

NEWSLETTER

# MEDIATION

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# ADR as a tool for management and for corporate governance

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'ADR' enjoys such growth and development internationally that the term itself begs for redefinition. One of those redefinitions must be the felicitous phrase chosen for the title of a full day of speakers at the 2006 IBA Annual Conference in Chicago: 'ADR as a management tool'.

In Europe, commercial mediation is on the rise, but many parts of the business community are still largely unaware of its benefits or even its attributes. In the United Kingdom, civil commercial mediation has experienced substantial growth since the Woolf Reforms, but it is still more often referred to than practised, and only a handful of practitioners are able to support themselves exclusively by service as mediators.

In both markets, the practice is more often looked upon as a means of resolving individual disputes than as a method of adding value to a business relationship or a technique to manage outside legal costs. And of course in Eastern Europe, the Middle East, Africa and (to a lesser extent) Latin America commercial mediation is an object of study more than of practice.

In the United States, the take-up is broader and the application less narrow. Most corporate legal departments understand the process of commercial mediation and many companies are responding to competitive pressure to reduce their legal budgets by looking to the principles of ADR to guide them in creating dispute management systems, rather than merely using mediation as an alternative to litigating or arbitrating particular cases. ADR systems have proven to be a highly reliable method of managing streams of cases in employment and other contexts. Entire platoons of consultants have realised a tidy business assisting corporations to set up 'Early Case Assessment' systems.

If at its heart ADR is, in fact, a tool for management, then what does it manage? Commercial conflicts, yes, but commercial *relationships* also. Any serious student of mediation readily appreciates that the process results in the reformation and clarification of business dealings, at least as much as it does the issuance of an award of damages. It is useful in the management of critical business partners such as IT professionals, vendors, customers and employees. This article questions whether ADR may have even further ramifications in the realm of corporate governance itself.

There are two aspects of corporate governance that imply a role for ADR skills. One is in facilitating the work of the board itself, and the other is in creating shareholder value. As to the first, there are few examples. A voluntary German corporate regulation (Deutscher Corporate Governance Kodex) calls for a 'Mediation Committee' to assist in the naming of employee representatives to the management board in the event that a two-thirds majority of employee votes needed to appoint such a member to the supervisory board is not met (see, eg, [www.bayer.com/about-bayer/corporate-governance](http://www.bayer.com/about-bayer/corporate-governance)). The American Bar Association has recently published two useful pamphlets on the topic: *Improving Board Effectiveness: Bringing the Best of ADR into the Boardroom*, by Jon J Masters and Alan A Rudnick, and *Corporate Governance: A Practical Guide for Dispute Resolution Professionals*, by Richard C Reuben (both available upon request at [www.abanet.org/dispute](http://www.abanet.org/dispute)). But neither of these valuable publications cites actual instances where boards availed themselves of facilitative mediators to assist them in their work of overseeing the management of the enterprise.

The influential and activist investment entity CalPERS (California Public Employees' Retirement System) has promulgated global corporate governance principles that provide, in part, that 'corporate governance issues between shareholders, the board and management should be pursued by dialogue and, where appropriate, with government and regulatory representatives as well as other concerned bodies, so as to resolve disputes, if possible, through negotiation, mediation or arbitration' ([www.calpers-governance.org/principles/international/global/page06.asp](http://www.calpers-governance.org/principles/international/global/page06.asp)). But the principle seems not to have been applied in real cases of managing internal or external board conflict.

It is in the second role of the board – ensuring the creation of shareholder value – that the most intriguing possibilities lie for application of the core principles of interest-based facilitated negotiation. No one would seriously contend that the management of particular disputes by the legal department is a matter rising to the board level – not, that is, unless something has gone very seriously wrong, in which case it is too late. But is not the management of critical business relationships clearly a board matter? Of course it is. The Ford Board should

know the status of relationships with Firestone, and the Intel Board should know the status of its relationship with Dell. And it may be entirely prudent for *any* board to ask senior management these questions, and be satisfied with the answers:

- Does the company have a system of early case assessment, and a method of establishing reserves against contingencies that the auditor approves? If not, why not?
- Does the company have a rigorously designed method of identifying and addressing streams of employee disputes? What is the track record of that system, and what trends have been uncovered? How many claims of racial or gender discrimination have been voiced, and is there any indication of mismanagement that might give rise to a class action that would have serious reputational consequences to the company? What percentage of employee disputes have remained unresolved and risen to the level of the filing of arbitration or lawsuits? What impact has the system had on rates of employee turnover and outside counsel costs?
- Does the company have an early dispute detection and resolution system with respect to its critical procurement functions such as IT vendors? If not, why not?
- What systems does the company have in place to manage disputes involving its patents and trademarks? What are the trends of outside counsel costs in the area of protecting intellectual property rights? What percentage of such claims result in licences, and what transaction costs are incurred between the onset of the claim and the licence agreement?

- Does the company have a policy that its transactional attorneys and businesspeople draft dispute management clauses in critical contracts, that are designed to protect the value of the deal? What resources are expended to provide such training for the professionals who negotiate and draft these critical deals?

The concept of 'shareholder value' takes on many forms, including measuring return on financial investment; managing the conflicting but cognisable interests of such stakeholders as employees, shareholders, communities, regulators, and NGOs; setting and enforcing ethical business practices; setting and enforcing sustainable business practices; and ensuring the continued value of the brand by protection of the company's reputation and goodwill. In this age of global corporate operations, these concerns are not easily identified or easily resolved as companies do business in regions with whose customs and expectations the senior management and the board may be unfamiliar. And it seems to many observers that these are matters that can very easily rise to the 'board level'.

If that is so, then it is highly likely that the set of skills that we know as 'ADR' will be of increasing importance as a tool, not only for management, but for corporate governance.

**Note**

\* This article is derived from remarks made at the Annual Conference of the International Bar Association on 21 September 2006.