



501 Creative Solutions to Cross Border Dispute Resolution

Alfred Farha
General Counsel, Europe
Flextronics International

Peter J. Schimmel
Partner
Ernst & Young Fraud Investigation & Dispute Services

Faculty Biographies

Alfred Farha

General Counsel, Europe
Flextronics International

Peter J. Schimmel

Peter J. Schimmel is partner of Ernst & Young in The Netherlands. He leads both the Dutch and the Central Europe practice of fraud investigation & dispute services (FIDS) of Ernst & Young.

Before joining Ernst & Young, Mr. Schimmel headed Arthur Andersen Fraud & Integrity Risk Services in the Netherlands. He has conducted special investigations, then working for the tax service. He has extensive experience with a wide range of investigations both in the public and private sector. While most investigations have been fraud related, FIDS also serves to unravel non-fraudulent factual complexes in situations of litigation support.

Mr. Schimmel is a qualified Master of Business Administration and member of the Dutch Institute of Certified Public Accountants.

Trouble is brewing with one of your customers or counterparties. Try as you might, you can't seem to agree on a resolution to your dispute, and the specter of arbitration looms large. How can you best prepare for this eventuality?

Consult the arbitration forum rules

Since arbitration is voluntary, your contract will specify the forum and the governing rules. Understand these

Preparing for Arbitration

BY KARIN B. SINNIGER

rules, since they will determine which outside counsel you should retain; what the procedural deadlines will be; what kind of discovery is permitted (which will drive your document management process), and so on.

Retain specialized counsel

Don't simply appoint your pet litigation firm. Make sure the firm you appoint has experience before the arbitral tribunal which will be hearing your case and is familiar with its rules, procedures, and customs and mores. Also, if the case requires special expertise (IP law or securities law, for example), ensure you appoint counsel with the requisite experience.

Note that in certain jurisdictions (such as continental Europe), legal advice given by in-house lawyers to clients in anticipation of arbitration is not privileged. If such advice comes from outside counsel, however, it is protected by the privilege rules. Act accordingly.

It is easy to lose objectivity when your team was on watch when the events leading to the arbitration oc-

curred. Asking your outside counsel to perform an independent legal review of the merits of your case, plus getting an independent technical review (discussed below) is invaluable to accurately assessing your chances of prevailing.

Appoint technical experts

Identify experts who can perform an independent review of the technical merits of the case. Specialized counsel and your client can help you locate such experts.

Remember that an expert with sound technical qualifications, who presents well and testifies infrequently, will likely have more weight with an arbitral tribunal than one perceived as a hired gun. Have outside counsel retain the services of experts to ensure the privilege of their opinion.

Manage documents and witnesses


Identify where *all* relevant documents relating to the issue(s) at the heart of the arbitration are likely to be held and by whom. This exercise will assist the preparations of your submissions and form the basis of your disclosure obligations. As part of this process, create a list of *everyone* involved in any of the material issues—whether technically, commercially, or legally—together with a short description of their role. This will help identify potential witnesses as well as ascertaining who has (or might have) relevant documents.

You should also ensure that *no* document that addresses any of the material issues is destroyed. Those individuals you have identified (see above) should be approached individually to ensure documents are not destroyed.

If there is a risk that the list of potential individual witnesses is not comprehensive, consider sending out a wider note to your clients asking them to preserve documents regarding the matter to be arbitrated. Furthermore, any routine procedure for the destruction of documents should be stopped for documents which are or may be relevant to the dispute, until its conclusion.

Finally, no documents should be *created* that might prejudice your position in the arbitration. At the very least, the relevant individuals should be told to assume that *all* internal documents might be disclosable, and to draft them accordingly. "Lessons learned" documents can be especially damaging when taken out of context. Also, ensure that your clients don't inadvertently agree to provide a letter of recommendation for the products, services, or the company at issue in the upcoming case. While legal proceedings are imminent, there should not be any correspondence with such a company unless first reviewed by you or outside counsel.

Identify potential arbitrators

Once you have drafted your Request for Arbitration (or received it), start identifying the qualities and names of potential arbitrators. For example, if you have a contractual dispute and the contract is in your favor, you will probably be better served by trying to get a lawyer who respects the "four corners of a contract approach" on your arbitration panel rather than an arbitrator without a legal background who may be more swayed by the equities of the case. Similarly, you may prefer an arbitrator with commercial experience over one from academia. 

Have a comment on this article?
Email editorinchief@acca.com.



KARIN B. SINNIGER was born and raised in Asia but is of European origin. She holds law degrees from both US and UK universities and has done deals on virtually every continent. She is a senior legal advisor for BP's Azerbaijan Business Unit based in Baku, Azerbaijan and can be reached at ksinnikh@bp.com. The views or opinions expressed in this column are those of the author and not necessarily those of the BP Group.

ALTERNATIVE DISPUTE RESOLUTION TOOLS**For a better security of international business relationships**

Among the alternative resolution tools, which enables the parties to solve a dispute without subjecting it to a state legal procedure, new tools are recommended for companies with international interests.

Alternative dispute resolution tools (ADR) which have been developed according to Anglo-Saxon models of the Alternative Disputes Resolution (ADR), are tools enabling the parties to solve a without subjecting it to a state legal procedure, thus optimizing the management of the dispute thanks to a better control of the costs and times of procedure. Among these tools, and in addition to arbitration, already well known in international matters (cf *le Monde* n° 1428, p. 68), new tools have appeared. They are mediation, the technical or amicable financial legal expertise, the med-arb, the adjudication clause.

A "neutral" third party helps to solve the conflict.

These tools include the intervention of a neutral, independent and qualified third, which helps the parties to find a solution. According to the procedures', this latter does not have any power of decision (mediation, amicable legal or financial technical expertise) or he has a secondary and strictly limited power of decision strictly framed (med-arb and adjudication clause). In the mediation, the third party, formed to the techniques of negotiation, does not deliver any opinion to the parties but assist them in finding an agreement. In case of failure, everything said during the mediation remains confidential. In the event of success, the parties formalize their decision in an agreement to which they can grant enforceability.

In the amicable legal or financial technical expertise friendly, the third party, an independent expert, delivers an opinion to the parties who jointly seized him. On the basis of this confidential opinion, the parties will be able to negotiate and find their solution. This procedure can lie within the scope of a mediation, an arbitration or negotiations between the parties. In any event, these procedures, which can be set at any stage of the dispute, are confidential and are framed within deadlines controlled by the parties, like the solution whose execution is thus facilitated. The simultaneous med-arb ensures the parties to obtain a solution in a very short time. A procedure of mediation and an arbitration are carried out by a mediator and an arbitrator, who are separated. If the parties do not reach an agreement in mediation, they know that the arbitrators will deliver their sentence within the time prescribed. The adjudication clause of emergency provides in the contract for the intervention of a third party with an interim power of decision, in the event of difficulties in performing the contract: the third party /decision maker takes a decision, which will be binding on the parties and whose consequences could be re-discussed subsequently before the judge on the merits.

