RESOLVING DISPUTES

Chapter 4
CHAPTER ISSUES

- The settlement process as it pertains to the trial process
- Alternative Dispute Resolution (ADR)
  - Strategic Considerations
  - Arbitration
  - Negotiation-Settlement
  - Mediation
  - Other forms of ADR
Strategic Considerations: The Court System vs. Alternatives to Resolving Disputes (ADR)

• The court system is adversarial in nature
• Parties argue positions before a court
• Underlying belief: Best way to discover the truth is through competing evidence
• Lawyers represent competing claims
• Judges don’t investigate
• Court applies legal rules
Decision-Making Factors of Business Involving Itself As A Plaintiff

- What is the probability of winning?
  - Can it get defendant before the court?
  - Is there a justifiable defense?
  - Can it produce necessary witnesses/documents?
  - What are the monetary costs of the case?

- Would the provided relief be worthwhile?
  - Is settlement, arbitration or mediation better?
  - Will/Can defendant pay?
  - What is the impact on company’s goodwill?
  - Is there a disclosure (i.e. trade secret) that may result?
Business As A Defendant

• How will lawsuit affect its goodwill?
  – Concern of publicity or reputation
  – If the viability of the company is at stake, it overrides concerns of goodwill, i.e. in the tobacco industry

• How important is the disputed business relationship?
  – Is the plaintiff’s relationship worth keeping?

• Is there a viable alternative?
  – Consider settlement, arbitration, etc.
  – Are there indirect costs of the lawsuit to consider?

• Nuisance Actions
  – Does it cost less to “pay off” than to litigate?
  – Does business wish to discourage a lawsuit at any cost?

• Rational lawsuits
  – Better to incur liability than to perform on a costly contract
Resolving Disputes Through Courts

- Complex facts and issues
  - Example of the “5000-page Response”
- Greater use of documents and exhibits
  - Texaco/Borden case: 500,000+ pages in documents
- Heavier reliance on expert testimony
  - Scientists, doctors, economists needed to assist
- Longer trials
  - Takes several years to even get to the trial stage
- Large damage awards
  - Businesses are viewed as “deep pockets”
  - Sympathy to plaintiff vs. “Corporate America”
Negotiation

- Least formal form of ADR
- Parties decide to settle matter between themselves
- Often use lawyers or representatives, though not required
  - Lawyers, etc. are agents of the parties of the dispute
- Negotiated settlement is usually a contract, which is enforceable, like other contracts, by the courts
Stages of Negotiation

- **Stage 1**: Study issues; plan the negotiation
- **Stage 2**: Exchange of information
  - Different styles: i.e. “tough guy” vs. “problem solver”
- **Stage 3**: Work your strategy
  - Usually involves compromise
- **Stage 4**: Agreement is reached; usually a contract is written
- *Policy of the courts is to enforce negotiated settlements*
**ARBITRATION**

- Most widely recognized
- Over 200,000 cases filed in 2000 with American Arbitration Association
- 3rd neutral party or panel (usually expert)
  - Arbitrator/Arbiter
- Parties agree upon this ADR in contract or during the dispute
- Arbitrator’s decision is binding

- Usual rule: *No right* to go to trial (parties to the dispute give up this right)
  - Appeals are very specific and limited
- Uniform Arbitration Act (UAA) upholds the integrity of this process
- See “Europe Emerges as the Arbitration Forum of Choice”
“Europe Emerges as the Arbitration Forum of Choice”

- In international business, arbitration is widely used
  - Jurisdiction problems create the need for an ADR
- Many European countries have changed their laws to accommodate this ADR
- United Nations Commission on International Trade Law (UNCITRAL) has rules for effective arbitration
- Private organizations also have rules for arbitration. These private organizations include
  - International Chamber of Commerce
  - London Court of International Arbitration
  - Stockholm Chamber of Commerce
The Arbitration Process

