sufficiently aggressive in hewing to a timeline for the process. Long periods of time between sittings of the panel also tend to increase costs as everybody needs to get back up to speed on the issues.

Bos: The efficiency of arbitration procedures is to a large extent dependent on the good working

relationship between the parties. If the parties to an arbitration are able to agree on efficient working procedures between themselves, without having to go back to the arbitration panel for every small managerial issue, costs can very well be managed. If parties need arbitral decisions for every step in the process, issue extensive lists of requests for expert witnesses and detailed disclosure, management costs will go up rapidly.

Duclercq: It is undisputed that the cost saving benefits of arbitration are eroded by the increasing number of procedural incidents and by the increasing presence of factual and expert witnesses, and so on. However, control of time and costs in international arbitration is an ongoing concern and has been the object of several studies and publications. Time and costs may thus be managed by the arbitral tribunal, which has a duty to conduct the arbitration in a time and cost-effective manner – see (Article 22(1) and (2) of the 2012 ICC Rules, Article 14.1(ii) of the LCIA Rules, Article 17(1) of the UNCITRAL Rules); and by counsel, who can refrain from raising too many procedural incidents or summoning witnesses of lesser importance to the hearing, for example. It should also be noted that a parties' behaviour which leads to a waste of time and an increase in costs may also be sanctioned by the arbitral tribunal in its award on the costs of the arbitration.

CD: What steps can parties take to accurately assess and manage the costs involved in today's disputes?

Bos: The costs of a dispute, to a large extent, depend on the willingness of both parties to solve the core of the dispute, without taking too much trouble with side issues or procedural issues during the dispute resolution process. Parties should try to keep the scope of the resolution process as limited as possible. Also, complete and accurate submission of requested information in a timely manner, to a court or an arbitration panel by both parties, will help to keep the costs of dispute resolution processes as limited as possible.

Duclercq: Before initiating proceedings, the majority of clients now require from their counsel an assessment of the costs of the dispute, which includes an assessment of the contractual commitments to which they are bound; an assessment of their claims but also of the counterclaims that could be made by the other parties; and an assessment of the legal costs, for example, arbitral institution – if any – expertise, witnesses and reasonable legal fees. Such an assessment might require the appointment of an expert so as to have a precise image of the amount involved in the event of a dispute. Beyond these assessments, they also often request an evaluation of their chances to succeed in the dispute resolution

process for each claim they anticipate. This contributes to the risk evaluation usually requested by multinational companies.

Bell: There needs to be a meeting of the parties and the panel at the start of the process, in order to agree on a timeline and hearing dates. The parties need to define the time that they require to present their case and thereby agree on a budget for time and costs. Then, it should be the panel's job to ensure that the parties adhere to the timeline and budget. If amendments are required, all should agree, but the bar should be set fairly high to determine if additional time is really needed or the required amount of time was just poorly managed.

CD: What role is appropriately played by the various types of dispute resolution processes: trial, arbitration, mediation?

Bell: Mediation has always seemed to be an appropriate part of a formal dispute resolution process. Through the assistance of a skilled mediator, the parties could become more informed of each other's position, potentially negotiate an appropriate resolution to the issue, and then more quickly turn their full attention back to exploiting the commercial opportunity that was the source of their dispute.

Certainly parties continue to communicate 'behind the scenes' of a formal dispute resolution process and this is entirely appropriate. We've been involved in many situations in which the parties negotiate a resolution before the completion of the formal dispute resolution process; in fact, that is the case in the vast majority of the circumstances. A negotiated resolution is almost certainly likely to be achieved more quickly and lead to a more appropriate outcome than an externally mandated resolution.

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Bos: When both parties would like to continue their relationship during and after the resolution of their dispute, mediation is typically recommended. A mediation process also offers the possibility of getting a better understanding of each other's standpoints and considerations. Arbitration offers good opportunities to have influence on the process. The advantage of both mediation and arbitration is

that it is a confidential process, whereas court trial is not. On the other hand, the advantage of a court trial when compared to arbitration or mediation is that it offers opportunities for appeal.

Duclercq: Although all dispute resolution processes may be used for most disputes, some are more suited for certain types of disputes. Amicable dispute settlement processes, such as negotiation, conciliation or mediation, first, are used as a preliminary step to either trial or arbitration, in an attempt to settle the dispute before commencing them. They are particularly recommended when the parties are to continue their business relationship, either when the contract out of which the dispute arises still produces effects or when the parties are bound to conclude other contracts together. As regards the choice between trial and arbitration, globally speaking, I tend to recommend trial for domestic disputes and arbitration for international disputes, arbitral tribunals being well versed in international trade practices. However, this is an archetype as each specific case requires specific assessment of the pros and cons of bringing suit to either trial or arbitration: indeed, even a domestic dispute could require privacy, speed, and so on.