This tool is adapted to long-term-contracts and enables to avoid their breach in the course of performance.

The procedures of medarb and adjudication ensures the parties have a solution to their dispute within a short time, if they do not reach it. All these alternative tools, applicable together or separately depending on the nature of the disputes, ensure to the parts a confidential, fast and balanced management of their disputes.

These procedures are less expensive, fees wise.

These procedures have another advantage for the companies with international interests. Further to avoiding strategic questions of applicable law or jurisdiction, they enable to take into account the multicultural and economic dimension of the dispute. Moreover, these procedures have enforcement facilities. By preventing breach of communication, they consolidate the perennality of the business relationships, which contributes to their securisation. Lastly, a considerable advantage remains the moderate cost of these formulas which results from the economy on counsel fees because of the fastness of the procedures, plus reasonable neutral third party's fees. In addition, the maintenance of the commercial relationships thanks to these procedures should not be underestimated, knowing that it is eight times more expensive to gain a new customer than to preserve one.

Some international centers of mediation have entered agreements facilitating alternative procedures between their respective countries. In the absence of such agreement, the parties in dispute assisted by their counsels can set up alternative procedures, apart from any solution with third parties they have chosen or at their disposal by the international Centers they will seize.

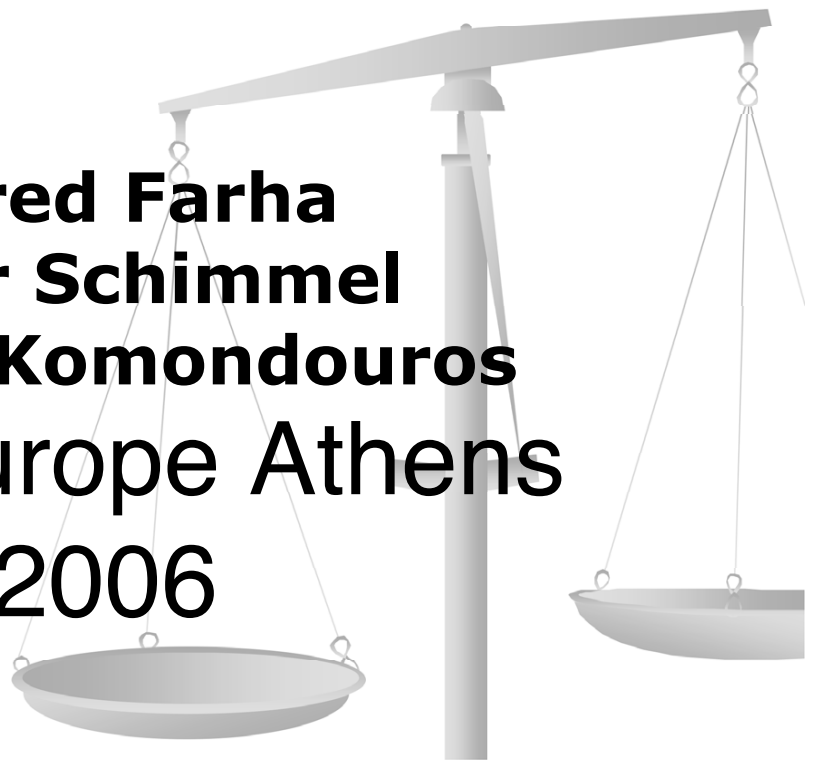
To facilitate the set of these alternative modes favorable to secured international relationships, it is recommended to the parties to provide for them as of their entering the agreement - an aspect which will be developed in a conference on "the alternative tools to resolve international disputes", which will be held on Ubifrance premises on June 24, 2004.

Isabelle Vaugon
Landwell & Partners, international mediator

(Isabelle.vaugon@fr.landwellglobal.com)

Creative Solutions to Cross-Border Dispute Resolution

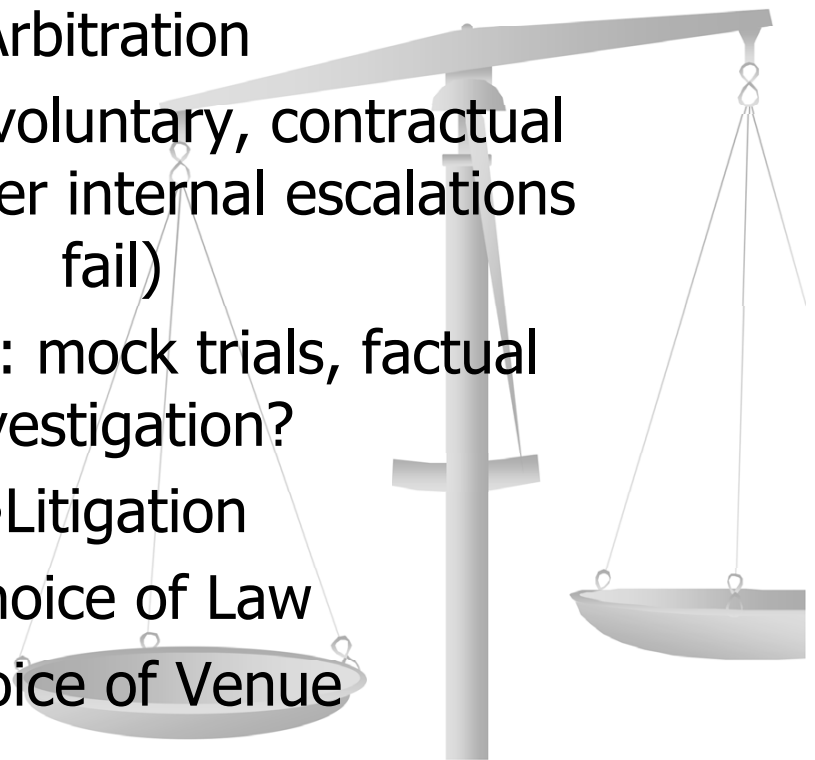
**Alfred Farha
Peter Schimmel
Markos Komondouros
ACC-Europe Athens
2006**



Resolving disputes – either lengthy court battles , or ADR.

