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Discussion

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Discussion after the Speeches of Clifford L. Whitehill and Katharine F. Braid

QUESTION, *Mr. Miller*: What risk might corporate counsel be taking in introducing ADR into a corporate culture that has not previously experienced ADR?

COMMENT, *Mr. Whitehill*: It is difficult to introduce ADR into a culture that has not practiced it before. Just as in a law firm, corporate counsel comes from law schools and learned the case system which originated from litigation. If a review was done of the number of litigated cases in which corporations were extremely dissatisfied with the results because they felt there had not been a fair and complete hearing, perhaps because the facts were somehow misconstrued by the jury, or because the experts were not understood, this study would go a long way in getting ADR introduced into the corporate culture. With ADR, at least the corporation can be satisfied, win or lose, that the determination was made by experts.

Marguerite Millhauser, who is an expert in this area, feels one problem with introducing ADR into the corporate culture is that typically it is a manager of a division that gets into a dispute with multi-millions of dollars at stake. The manager figures that his normal term in the particular position is three or four years. He does not want to risk receiving a speedy but bad decision via ADR. Therefore, he sues because he knows it will be ten years before the final appeal and he will be someplace else by then.

One of the things that General Mills does to get a different perspective on the immediacy of the question is to require the law department to examine these disputes, ideally on a basis that is not prejudicial, to determine the exposure. For instance, if the exposure is estimated to be \$3 million, the law department tells the party to the dispute, "You are going to have to reserve \$3 million this year against your P and L." And the party responds, "I don't believe that. Is there some quicker way to get this thing resolved?" Immediately there is attention paid to the problem.

QUESTION, *Mr. Reifsnyder*: Is there ever any reluctance to propose ADR to the other side of a dispute because, in effect, it is seeking a concession?

ANSWER, *Mr. Whitehill*: Absolutely. There are two aspects to that concern. One is, do you owe them something? The other involves the question of ADR, and is brought up after the dispute has crystalized. Generally, one party will perceive an advantage in going to ADR and the other party will perceive an advantage in going to litigation. That is

one of the reasons why the courts have started mandating certain types of ADR, because one party wants to go one way and one party wants to go the other.

One of the ways this reluctance may be partially overcome is by requiring an ADR clause in the agreement. General Mills literally will not sign a contract without an ADR clause in it. If you do not want to do business with us on that basis, then you do not do business with us. Under the Committee for Public Resources there is what is called a corporate pledge. At least 1,000 major corporations have taken the pledge, which states that when a dispute arises, the corporation will endeavor to find methods of ADR in settling the dispute.

QUESTION, *Professor King*: Is there a size limitation on these types of disputes? Are there any exceptions to this approach?

ANSWER, *Mr. Whitehill*: Other than determining what is subject to ADR, none whatsoever. An interesting question that General Mills has struggled with concerns attempting to bifurcate an agreement beforehand into which issues might be litigated and which issues might be suitable for an ADR resolution. Trying to pre-determine what is a question of law and what is a question of fact, or how they interrelate, is difficult. A lot of times you have to decide the questions of fact before you can get to the questions of law. What General Mills does is to try and structure an ADR or an arbitration clause so that whatever question is presented is ideally determined by experts in the field, whether it is a question of engineering, accounting or law.

COMMENT, *Ms. Braid*: It varies considerably with the type of agreement in question. For instance, you may know that Canadian Pacific has a new tunnel through the Rocky Mountains. There were a lot of construction contracts involved with the tunnel. These contracts involved the specifications, or what work was to be done, and anything which was essentially an engineering question. The arbitration clause basically said that disputes arising under sections X, Y and Z of the agreement will be submitted to arbitration. The arbitration will be conducted under the rules of arbitration in the Province of British Columbia, and will be dealt with in a specified way.

The other clauses in the contract, such as a basic misrepresentation clause, which said the contractor is not relying on any information about the work or the nature of the work or the site provided by the owner, but relies on his own information, were not subject to arbitration. I would not want to take that clause to arbitration. I have already taken it to the Supreme Court of Canada, but I would not want to take it to arbitration because you cannot have the contractor relying on what some junior draftsman in some engineering office says.