CD: In your experience, have you seen any attempts by parties to draw out dispute resolution processes to force a

settlement? If so, what tactics might be used and how can they be countered?

Duclercq: In my experience, it is quite common for a party to threaten to initiate proceedings – either litigation or arbitration – or even to initiate them when settlement negotiations stall. The tactics depend on the particulars of the case. Indeed, if a public entity or a quoted company is involved, the risk that the dispute is made public during the dispute resolution process can be an argument to force a settlement. In addition, the fact that a dispute resolution process will require time and costs can be an argument to initiate another amicable settlement process; initiating several provisional measures before proceedings can also encourage discussion. To avoid such tactics, it is wiser to include in the contract an amicable resolution process such as negotiation, conciliation, mediation, and so on.

Bell: We have not been exposed to circumstances where it appears that discovery requests and expert witnesses are being used to draw out the process inappropriately. Presumably, it is the panel's prerogative to rule on requests for additional discovery and the need for experts. Again, as disputes become more technical, rather than just matters of legal interpretation, one should expect an increase in discovery and the use of experts. Otherwise, it is doubtful that an informed decision will result.



Bos: Drawing out dispute resolution processes as long as possible, in order to try to push the opposite party to the limit – to the point where the opposite party is no longer able to fund further processes or management attention goes down – is a well known tactic. Accepting a settlement can then be the only remaining option. This can be countered upfront, in ‘good times’, when drafting the agreement to arrange a relationship between parties. At that time, it is much easier to agree that, if a dispute might arise, parties will not enter into a lengthy court trial – with two possible instances of appeal – but will go for an alternative dispute resolution process that offers less of an opportunity to draw out the process.

CD: What steps can disputing parties take to ensure that working relationships are not adversely impacted by the dispute?

Bos: The best way to avoid an adverse impact on the working relationship is to isolate the issue in dispute from any other business relationship. Stay fair in the process. The dispute is the result of a different interpretation of an historic event between the parties. In most cases different interpretations both have their merits. Although defending your own position, it helps to understand that different positions are possible. It is easier to understand the

opposite party’s position when working relationships are still at a reasonable level when deciding to start a dispute resolution process. It could also help if parties do not handle the dispute at the highest level – this leaves room for continued business relationships at the top level. Finally, involving external lawyers will make a dispute less ‘personal’.

Duclercq: First, the parties should obviously try to settle the dispute amicably prior to initiating any adjudication process – litigation or arbitration can be

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a very long and traumatising process for the parties, each of them accusing the other of breaches. To this end, amicable dispute resolution methods and dispute boards have been created in recent years to help parties find a settlement without putting an end to their relationship. Second, ensure your counsel is aware of the continuing working relationship and its importance – the outcome’s objective is

generally not the same, which inevitably impacts the strategy adopted. Moreover, the strategy will be greatly influenced by the evolution of the working relationship. Finally, counsel will probably use a less aggressive tone than normal when drafting memoranda.

Bell: Realistically, it is difficult to ensure that a working relationship between the parties is not adversely affected by a dispute between the parties. A diminution of the effectiveness of a working relationship between the parties needs to be considered as a likely cost of the process. Further, it can be a cost of the process that could persist beyond the resolution of the dispute, particularly if that resolution is externally mandated as opposed to the result of a negotiation between the parties. To the extent that those directly involved in the working relationship could be shielded from the proceedings, and particularly from any acrimonious assertions, that is likely to be beneficial. Both parties will need to work to minimise the disruptive effect of the dispute resolution process.

CD: What trends if any have you seen with regard to the settlement of disputes? Are today's companies more likely to reach a settlement out of court? What processes and procedures should parties follow in such circumstances?

Duclercq: Being quicker and less expensive, out-of-court settlements have been favoured in times of crisis. However, the financial crisis is not the only reason for such favour. In recent years, the importance of good faith in commercial contractual relationships has been growing, and is now considered a universal principle of international trade law. One of the aspects of this principle is negotiating in good faith should a dispute arise between the parties. There are multiple processes and procedures available to reach a settlement, which are more or less flexible. Parties can discuss around a table with or without the help of a neutral, or agree to recourse to an *ad hoc* or administered amicable dispute resolution process such as conciliation or mediation. Most arbitral institutions, like the ICC, provide amicable dispute resolution services and have elaborated sets of procedural rules to that effect. In any case, it is of particular importance, if the parties settle the dispute amicably, to lay down the terms of their settlement, and register this with a competent court.