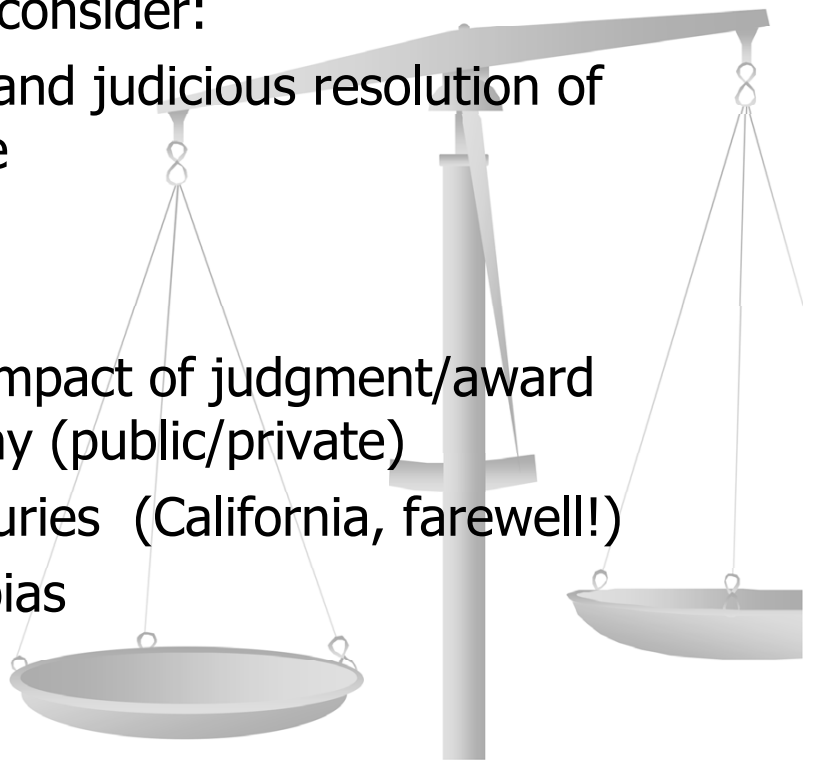
Arbitration

- Mediation (voluntary, contractual or agreed after internal escalations fail)
- Other ADR: mock trials, factual investigation?
 - Litigation
 - Choice of Law
 - Choice of Venue

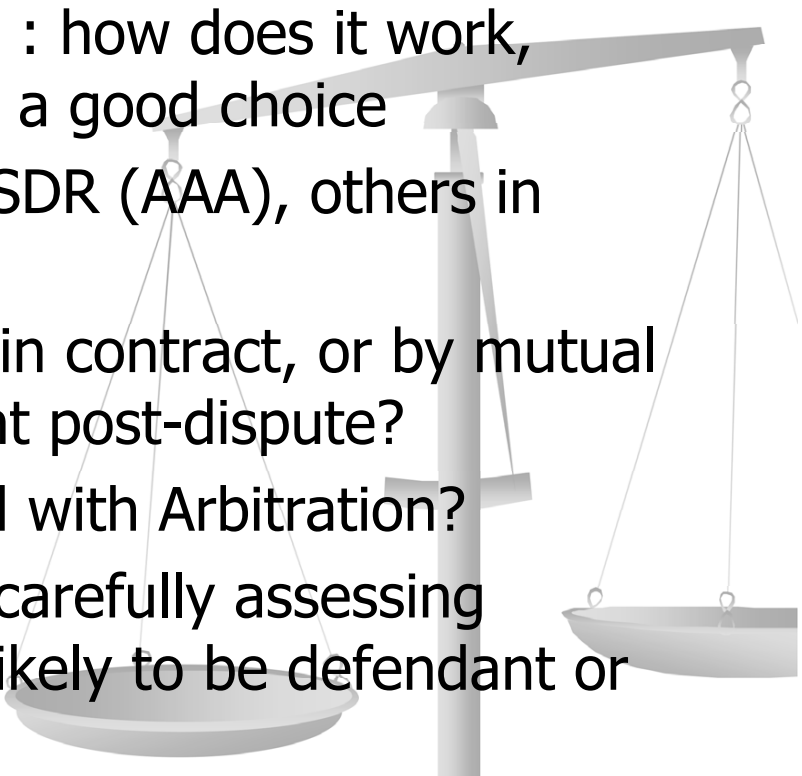


Making The Decision - To Arbitrate Or o Litigate? Or Mediate...?

- Factors to consider:
 1. Informed and judicious resolution of the dispute
 2. Cost
 3. Speed
 4. Potential impact of judgment/award on company (public/private)
 5. Avoiding juries (California, farewell!)
 6. Avoiding bias



Mediation

- Mediation : how does it work, when is it a good choice
 - CEDR, ICSDR (AAA), others in country
 - Required in contract, or by mutual agreement post-dispute?
 - Combined with Arbitration?
 - Consider carefully assessing whether likely to be defendant or claimant
- 

Fundamentals to consider when arbitration is your first choice

Institutional Arbitration:

ICC (Paris), ICDR/AAA, LCIA (London), CIETAC (China), VIAC (Vienna); Stockholm Chamber of Commerce; Singapore; DIS (Germany); WIPO (Geneva)

Ad hoc: UNCITRAL (Vienna)

New Swiss Rules (C's of Commerce):

