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Technology Dispute Resolution in the United States: A Practical Perspective

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Alternative dispute resolution (ADR) has become an overused term to describe non-litigation means of resolving disputes. I intend to provide a practical perspective of the non-litigation techniques used in the United States to avoid costly, time-consuming, and antagonistic litigation in resolving technology disputes.

I will begin by describing BP America, Inc., and its experience in the ADR area, and then broadly cover the subject from the standpoint of a technology-oriented United States company. Adjudicated cases will not be cited here because most satisfactory non-litigation resolution of technology disputes are not reported in legal journals or reporters.

BP America, Inc. is the successor of both the Standard Oil Company of Ohio (Sohio) and BP North America, Inc. which were merged in 1987 following BP's successful tender offer to the minority shareholders of Sohio stock. Prior to the 1987 merger, BP owned 54% of Sohio stock. BP America is a major U.S. corporation with assets exceeding $20 billion and annual sales exceeding $15 billion. BP Exploration, Inc. is one of the largest holders of proven U.S. oil reserves, and produces nearly 800,000 barrels of oil per day from wells in the United States. BP Oil refines approximately 750,000 barrels of oil per day at five refineries, two in Ohio, one near Philadelphia, one in Louisiana and one in northern Washington. BP Oil has over 7,500 service stations in twenty-four states. The corporation also owns more than 100 PROCARE full-service auto centers and more than forty truck stops in those states. BP Oil is one of the largest suppliers of aviation fuel and the largest supplier of marine fuel. BP Chemicals owns the world's most successful chemical technology, a process to manufacture acrylonitrile from propylene, ammonia, and air, which was first developed in the late 1950s and has been continually upgraded. Acrylonitrile is used in synthetic fibers and plastics. Today, nearly all of the world's acrylonitrile is produced by BP Chemicals or in plants licensed by BP Chemicals. BP Chemicals International also owns the leading processes for producing acetic acid and polyethylene. The Carborundum Company is the nation's leading manufacturer of advanced ceramic parts for automotives and aerospace. Another major business facet of BP America is animal nutrition. BP America's wholly
owned subsidiary, Purina Mills, Inc., is the leading United States supplier of animal feeds.

The best ADR is one that forces (or strongly encourages) a negotiated settlement. This has been the result of most of the cases in which I have been involved. Litigation, on the other hand, because it is so antagonistic and costly, usually discourages settlement and almost always, in my experience, results in a decision/verdict and often in an appeal. The longer litigation lasts, especially if extensive discovery is utilized, the greater the cost and the higher the level of antagonism. The result is that the parties involved in litigation are less likely to settle.

There is a school of thought that views an arbitration clause in an agreement as a safety valve. That school teaches that the parties to the agreement need not struggle to resolve disputes through negotiation since they can call in a third party to resolve the dispute for them in a timely and cost-efficient manner. The threat of litigation can be an effective inducement for conscientious negotiation. I do not subscribe entirely to this concept, but I see its logic. A better idea, perhaps, is to require the two parties first to attempt to negotiate a settlement. If this fails, then permit the accused party to present its case to a senior representative of the aggrieved party.

A brief overview of ADR techniques is in order. All disputes have two points in common; they have a beginning and an end. In all other respects they are very different. The gap between these two points is bridged by dispute resolution techniques.

A successful dispute resolution technique is one which expedites the bridging process from the beginning of the dispute to its most cost-efficient resolution. Therefore, it is important to choose a dispute resolution technique that matches the dispute in question. An understanding of the characteristics of the various dispute resolution techniques is necessary before the matching process can proceed. Disputes are not static - they change substantially as progress is made toward their resolution (see Appendices A & B for convenient matrix form summaries of dispute resolution techniques identified by the Center for Public Resources in 1982).

In late 1982, the United States Congress passed a law, 35 U.S.C. § 294, which provides statutory authorization for voluntary, binding arbitration of disputes concerning patent validity and patent infringement pursuant to an agreement between the parties. This law overturned the long-standing public policy opposing private arbitration of patent validity because of public interest.