One needs to include specifically in the contract what should be arbitrated. Everything else goes to litigation. On a commercial transportation agreement, not very many of which go to arbitration, I have seen the

mechanisms set out for escalation clauses which specifically refer to arbitration. In hotel management contracts, mainly in the pricing, if it is a flat fee plus a percentage of revenues or percentage of net, where it is essentially an accounting issue, we usually agree to arbitrate. But I would not agree to arbitrate the general interpretation of a hotel management agreement in Canada.

QUESTION, Mr. Ristau: Mr. Whitehill, I was fascinated by your reference to the new federal act allowing federal agencies to use new dispute resolution machinery. As an ex-bureaucrat, I am mindful that the federal government has no authority to arbitrate. From time to time, someone would slip up and arbitrate, and the General Accounting Office would not pay the arbitrator. Therefore, the government wound up with a wonderful award which was ultimately unenforceable. There are two decisions from the old court of claims saying that since the government had no authority to arbitrate, the awards were unenforceable.

Under the new statute, do you happen to know if Congress is going to apportion money for payment of arbitral awards against the United States?

ANSWER, Mr. Whitehill: Yes, assuming that the award is binding. There is a clause in the statute for questions of constitutionality concerning whether or not the agency can agree to binding arbitration. There is also a thirty day vacating clause. If it is not vacated by the agency, then it becomes binding. Under the Federal Arbitration Act it can then be entered into any court for enforcement. Of course, the agency is authorized to pay. Under the Act, expenses associated with the arbitration are allowable expenses.

I do not think we will have any difficulty other than the question of whether or not an agency may vacate the award. Clearly the act intends that such will not be the usual procedure.

QUESTION, Mr. Fried: Where do you expect the line to be drawn, particularly in your industry, where health and safety regulation is important? There will also be differences regarding how much additive is adequate or inadequate in the FDA rule making. Do you see that type of dispute following more on the public interest side or more on the ADR side?

ANSWER, Mr. Whitehill: It is built into the statute whether or not the decision is of some precedential value to many other interests. We have many proceedings at the FDA, for instance, asking whether a new product or ingredient may be added to the grass list, that is, generally accepted as safe. It may not really concern many companies, but there may be one company that might join us in the petition. If there is a disagreement, I do not see any reason why that should not be subject to ADR. There can be other issues before the FDA that, obviously, will be of great

interest to the entire population. But some of those can be taken care of by having proper parties as part of the hearing.

QUESTION, *Mr. Shanker*: You said that all of your commercial arbitrations involve using three arbitrators. Is that your preference? Do you see any advantage to three rather than one?

ANSWER, *Mr. Whitehill*: Usually the reason it is a panel of three is simply because of the procedure of choosing the arbitrators, i.e., one party chooses one, one party chooses another and a third is chosen as a neutral. In a proper circumstance I do not see any reason why there cannot be only one. In fact, there have been cases where two were used.

COMMENT, *Ms. Braid*: I have a preference for three arbitrators because the kind of matter that I usually arbitrate is often technical. Frankly, I am going to appoint someone with the technical background who I have a pretty good idea will agree with my point of view on what the result should be. The other side is going to do the same thing. Then between the two arbitrators, a middle-ground arbitrator is chosen. I want someone who is sufficiently well known in his field, sufficiently diligent and sufficiently thought of as being unbiased that his view is going to carry a lot of weight with the middleman. On technical issues, I think more than one point of view is useful. The neutral is also useful in asking questions. Questions asked from the neutral often have more effect than questions asked from your side of the table. If you are a member of the arbitration panel, ask questions of the other side's experts. It is useful.

COMMENT, *Mr. Whitehill*: By the way, the bias is taken out of choosing arbitrators under agencies such as the AAA, where you cannot appoint your arbitrator at random. You choose an arbitrator from a neutral panel. If that arbitrator has any particular relationship to your company, he is disqualified. Therefore, the panel of three, where one is for one side and one is for the other, and the neutral is in between, is really not the practice today.