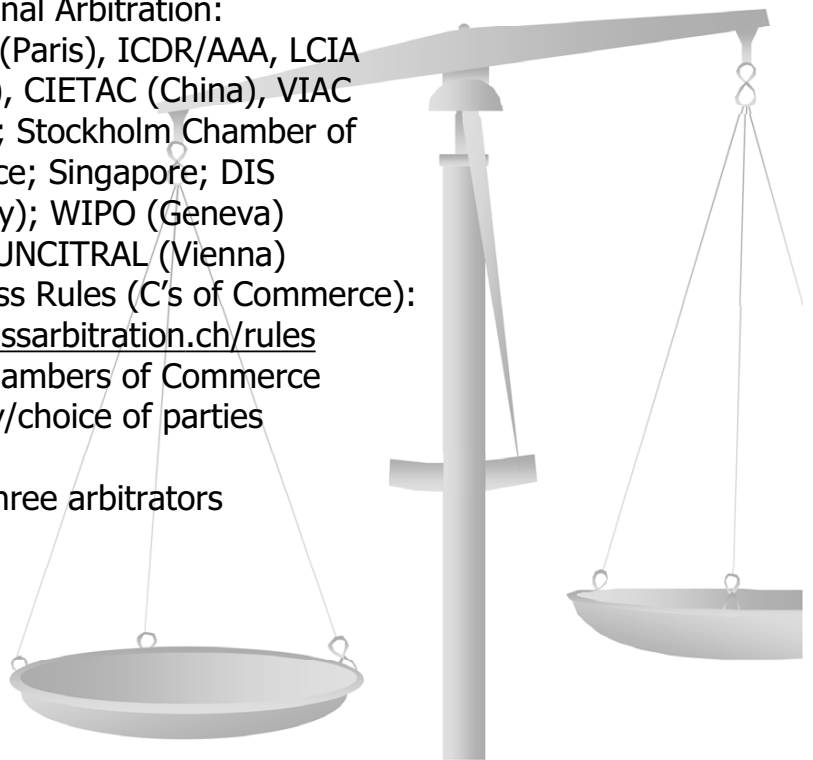
www.swissarbitration.ch/rules

Other Chambers of Commerce

Flexibility/choice of parties

Costs

One or three arbitrators

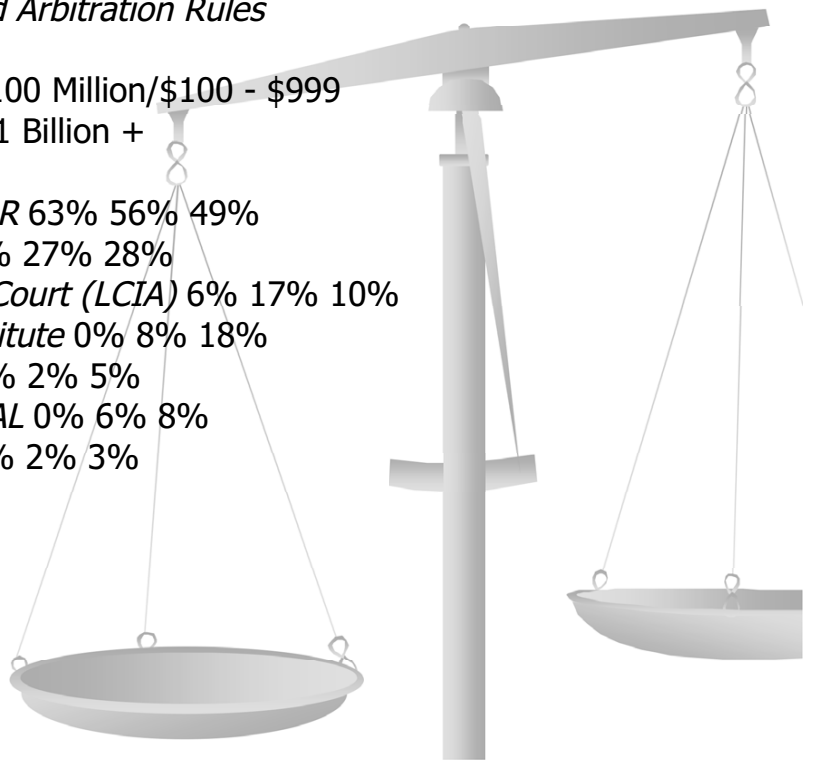


Arbitration : survey

Preferred Arbitration Rules

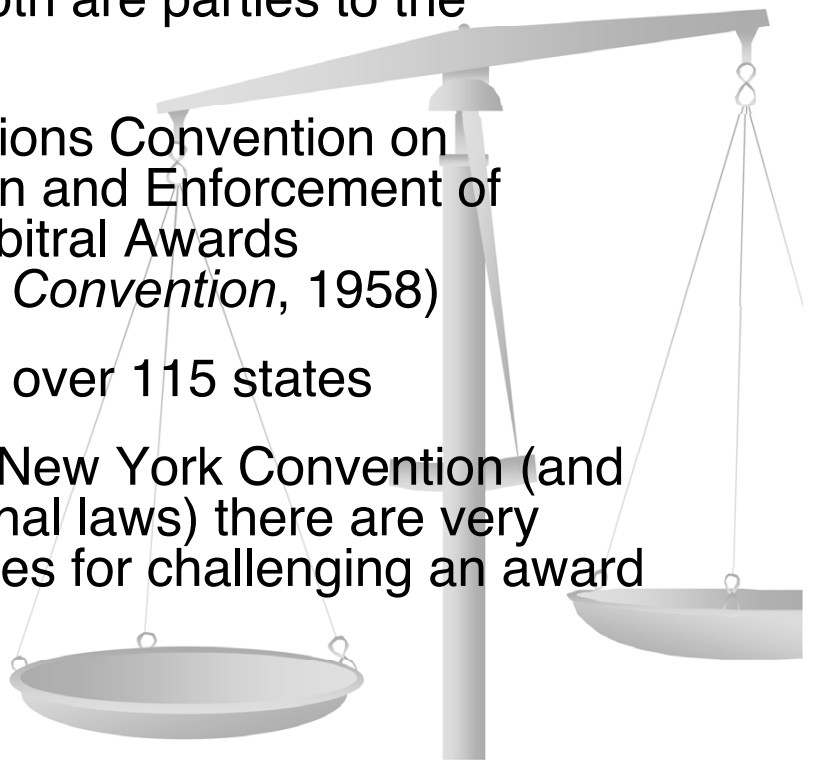
Under \$100 Million / \$100 - \$999 Million / \$1 Billion +

<i>AAA/ICDR</i>	63%	56%	49%
<i>ICC</i>	44%	27%	28%
<i>London Court (LCIA)</i>	6%	17%	10%
<i>CPR Institute</i>	0%	8%	18%
<i>ICSID</i>	6%	2%	5%
<i>UNCITRAL</i>	0%	6%	8%
<i>WIPO</i>	0%	2%	3%



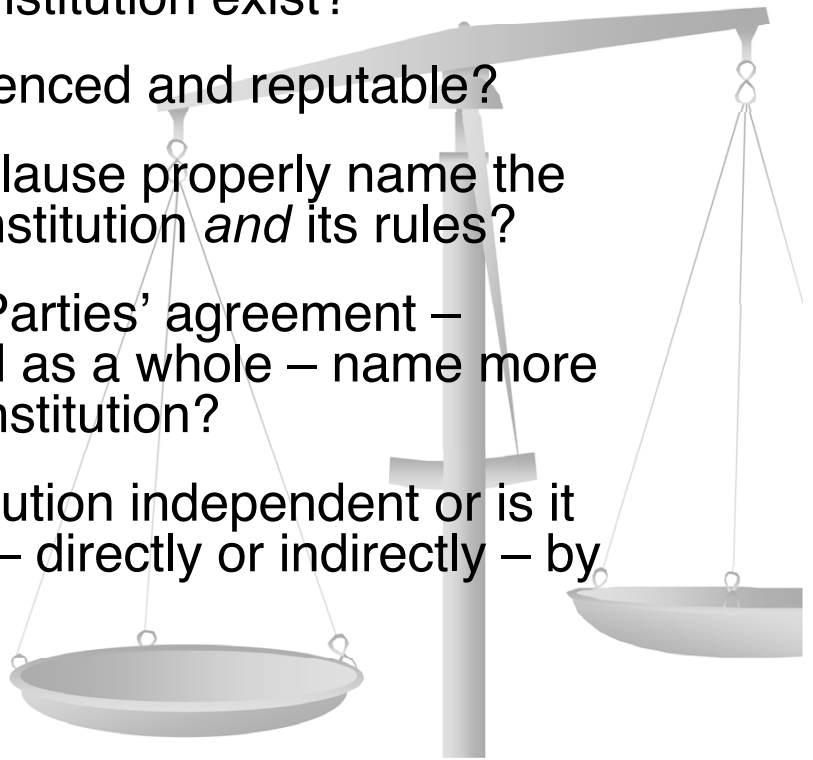
Fundamentals to consider when arbitration is your first choice

- Check if both are parties to the following:
- United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention, 1958*)
- Ratified by over 115 states
- Under the New York Convention (and most national laws) there are very limited bases for challenging an award