Patent arbitrations usually are conducted by a single, skilled arbitrator with limited discovery and a fixed time schedule. The quality of a patent arbitration decision depends upon the ability of the representatives of the parties to the dispute and the ability of the arbitrator(s). Similarly, in litigation, the attorneys and judge contribute to the quality of the decision. The objective of patent arbitration is a high-quality, timely,
non-antagonistic, and cost-effective result. To obtain these objectives, both the parties and the arbitrator must be willing to assume certain burdens and risks, such as the following.

1. The arbitrator may rule with fewer defenses or issues than are possible in litigation.
2. The parties must be willing to rely on limited discovery and evidence which may not conform to traditional evidentiary rules.
3. The parties must accept a win/lose result without a lengthy explanation of the basis of the decision.
4. In binding arbitration, the parties must be willing to tolerate a proceeding which yields an award in which judgment may be entered and from which there is no substantive appeal.
5. The parties must accept the impact of an award (whether binding or not) on subsequent proceedings.
6. The arbitrator must be willing and able to control the course of the proceedings, to make definitive rulings on substantive and procedural matters and to render a clear-cut decision.

A great deal of time could be spent on patent arbitrations alone; but patent matters, including their validity and enforceability, are now arbitrable in the United States following the enactment of the 1983 law. (See Appendix C for the text of 35 U.S.C. § 294).

My personal experience in litigation and non-litigation dispute resolution has been reasonably extensive. Two illustrative examples follow. One involves an international technology license, and the other, a patent and trade secret dispute. The international license provided for arbitration under the Rules of the Stockholm Chamber of Commerce. The patent and trade secret dispute was arbitrated as a result of an agreement reached between the parties after the substance of the dispute had been identified.

The license agreement was between Sohio and an organization in East Germany. Under the license, which was entered into in the late 1960s, the licensee received as a part of its license the right to manufacture Sohio's highly proprietary catalyst for its own use and to use the catalyst in our proprietary process. The licensee's catalyst manufacturing right was limited to a specific catalyst and only for its own use, i.e., not for sale to others. Some years after the original license was signed, Sohio developed a new, improved catalyst which was offered for sale to the licensee. The licensee showed enough interest to obtain a sample of the catalyst under a non-analysis agreement and under the strict secrecy terms of the original license, but ultimately elected not to purchase it. Two or three years later, we realized that our other Eastern European licensees were not purchasing the catalyst from us. Upon investigation, we obtained a sample of a catalyst being offered for sale by a sister organization of our licensee and discovered it was a crude copy of our new catalyst. It was obvious that the licensee had reverse-engineered our new
catalyst. It was only able to do this because it had access to our information relating to the manufacture of the earlier catalyst and to our process for using the catalyst. Even so, its version was, at best, a crude copy, albeit better than the earlier catalyst it was licensed to manufacture.

Once we became aware of the licensee’s activities, we attempted to resolve the dispute through friendly discussion. This proved impossible because, no matter how friendly we became, a substantial sum of money had to change hands. The Communist government had not planned for this payment, and thus, it could not be tendered unless a third party (in this case, the Arbitration Board) required them to make the payment. As a result, we were forced to bring an arbitration proceeding in order to resolve the dispute.

The agreement which was signed in the late 1960s provided for arbitration to be conducted under the Rules of the Stockholm Chamber of Commerce. These rules are very similar to other international arbitration rules in that they provide that each party may appoint an arbitrator. The two arbitrators which are appointed by the parties then select a third neutral arbitrator who assumes the role of president of the arbitration panel. In the late 1960s, Sweden had emerged as a desirable location for resolving east-west trade disputes because of its supposed neutrality. The arbitration in this case, however, was never conducted in Stockholm, probably because of the tax laws of Sweden. Rather, sessions were conducted in Paris, Frankfurt and Vienna. Although the arbitration clause did not indicate a site for the arbitration, it did provide that the English language and New York law would be utilized by the arbitrators. The usual surety bonds and costs to be paid by the parties were provided as well.

Only after it was clear that the arbitrators were going to decide in our favor were the East Germans able or willing to negotiate. The final negotiation was conducted just before the arbitrators were scheduled to meet to determine the amount of our reward. I am convinced that the settlement we received was actually higher than the award we would have been given by the arbitrators. In other words, the East Germans paid a premium to achieve a resolution that could be represented to their unsophisticated Communist bosses as a “business” solution.