- Decided at time of making the contract or after dispute arises
- Begins when party files a submission (See Exhibit 4.2)
- Parties agree on arbitrator(s)
- The hearing
  - Closed door
  - Less restrictive procedural and evidentiary rules than a trial court
- The award (decision)
  - Usually given in writing within 30 days of close of arbitration hearing
  - Arbitrators have broad powers to decide remedies
- Appealing the award
  - Attacks on arbitrators are rarely successful
  - Errors of fact or law are not reviewable
  - Grounds for overturning appeal: fraud, partiality, serious procedural misconduct, excess use of power by arbitrator
  - Arbitrators have wide latitude in awards
- Generally arbitration award is final
Compulsory Arbitration
(A Required Dispute Resolution Process)

- Labor Contracts
  - Unions
  - Insurance contracts
  - Stockbrokers
  - Pro-baseball, football

- Public Sector Employment
  - Police officers
  - Firefighters
  - Public school teachers

- Court-Annexed Arbitration a/k/a Judicial Arbitration
  - Some courts require it as a pretrial requirement
  - Either party may reject the decision
  - Parties may proceed to trial after arbitration
  - Reduces court backlogs

- See “Global Acceptance of Arbitration”
- See also Cyberlaw: “International Arbitration and Mediation of Domain Name Disputes”

- Eric Baker worked as a cook at Waffle House.
- Signed employment contract requiring arbitration of any dispute.
- Fired after suffering seizures on the job; complains to EEOC about disability discrimination.
- EEOC sues Waffle House on behalf of Baker; district court allows suit to proceed; appeals court holds that matter must go to arbitration.
- Supreme Court holds that since suit brought by EEOC, which was not a party to contract with Waffle House, it did not have to arbitrate. Litigation could proceed.
- Note: If Baker had sued; he would have had to go to arbitration even though suit is based on a federal right.
“Global Acceptance of Arbitration”

- Over 100 nations have signed the UN Convention on the Recognition & Enforcement of Foreign Arbitral Awards
- In some countries, it is harder to receive enforcement, but trend toward judicial enforcement globally.
  - China and India had reputations for non-enforcement, but improving
  - Germany recently adopted laws meeting international standards
Cyberlaw: “International Arbitration and Mediation of Domain Name Disputes”

- World Intellectual Property Organization (WIPO) in Geneva establishes rules for trademarks and other intellectual property.
- WIPO has domain name resolution service to protect domains (i.e. .mx for Mexico and .edu for education).
- WIPO has a Uniform Domain Name Dispute Resolution Policy (UDRP) dealing with such problems as “cybersquatting”.
- Parties go to Arbitration and Mediation Center (http://arbiter.wipo.int) where experts handle disputes.
- Fees are assessed:
  - If 1-5 names included in a complaint--$1500
  - If 3 panelists are requested -- $3000
- Over 1000 disputes/year submitted to the Center for resolution.
Mediation

- 3rd neutral person (*mediator*) assists the parties of the dispute
- Parties mutually decide on a resolution
- Mediator makes *suggestions*; all discussions confidential.
- Mediator’s suggestions are *NOT BINDING* on the parties
- Parties may go to trial after this ADR
- Mediation often helps to maintain the relationship between the parties
Some states have no requirements at law.

Most people prefer a trained or experienced person.

If no requirements, the mediator may be the choice of the parties.

If mediator fails to act professionally, may be subject to liability to one of the parties.
The Mediation Process

- Mediator collects information, outlines key issues, listens, asks questions, observes the parties, discusses options, and encourages compromise.
- Mediator often helps to draft the settlement agreement.
- The settlement agreement is enforceable in court.
- Mediator may assist in deciding the confidentiality of the case.
- If confidentiality is agreed upon, which is normal, nothing can be said in public.
- Information revealed during negotiation or mediation should not be used as evidence if the dispute goes to a later trial.
- See *Paranzino v. Barnett Bank of South Florida*.
Paranzino v. Barnett Bank of South Florida