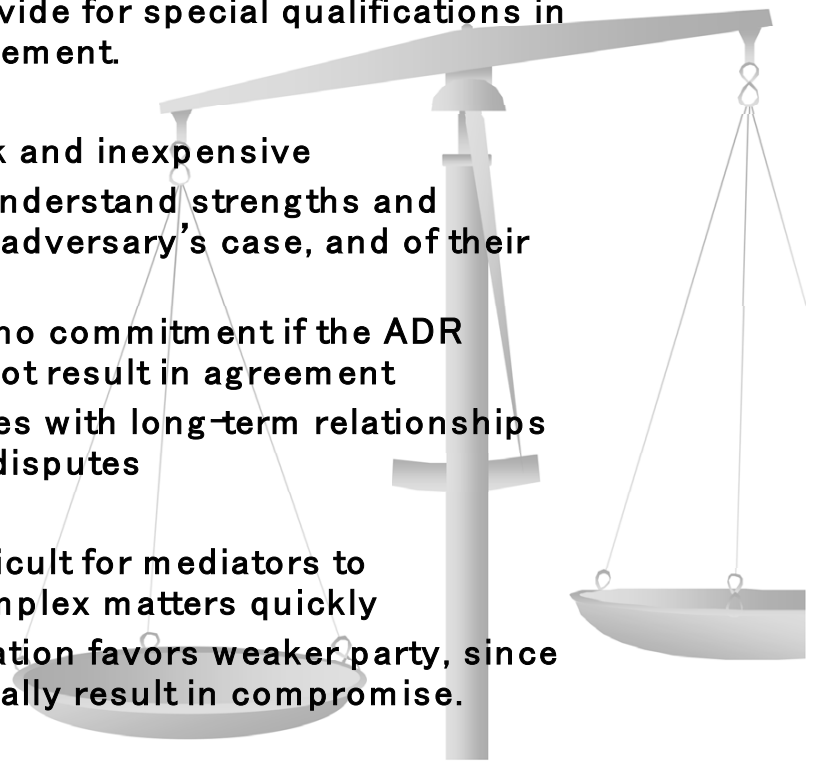


Mediation/arbitration clauses

- Does the institution exist?
- Is it experienced and reputable?
- Does the clause properly name the intended institution *and* its rules?
- Does the Parties' agreement – considered as a whole – name more than one institution?
- Is the institution independent or is it controlled – directly or indirectly – by the State?



- **Biggest issues: Neutrality.**
 - Arbitrators/mediators generally are experienced commercial lawyers (solicitors/barristers), or retired judges
 - Parties can provide for special qualifications in arbitration agreement.
- **Advantages**
 - Relatively quick and inexpensive
 - Parties better understand strengths and weaknesses of adversary's case, and of their own.
 - Non-binding —no commitment if the ADR process does not result in agreement
 - Useful for parties with long-term relationships or mid-project disputes
- **Disadvantages**
 - Sometimes difficult for mediators to understand complex matters quickly
 - Nature of mediation favors weaker party, since mediations usually result in compromise.





Dispute-WiseSM Business Management

Improving Economic and Non-Economic
Outcomes in Managing Business Conflicts



Background and Objectives

- Our initial study objectives included:
 - To explore the ADR practices of a broad range of companies
 - To identify companies that might be characterized as “**dispute-savvy.**”
 - To examine the relationship between **Dispute-Wise Business Management practices** and favorable “outcomes” of both an economic and non-economic nature.

Methodology

- The study was conducted for the American Arbitration Association by Clark, Martire, Bartolomeo & Shulman.
 - Based on a sample of 254 corporate general counsel, associate general counsel or people in similar positions and levels.
 - They were drawn from three company sizes/types:
 - 101 from Fortune 1000 companies
 - Mean revenue: \$9.09 billion
 - 103 from midsize public companies
 - Mean revenue: \$384 million
 - 50 from private companies
 - Mean revenue: \$690 million



*Defining and Explaining
Dispute-Wise Business Management*

- 5 items are positive indicator statements of Dispute-Wise business management practices:

- The legal staff has a very good understanding of the broader business issues facing the company and industry.
- The legal department is highly integrated into the general corporate planning process.
- Senior management in this company is focused on preserving relationships and settling cases rather than just winning cases.
- A lot of our time is spent on highly complex and technical issues.
- A lot of our time is spent on international issues.

- 3 items are indicator statements of behaviors that are counter to Dispute-Wise business management practices.

- Our primary focus is on reviewing contracts and agreements.
- We often favor litigation over ADR.
- When disputes arise we usually take an aggressive approach.



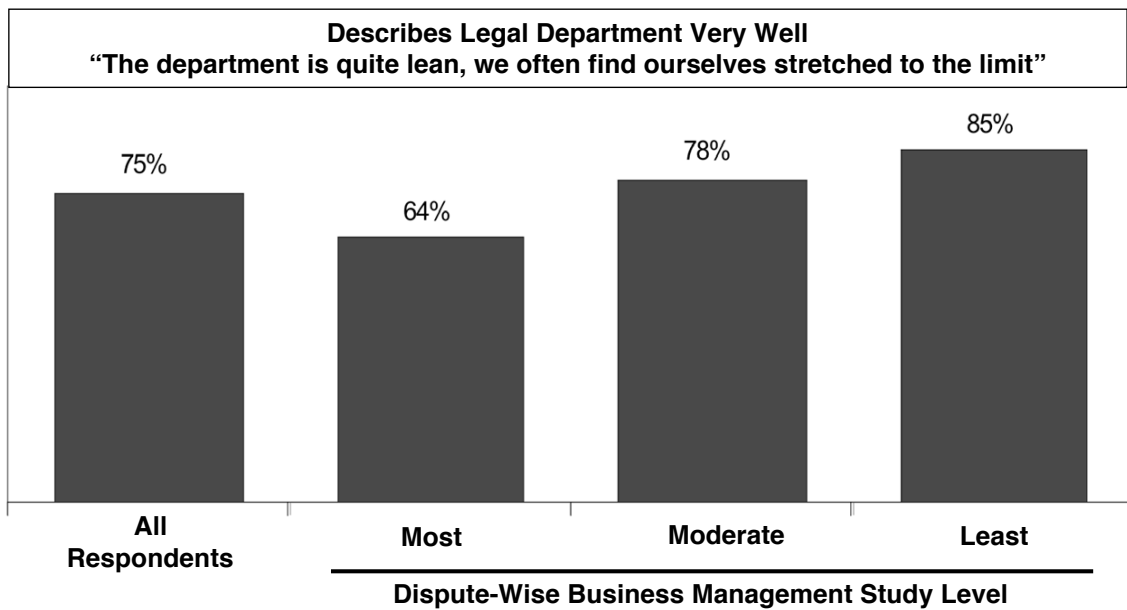
*Benefits Associated with
Dispute-Wise Business Management*

The “least dispute-savvy” companies have significantly higher legal department expenses.

