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Discussion

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## Discussion After the Speeches of Larry W. Evans and Clive V. Allen

QUESTION, *Mr. Siber*: It seems that part of the reason ADR is so attractive is that judges in many cases fail to use their authority because they fear being reversed. There are jurisdictions in the United States federal courts, for example, the Northern District of Virginia - sometimes called the rocket docket - that can push a patent litigation through in six months. There are other jurisdictions in which the courts feel free to use masters to marshal the evidence and to make technical judgments. My question is, should we not be pushing for a marriage between these sorts of concepts in order to have the courts expedite the process, and rely on other resources as opposed to just picking one or the other?

ANSWER, *Mr. Evans*: First of all, I do not think federal judges are afraid of anything. We have Judge Lambrose in Cleveland, who uses the summary jury trial, which is not really a binding situation but certainly helps speed up negotiation. I think a "rocket docket" can be an unfair forum. One of the advantages of arbitration is that the arbitration can be sped up or slowed down, depending on whether or not the two parties have an agreement and the arbitrator is a good manager.

Arbitration is not to be automatically recommended. The situation must be one which meets the parties' best interests. This determination must be made on a case by case basis. In bigger cases I would probably rely on the courts, providing I had a strong case. Juries are more willing than judges to respect the presumption and validity of patents. Most judges do not believe in private monopolies. They might pretend they do, but sometimes they have a hard time grasping the concept, whereas juries do not.

Ideally, a process will be developed that has judicial trappings and precedence, but is faster and makes use of experienced, capable, and qualified judges.

COMMENT, *Mr. Allen*: First, as a defendant, I would like to know that the case is going to be well tried. As a plaintiff, I may be anxious to have an early and prompt decision; but as a defendant I am usually prepared to wait. Second, I have been involved in litigation in most parts of the world. Frankly, I have never had a problem, or had a concern with any of that litigation unless it has been in the United States.

The fact that you have a situation here that is horrendous, unique, costly, and inefficient is something that should certainly be addressed in the United States. But do not expect other people to impose new techniques or take different approaches when they do not have that problem. Rather than exporting American style ADR around the world, address

and clear up the problem here first. Do not worry about the rest of the world.

COMMENT, *Mr. Evans*: I cannot let that go unchallenged. I did an investigation a couple of years ago, before testifying before the Senate on Japanese patent law, and the only case that I and my American colleagues could come up with in which a Japanese patent owned by a foreign company was enforced in Japan was a patent that Monsana enforced against Stauffer Chemical, another American Company. None of my other colleagues, including those at General Electric, had ever successfully prosecuted or enforced a patent owned by a foreign company in Japan against either a Japanese company or anyone else.

COMMENT, *Mr. Allen*: Northern Telecom did settle a case in France within the last week or so which was based on trademarks. It moved efficiently, was relatively inexpensive, and a satisfactory agreement was reached. But having said that, in spite of the size and diversity of our operations, we have very, very little litigation going on at any point in time. Our business approach, and I think it is that of most major companies, is to settle matters amicably. You only get into a dispute, frankly, when the parties are really being unreasonable.

Those situations where we got involved with litigation fall into a category of things that are insured, such as automobile accidents. These are problems for the insurance company as far as we are concerned. In terms of actual business disputes with suppliers or customers, we may presently have three or four situations worldwide, out of a total caseload of perhaps 125 cases. So from a practical prospective, this is not a major concern.

QUESTION, *Mr. Miller*: The question that needs to be focused on is what is ADR an alternative to? Most often it is said to be an alternative to the courts. That may be to facile and unfair to courts. It is an alternative to handing somebody else your problems to sort out, namely a judge. Therein lies the attraction of ADR. The real revolution here is that parties want to maintain control over their own businesses or personal lives, and do not want to give matters to a judge to sort out for them. It is part of a definite trend and is economically sound. Mr. Evans, can you expand a bit upon how corporations react to being able to handle things for themselves?

ANSWER, *Mr. Evans*: I completely agree with that statement. Some corporations are leery of arbitration clauses and agreements because they think that such clauses and agreements promote the perception that arbitration is simple, does not cost very much, and takes very little time, leading people to immediately resort to arbitration rather than trying to work it out.

To override this perception, the parties may contractually require in their agreements authorized decision makers within the corporation to

listen to the other side and try to reach a decision. These decision-makers know that if they fail to reach a decision, they will have to face one of these endless third-party type litigations with discovery and all the trappings. We are better able to resolve our own disputes than to resort to an unqualified third party.

Non-binding arbitration may also be an option, as long as adequate provisions for it can be devised.

**QUESTION, *Mr. Stayin*:** In your international agreements, licenses, or other transactions do you have arbitration clauses? If you do, what rules do you choose? What choice of law? Do you prefer to arbitrate and does that change depending on the place of the world that you are in?

**ANSWER, *Mr. Evans*:** In international license agreements we always have arbitration clauses, even with British, German or Canadian companies. I think it is a good idea because you tend to have more of a neutral sort of a proceeding when multi-national situations occur. I do not have a preference between AAA or ICC or Stockholm or UNCITRAL. Perhaps certain procedural rules of one or the other of these conventions should apply. Ideally, the arbitrator should be given flexibility. If possible, arbitration clauses should be designed so that the arbitrator is not limited by any particular continuing rules of any particular organization.