In retrospect, this arbitration, as well as others which BP has experienced under the Rules of the International Chamber of Commerce, offered significant advantages in time and money over litigation. The biggest advantages, in my experience, were that through arbitration we could be assured of a neutral decision maker, and the arbitration environment did not promote the kind of antagonism which is usually experienced in litigation. In fact, we have remained quite friendly with our opponent even after they made a preposterous presentation of how they were able to duplicate our catalyst through purely “independent” work.

The patent and trade secret arbitration was between BP America and a friendly United States competitor. The competitor alleged that one
of its former employees had been hired by BP to duplicate one of its products so that BP could compete with the competitor. Moreover, it alleged that the manufacture and sale of our product infringed upon two or three of its patents.

Patent litigation too often results in an expenditure of several millions of dollars either to prosecute or defend. For example, BP is currently involved in a patent litigation which has lasted for more than ten years with more than $4 million spent to date.

In this case, neither BP nor our competitor had a business that could justify this kind of expenditure; but indeed, the business was important enough to cause us to want to resolve our dispute. Very early in our negotiations we decided to institute a binding arbitration utilizing a single arbitrator agreeable to both of us. The arbitrator, with our help, would decide upon the procedural rules for the arbitration, i.e., the amount of discovery and testimony, and the issues to be resolved. We also agreed upon cost. In this case, the plaintiff was to bear costs up to a specific amount, and all costs over that amount would be shared between the parties. Another unique aspect of the agreement was that we agreed to waive our patent validity defenses in return for their agreement to waive damages as a remedy. That is, our worst case result would be that we would stop infringing, stop using their trade secrets and return any notebooks, reports, etc., that the former employee brought with him.

The results of this arbitration were of very high quality. The decision maker was an experienced patent judge from the Court of Claims, and the two parties cooperated very well in meeting all of the arbitrator's requirements. Costs were very low, less than 10% of the cost of litigation, and a decision on two very complex issues was reached. The arbitration was accomplished within a ten month span; if the parties had wanted, it could have been accomplished much more quickly. The non-antagonistic environment provided for many mutually agreed delays.

A procedure which appears to have considerable merit is illustrated by the language in Appendices D and E. In this procedure, in the event of a dispute, the accusing party first affords the accused party an opportunity to meet so that each party may present its position to a senior authorized representative of the other party in an attempt to reach an amicable resolution. Details of the presentation are provided, including the opportunity to utilize a neutral legal advisor. It is required that this procedure take place before either party avails itself of other legal remedies. Such a procedure provides an opportunity for a negotiated settlement which is more likely to be equitable than a decision reached by a third party who does not have as much information available to him as the senior executives. Additionally, this procedure would minimize the antagonism that inevitably results from litigation.

Last year, I participated in a study, conducted by Albany Law School for the National Institute for Dispute Resolution, which concerned the management of disagreement in emerging high-technology
businesses. Copies of the entire report or of its executive summary can be obtained from Albany Law School. In the report, several concerns of disagreement management were identified. These elements included damage to relationships, monetary cost and loss of key personnel time. Also, the potential for loss of confidentiality of details of the dispute was noted. The themes expressed by representatives from some twenty-seven large companies are reflected in the following paragraphs.

Importance of Relationships

The impact of disagreement upon relationships with customers, suppliers, and others with whom business is transacted was repeatedly voiced, to a greater or lesser extent, as a major concern to the large corporations. One executive stated that his company is predisposed to avoid litigation, referring to litigation as a “game that’s not worth it.” The industry represented by this individual enjoys a unique marketplace which relies on continuing close relationships with a limited number of customers. This has required that his company take great care to avoid alienation, and perhaps has occasionally been taken advantage of as a result. This company works hard to develop mutual trust with its customers. Although not referring to it as ADR, the executive recounted that one approach successfully used when a dispute arises is to assemble a negotiating team of sales, manufacturing, technology, and management personnel to examine the problem. It was specifically noted that legal representation was not included at this time. This particular company has very few occurrences of litigation. An interesting characteristic of this company is that it has very few lawyers in its management structure and relies solely on external counsel, even though it is a highly successful company with thirty-four plants in twelve countries. A similar pattern emerges in its relationship with its suppliers, consisting of large reputable companies also anxious to remain on good terms with their customers.