Legal Department's Annual Budget				
	Total	Dispute -Wise Business Management		
		Study Level		
		Most	Moderate	Least
Mean Legal Department's Annual Budget Excluding other Legal Services	\$4,046,000	\$3,326,000	\$3,692,000	\$5,243,000
Mean Outside Legal Services Annual Budget	\$6,260,000	\$6,966,000	\$4,944,000	\$6,978,000
Total budget for legal services	\$10,306,000	\$10,292,000	\$8,636,000	\$12,221,000



Despite smaller budgets, the legal departments of the “most dispute-savvy” companies feel less “stretched” within their budget constraints.



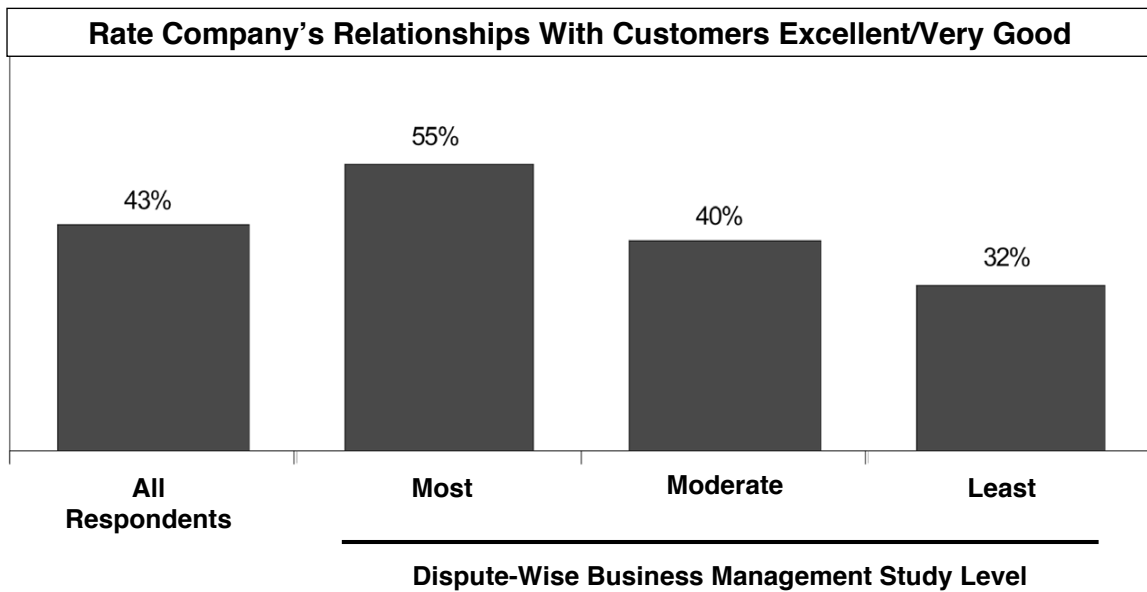


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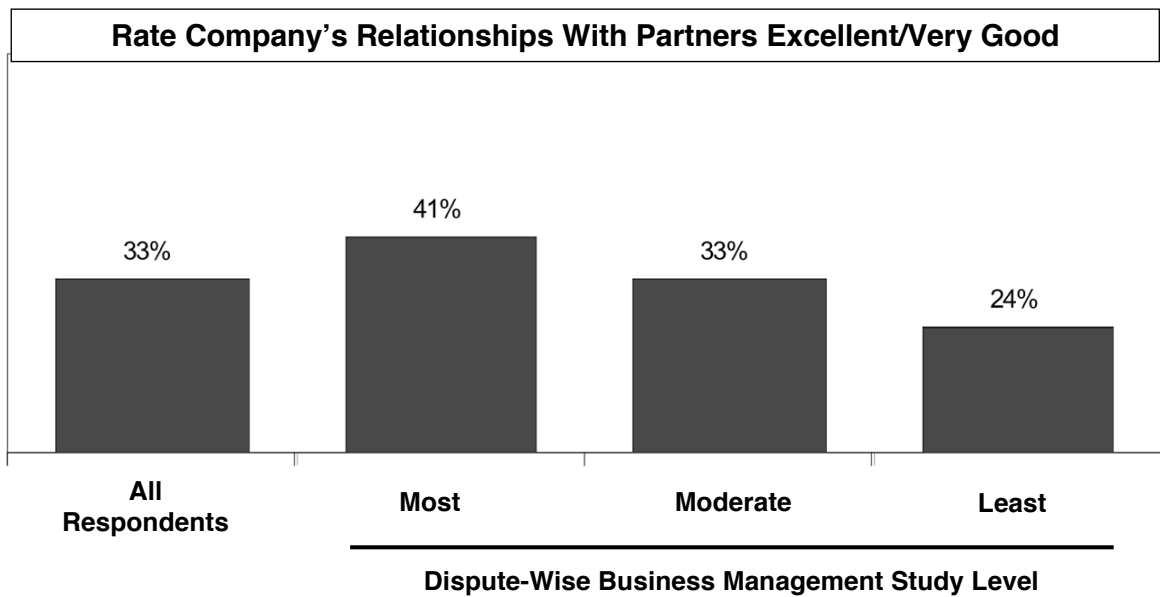


The “most dispute-savvy” companies are more likely to describe their customer relationships as excellent/very good.



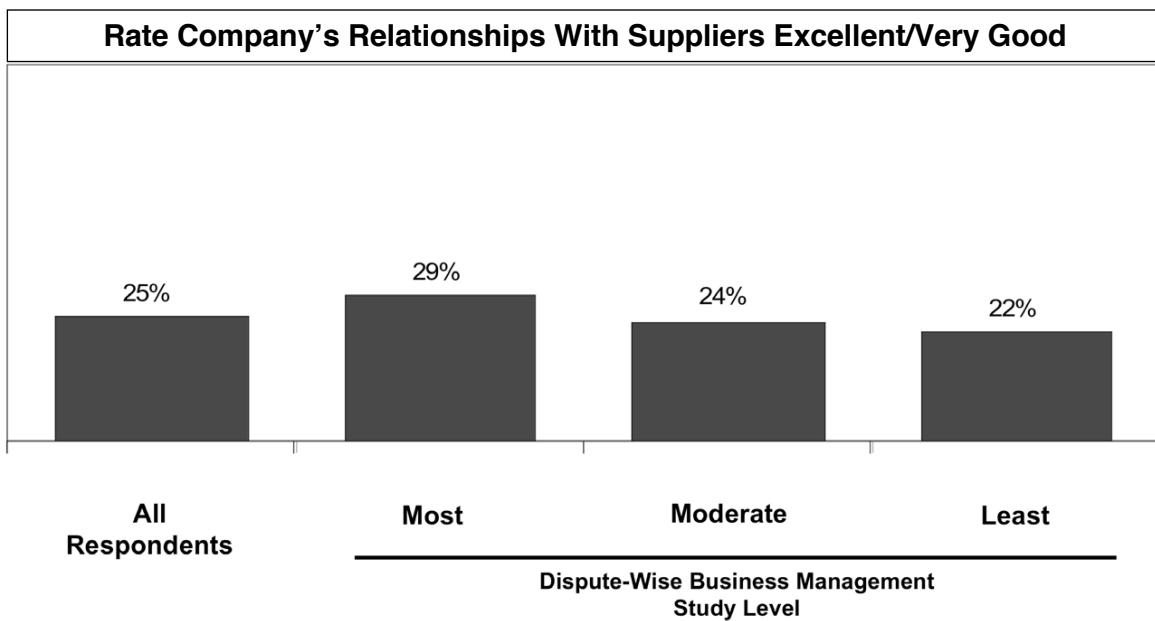


The “most dispute-savvy” companies are more likely to describe their relationships with partners as excellent/very good.