Bell: We've not done a study to conclude one way or the other about the propensity for parties to reach a settlement out of court. We've seen some settlements move to secure a working relationship in other areas, either tangential to or separate from the dispute. This can have the benefit of securing, to the extent possible, the full commitment of both parties for re-engagement on the commercial opportunity

that was the source of the dispute. Hopefully, to the extent there was a misunderstanding or a poorly worded contract that was at the source of the initial dispute, those issues have been addressed in a settlement which has the parties committed to another working relationship. In addition, settlements are more likely to be effective from a business perspective if they also address other areas of dispute or potential dispute between the parties. Although less costly than formal dispute resolution, settlement is still a costly process, demanding of the time of senior business executives and corporate legal staff. It can be more efficient and more effective to resolve several issues at once rather than individually.

Bos: The vast majority of cases in which we are involved as financial expert end up in settlements. In many cases, liability is decided upon in a first phase, followed by a phase of establishing the quantum of damages. Once it has been established that the defendant is liable for damages, and the method that will be followed by the court or the arbitration panel to establish damages becomes clearer, parties, or at least one of the parties, become more willing to end the process. Under these circumstances, settlements are often made.

CD: What should be the role of expectations and objectives in the dispute resolution process?

Bos: The most important objective in the dispute resolution process should be to arrive at a result that benefits the company. This can be winning the case, reaching a reasonable settlement, or losing the case but keeping the relationship with the opposite party at an appropriate level. With respect to the outcome of a dispute resolution process, expectations play a role in the valuation of disputes, as reported internally as well as externally. Furthermore, management's expectations of the outcome of a case should be managed carefully and early in the process by internal and external lawyers. This will increase the chances of management reaching a reasonable settlement.

Bell: Expectations and objectives should guide the dispute resolution process without shackling counsel. Opportunities for settlement or narrowing the field of dispute often arise during the course of an arbitration, and counsel needs to be free to creatively search for and take advantage of such opportunities. The key is to remember that the parties are here to resolve business conflicts and return to their commercial activities, and arbitration provides a venue where they can reach a resolution and return to those efforts. So long as expectations and objectives are framed in the greater context of the business relationships, they will provide useful guides.

Duclercq: Expectations and objectives are key in the dispute resolution process as they dictate the strategy to be followed, and the desired outcome of the dispute. For example, the same strategy will not be followed if the parties continue to have business relationships on other deals or if the contract was a 'one shot deal'. Also, the strategy will depend on whether the claims made consist of requests for declaratory relief or financial compensation. Also depending on their expectations and objectives, the parties could invest more time and money in the dispute resolution process – they could be more inclined to appoint an expert, to call witnesses, or to ask for discovery and so on. Finally, depending on the urgency of the situation, the parties may choose a different type of dispute resolution process.

CD: Often, parties to a dispute can become entrenched in a 'win at all costs' mindset, which can result in unpredictable and unwanted outcomes. How do you suggest parties keep sight of the objective of the dispute, and arrive at a result that benefits the company?

Bell: The 'win at all costs' mindset tends to come to the fore when personalities dominate and reason, judgement, and business interests have often been

relegated to secondary considerations. To help keep the 'win at all costs' mindset at bay, it is best to formulate objectives and expectations for the dispute resolution process at the outset and then keep those objectives and expectations at the forefront of considerations. It can also be important to rein in external counsel, who may pursue the 'win at all costs' mindset to the exclusion of the future working

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relationship, if any, that will need to exist between the parties, long after the dispute in question has been resolved. Acrimonious, bombastic, outrageous, and pejorative assertions seem to be an unfortunate by-product of the formal dispute resolution process. Ideally, cooler heads eventually will prevail. When that happens, both parties have the potential to gain from the dispute resolution process and the original working relationship between the parties has the opportunity to go forward without being irreparably harmed.

Bos: When entrenched in a 'win at all costs' mindset, disappointment in the case of a negative decision is significantly greater. Furthermore, if such a mindset is also expressed to the opposite party, this will have an impact on the possibility of continuing a business relationship at an appropriate level during and after the dispute resolution process. This would also impact the possibility of reaching a settlement. Again, in most cases, different interpretations both have their merits and, although defending your own position, it helps if you can understand that different positions are possible.

Duclercq: In my opinion, it is counsel's role to remind his client of the objectives of the dispute

when he loses sight of them. It is also up to counsel to remind his client that the dispute is not a person to person fight but a contractual analysis. Regarding keeping sight of the objective of the dispute, it is of the utmost importance to leave the human aspect of the case to one side. Therefore, the legal and financial analysis should prevail on the human aspects and the claim should be established with an objective and reasonable point of view: a pre-risk analysis before initiating any resolution process is thus very important so as to limit any unpredictable and unwanted outcomes. Finally, it is key that counsel does not abide blindly by all his client's requests, but, to the contrary, listens to his client's requests and finds the most appropriate legal answer. CD