Another individual, representing an even larger corporation, spoke of his industry as one which has also experienced less litigation than most. He felt that this was attributable in part to a recognition that relationships are particularly important in an industry such as his which traditionally has had many points of contact with its competitors. This has encouraged cooperative management of disagreements within antitrust constraints.

Efficiency Considerations

As was expected, efficiency factors were continuously voiced as major high-level management concerns. One executive spoke of frequently accepting settlements that were unsatisfactory in order to avoid expending management and staff time to litigate. In this particular company, internal counsel was given authority to settle any disputes involving less than $100,000, and this was done with limited or no direct involvement
by other management. The response to the dispute was directly related to the degree of exposure.

Importance of Confidentiality

Confidentiality was mentioned as a concern, particularly with respect to disagreements involving intellectual property issues. Protective orders and "in camera" court proceedings are not terribly effective in preserving confidentiality.

The large companies who participated in the study had mixed feelings about ADRs. Most opposed binding arbitration. Many felt that traditional arbitration rules are often abused and that the lack of judicial supervision often allows the resolution process to get further out of control than it would have had the dispute been litigated. They felt that binding arbitration is often "baby splitting," resulting in poor, non-appealable decisions.

Most of the company representatives expressed support for negotiated settlements. The best ADR is one which uses skilled negotiation between attorneys, with principals involved. Involvement of senior executives increases candor and cooperation and reduces adversarial posturing.

A non-destructive ADR process, however, such as negotiation, stands the best chance of preserving corporate relationships. When legitimate questions of fact are present, mini-trials, mediations, summary jury trials, and non-binding arbitration often facilitate settlement. There remain, however, some areas that are best handled by litigation, e.g., antitrust, products liability, and unfair competition.

In all cases, the importance of senior management involvement at an early stage was viewed to be very helpful because it affords an opportunity to avoid prematurely hardened positions.

It is clear from the Albany study that receptivity of non-litigation methods of resolving disputes is growing among U.S. companies. Perhaps the need for increased global competitiveness is causing businesses to seek ways to conserve money and time. Additionally, as court dockets become more crowded, lower-quality decisions result. A possible exception is the patent area in which the Court of Appeals for the Federal Circuit, since its establishment in 1982, has led to an improvement of court decisions in this area. The traditional belief that the party with the strongest case prefers litigation and the weaker prefers arbitration is changing somewhat. Today, both sides realize the inherent difficulties of litigation and the potential strengths of arbitration.

To summarize, any process which tends to preserve rather than destroy relationships to reduce time and cost and results in a high-quality resolution is preferred in U.S. technology disputes. Well-conceived ADRs, using qualified mediators/arbitrators/neutral advisors, seems to offer the best potential for attaining the desired result.
### APPENDIX A

**COMPARISON OF DISPUTE RESOLUTION PROCESSES**

**"Hybrid" Dispute Resolution Processes**

<table>
<thead>
<tr>
<th>PRIVATE JUDGING</th>
<th>NEUTRAL EXPERT FACTFINDING</th>
<th>SETTLEMENT CONFERENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary</td>
<td>Voluntary or nonvoluntary under FRIE 706</td>
<td>Voluntary or mandatory</td>
</tr>
<tr>
<td>Binding but subject to appeal and possibly review by trial court</td>
<td>Nonbinding but results may be admissible</td>
<td>Binding on nonbinding</td>
</tr>
<tr>
<td>Party-selected third-party decision-maker may have to be former judge or lawyer</td>
<td>Third-party neutral with specialized subject matter expertise may be selected by the parties</td>
<td>Judge, other judge, or third-party neutral selected by parties</td>
</tr>
<tr>
<td>Statutory procedure (see, e.g., Cal. Code Civ. Proc §638 et seq.) but flexible as to timing, place, and procedures</td>
<td>Informal</td>
<td>Informal, off-the-record</td>
</tr>
<tr>
<td>Opportunity for each party to present proofs supporting decision in its favor</td>
<td>Investigatory</td>
<td>Presentation of proofs may or may not be allowed</td>
</tr>
<tr>
<td>Winlose result (judgment of court)</td>
<td>Report or testimony</td>
<td>Mutually acceptable agreement sought; binding conference is similar to arbitration</td>
</tr>
<tr>
<td>Findings of fact and conclusions of law possible but not required</td>
<td>May influence result or settlement</td>
<td>Agreement usually embodied in contract or release</td>
</tr>
<tr>
<td>Adherence to norms, laws, and precedents</td>
<td>Emphasis on reliable fact determination</td>
<td>Emphasis on resolving the dispute</td>
</tr>
<tr>
<td>Private process unless judicial enforcement sought</td>
<td>May be highly private or closed in court</td>
<td>Private process but may be discovered</td>
</tr>
</tbody>
</table>