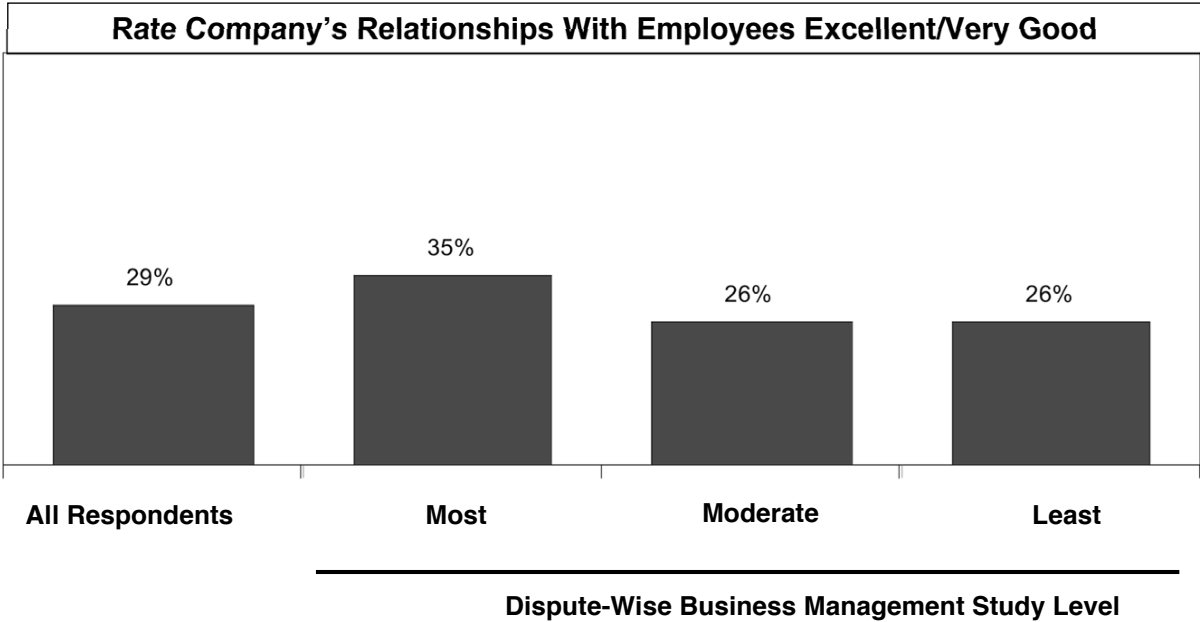



The “most dispute-savvy” companies are somewhat more likely to describe their relationships with suppliers as excellent/very good.





The “most dispute-savvy” are somewhat more likely to describe their relationships with employees as excellent/very good.



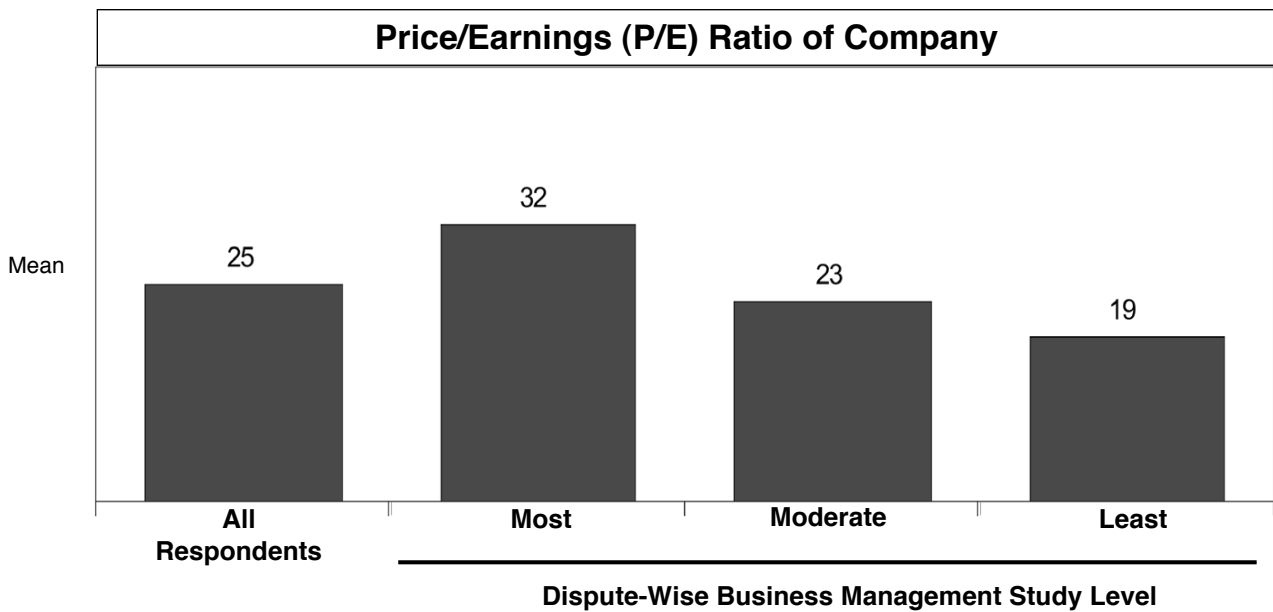


Relative to these stronger relationship findings, it is interesting to note a similar correlation when we looked at the price/earnings ratios for the publicly-traded companies.

P/E ratios are often thought of as a measure, among other things, of stockholder confidence in corporate management.



The “most dispute-savvy” companies had higher P/E ratios.