- Paranzino claims she gave $200,000 to bank & received only 1 certificate for $100,000.
- Bank gave her receipt for $100,000; denies her claim.
- Her bank statements reflect the bank’s claim.
- Parties attend court-ordered mediation with an agreement that includes a confidentiality statement.
- Paranzino offered $25,000 by the bank to settle, which she rejects.
- She calls the newspaper which prints story about the case.
- Bank moves trial court to strike her pleadings and asks for sanctions for breach of confidentiality.
- Trial Ct. strikes pleadings; dismisses case with prejudice.
- Paranzino appeals.
- Held: Affirmed order of the trial court. Case dismissed with prejudice.
- She “willfully & deliberately disregarded the confidentiality agreement. “
Creative Business Use of Mediation

Example of Ford Motor Company

- Ford is an example of efforts that try to avoid “bad press” through mediation
- First consumers discuss complaint with dealer & local district office
- Next complaint filed with Ford Consumer Appeals Boards
- Board’s decision: binding on Ford but not consumers, who can still seek legal remedies
- Process encourages dealer responsiveness to consumer problems
- See also “Creative Dispute Resolution”
Innovative Forms of ADR

- Alternative Dispute Resolution Act of 1998 directs federal courts to implement a dispute resolution program, though Congress has not funded the mandate.

- **Minitrial/Private trial:** Parties decide a structural settlement process that blends negotiation, mediation, and arbitration.
  - Parties may quit the process at any time.
  - Several federal district courts use “court supervised” minitrials.

- **Summary Jury Trial:** The jury equivalent of a minitrial.
  - Usually six advisory jurors; witnesses rarely used.
  - Judgment is not binding (though jurors don’t know this).
  - Dissatisfied parties may still take the case to court.
  - Courts have held that ADR proceedings are closed to the public and the press.
Expanding the Use of ADR
(Congressional Encouragement)

- **The Judicial Improvements Act of 1990**
  - Encourages (sometimes requires) use of ADR by federal district courts
  - Courts must develop a caseload management plan
  - 1998 RAND Report indicates there has been little impact on caseload speed or cost to parties

- **The Administrative Dispute Resolution Act of 1990**
  - Authorizes use of ADR by federal administrative agencies--they must adopt some kind of policy
  - Requirement that all parties (public & private) must consent to use of an ADR technique
Pros & Cons of ADR To Business

• **Pro**
  - Avoids high cost litigation
  - Greater degree of control of the problem
  - More control over process itself
  - Quicker resolution of case
  - May maintain business relationship
  - Outcome and/or agreement is confidential
  - See *Should Lawyers Agree Not to Sue?*

• **Con**
  - Legal outcomes are better--give direction to future business decision-making
  - Learn from mistakes of others from public cases
  - In arbitration, legal right to the court system is given away
  - Emotional appeal to juries are not available (in fact, this may be a “pro” for businesses)
Should Lawyers Agree Not to Sue?

“Some Lawyers Promise Not to Sue in Exchange for Cash from Firms”

• Little-known negotiated settlement term: “Law firm agrees not to sue a defendant again on behalf of future potential clients.” (Ex: Company privately pays lawyer large sums to settle cases, IF the lawyer agrees not to sue the company again for future clients.

• Unethical? Usually under states’ legal ethics codes

• HOWEVER: If a company signs the plaintiff’s lawyer up as a “consultant”, then a “conflict of interest” is created in the lawyer who then can’t sue company again.

• It’s a contrivance, but is within the rules -- Recent cases:
  - DuPont: pays lawyers $6.4 million arranging to not bring future cases against DuPont—lawyers had great expertise in matter
  - BellSouth in discrimination lawsuit allowed lawyers to determine their “consulting fees” from the $1.5 million settlement fund of the lawyers’ clients
  - Warner Lambert (now unit of Pfizer) agreed to pay lawyer $225,000, issue refunds to 90 potential members, etc. if lawyer dropped the clients, kept payment secret, and agreed not to sue Warner Lambert in the future.