**The Next Step:
Dispute-Wise Business Management
Leading Practices Interviews**

In-depth interviews with 20 In-house Counsel representing primarily a cross section of the “most dispute-savvy” companies

The Result

- Nearly 400 distinct practices or approaches to the prevention and management of disputes, framed in 21 management areas across five broad categories:

Environment

Legal Operations

Outside Counsel

Measurement & Reward

Management Process

Detailed Findings Areas

Environment:

- Culture
- Getting Started
- Building Credibility

Legal Operations:

- Legal Executive Development
- Legal Department Structure
- Legal Recruiting
- Legal Relations

Outside Counsel:

- Selecting Outside Counsel
- Managing Outside Counsel

Measurement & Reward:

- Measure/Reward Outside Counsel
- Legal Department Measurement

Management Process:

- Tracking & Reporting
- Teaming Process for Employee Disputes
- Driving ADR
- Policies & Standards
- Technology
- Training
- Communications
- Knowledge Management
- Customer, Partner, & Employee Relations
- International Practices

Dispute-Wise Business Management is NOT About

- Being pushovers in disputes
- Simply pressing law firms to lower fees
- Avoiding litigation at all times
- ADR, arbitration, or mediation per se

The Result

Detailed Findings Summarized into Top-Line Findings

Top-Line Finding #1:

Foster a Business Culture Rooted in a Golden Rule

Top Line Finding #2:

Integrate Legal Operations into the Fabric of the Business

Top Line Finding #3:

Establish a Process that Achieves Early Case Resolution and Leverages ADR

The Result

Detailed Findings Summarized into Top-Line Findings

- **Top Line Finding #4:**
View Disputes as Part of a Portfolio – Managed as an Investment or a Cost
- **Top Line Finding #5:**
Orient Internal/External Legal Team to Business Goals & Expectations
- **Top Line Finding #6:**
Treat DWBM as a Process of Continuous Development and Refinement

Key Steps in Building a Dispute-Wise Business Management Organization

- Identify a Dispute-Wise Business Management **leader** and owner
- Create **an architecture and a framework** for dispute-savvy operations in your business
- Select and **implement leading practices, approaches, and metrics** that fit in your context
 - Early case intervention will always fit
- **Measure, learn, and follow up** to assure continuous improvement

Concluding Thoughts:

- One thing that came across loud and clear in our many hours of interviews: Dispute-Wise Business Management is as much about strategic business thinking and relationships as it is about disputes.
- It's about creative, flexible problem solving oriented towards creating win-win situations on a regular basis.
- Dispute-Wise Business Management practices are good business practices.

Creative solutions to cross-border dispute resolution

Markos Komondouros
Athens, 16 May 2006

The business landscape is changing

- More regulation
- Greater transparency
- More cross-border business
- Fast-changing technology and markets
- More complex relationships
- Longer-term service contracts
- Business more relationship-based than transaction-driven

BUT: More scope for disputes

Disputes arise naturally in business and need to be handled
creatively and efficiently

Advantages of mediation

- Speed
- Voluntary process
- Outcome under parties' control
- Informal
- Testing of options/flexibility
- Confidentiality
- Maintenance of relationships
- Low costs
- Certainty

Mediation can help address all aspects of a dispute...

Where mediation works best

- Small to medium-sized disputes
- More complex or technical problems
- Cross-border disputes
- On-going relationships

...and can be effective in a wide range of cases

Selection of case studies

Sector	Nationalities	Amount in dispute	Time from decision to mediate to outcome	Length of mediation	Cost per party
International trade - distribution	American and British	US\$8 million	2 months	1 day	US\$3,600
Maritime	American and Cypriot	US\$1.1 million	3 weeks	1 day	US\$2,400
Maritime	Chilean and Dutch	US\$4.8 million	2 months	1.5 days	US\$4,800
Construction and Engineering	Far Eastern and Canadian	US\$50 million	1 month	3 days	US\$6,500
Professional services	French, American, British and Italian	US\$450,000	2 months	1 day	US\$2,240
Telecoms	Danish and American	US\$6.6 million	2 months	1 day	US\$6,000
Professional services	American and British	US\$12 million	1 month	1 day	US\$ 8,000
Insurance	Spanish and British	US\$4 million	2 months	1 day	US\$3,600
Reinsurance	Lebanese and British	US\$5 million	3 months	1 day	US\$3,000
Construction and Engineering	Spanish and Norwegian	US\$1.6 million	8 months	2 days	US\$3,800
Manufacturing	Italian	US\$80,000	2 months	2 days	US\$3,600
Franchise	Canadian and British	US\$640,000	4 months	1 day	US\$2,400
Pharmaceuticals	American, British and Israeli	US\$2.3 million	1 month	1 day	US\$3,000

Source: International mediation - the art of business diplomacy. Carroll & Mackie, 2000

Mediation in cross-border disputes

Benefits

- Cultural issues
- “Us” and “them” accentuated
- Logistics/cost
- Commercial issues
- Process can be tailor-made
 - Med-arb/arb-med etc

Possible drawbacks

- Suspicion of process
- Neutrality?
- Quality?
- Language
- Authority/responsibility?

Questions

- How systematic can our approach to choosing the most appropriate dispute resolution method be?
 - BAT Industries:Olé
- When is mediation clearly not appropriate?
 - Clear guidelines
- What body can be approached internationally for a cross-border mediation? How can we secure a mutually acceptable, high-quality, experienced mediator?
- How can we convince the other party of the benefits of mediation?
- Other pros/cons of cross-border mediation?

How trustworthy are you?

ACC Europe 2006 Annual Conference: Taking the Lead As In-House Counsel

14-16 May 2006


Peter Schimmel




Tests and research show..

- ... that one out of thousand employees defrauds it's company once a year. Which means that on average a company is hit every five years.
- ... that in the USA more than \$ 600 billion yearly is lost as a result of fraud (6% of revenue)
- ... only 4 out of 10 people are honest most of the time
- Read The Report to the Nation on Occupational Fraud and Abuse 2004 of the ACFE to learn more

Integrity Test

- How trustworthy are you? A test.
 - Stand if statement is true for you
 - Keep sitting if statement is false for you
 - Answer truthfully
- 

Statements Integrity Test

- “I have skipped lessons without an official reason when I was a teenager”
 - “When asked how I am, I always tell that I am fine, while many times that is not the truth”
 - “I have used excuses like traffic jams when in reality I left my house or work too late to be on time”
 - “I sometimes think of someone else when I kiss my spouse/boyfriend/girlfriend”
 - “I do not think that all individuals in this room did answer completely truthful to the statements”
- 

A Cross Border Situation To Resolve

ACC Europe 2006 Annual Conference: Taking the Lead As In-House Counsel

14-16 May 2006

Peter Schimmel



What is the client thinking of?

- Should I do it myself (seems fun), work with internal audit, outsource to a local or to a foreign company and what type of company?
- Why does my investigator wants to know what I plan to do with his findings? That is my prerogative!
- Why can't I freely move data cross border to analyze them at home?
- What if the findings are not in my interest. Can I keep the findings confidential?
- Can I ask the fact finder for an undercover operation for instance during a regular contractual third party audit?
- The fact finder tells me that my adversary has right of response prior to me receiving the findings!
- Why does my investigator refuses to give an opinion that my adversary has been cheating now the findings clearly show fraud?

Some cross border issues

- Go for local, combined with international oversight (beware of mixing)
 - Wonder about specifics of jurisdiction (choice)
 - Beware of local reporting requirements (irregular transactions, criminal acts)
 - Adjust to local standards; do not condemn what is different
 - Beware that US laws are not always the strictest
 - Beware of privacy issues and the challenge of data migration
 - Always consider privilege to keep control (per country)
 - Do not interfere in the investigation, be patient, but ask for accountability
 - Refrain from taking short cuts, asking investigators to do undercover operations or investigation under false pretext
- 