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### APPENDIX B

**COMPARISON OF DISPUTE RESOLUTION PROCESSES**

<table>
<thead>
<tr>
<th>ADJUDICATION Non-Voluntary</th>
<th>ARBITRATION Voluntary unless contractual or court centered</th>
<th>MEDIATION/ CONCILIATION Voluntary</th>
<th>TRADITIONAL NEGOTIATION Voluntary</th>
<th>MINITRIAL Voluntary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Binding</td>
<td>Binding (usually)</td>
<td>Nonbinding</td>
<td>Nonbinding (except through use of adjudication to enforce agreement)</td>
<td>Nonbinding (except through use of adjudication to enforce agreement)</td>
</tr>
<tr>
<td>Imposed, third-party neutral decision-maker; with no specialized expertise, in dispute subject</td>
<td>Party-selected third-party decision-maker; usually with specialized subject expertise</td>
<td>Party-selected outside facilitator, often with specialized subject expertise</td>
<td>No third-party facilitator</td>
<td>Third-party neutral advisor often with specialized subject expertise</td>
</tr>
<tr>
<td>Highly formalized, highly structured by predetermined, rigid rules</td>
<td>Procedurally less formal; procedural rules and substantive law may be set by parties</td>
<td>Usually informal, unstructured</td>
<td>Usually informal, unstructured</td>
<td>Less formal than adjudication and arbitration but procedural rules and scope of issues may be set by the parties and implemented by neutral advisor</td>
</tr>
<tr>
<td>Opportunity for each party to present proofs supporting decision in its favor</td>
<td>Opportunity for each party to present proofs supporting decision in its favor</td>
<td>Presentation of proofs less important than attitudes of each party; may include principled argument</td>
<td>Presentation of proofs usually indirect or nonexistent; may include principled argument</td>
<td>Opportunity and responsibility to present proofs supporting result in its favor</td>
</tr>
<tr>
<td>Win/lose result</td>
<td>Compromise result possible (probable?)</td>
<td>Mutually acceptable agreement sought</td>
<td>Mutually acceptable agreement sought</td>
<td>Mutually acceptable agreement sought</td>
</tr>
<tr>
<td>Expectation of reasoned statement for particular interest</td>
<td>Reason for result not usually required</td>
<td>Agreement usually embodied in contract or release</td>
<td>Agreement usually embodied in contract or release</td>
<td>Agreement usually embodied in contract or release</td>
</tr>
<tr>
<td>Process emphasizes consistency and predictability of results</td>
<td>Consistency and predictability balanced against conscious for disputants' relationship</td>
<td>Emphasis on disputants' relationship, not on adherence to or development of consistent rules</td>
<td>Emphasis on disputants' relationship, not on adherence to or development of consistent rules</td>
<td>Emphasis on sound, cost-effective and fair resolution satisfactory to both parties</td>
</tr>
<tr>
<td>Public process; lack of privacy of submissions</td>
<td>Private process unless judicial enforcement sought</td>
<td>Private process</td>
<td>Highly private process</td>
<td>Highly private process</td>
</tr>
</tbody>
</table>

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APPENDIX C

35 U.S.C. § 294

Voluntary Arbitration

(a) A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.

(b) Arbitration of such disputes, awards by arbitrators and confirmation of awards shall be governed by Title 9, United States Code, to the extent such title is not inconsistent with this section. In any such arbitration proceeding, the defenses provided for under Section 282 of this title shall be considered by the arbitrator if raised by any party to the proceeding.

(c) An award by an arbitrator shall be final and binding between the parties to the arbitration but shall have no force or effect on any other person. The parties to an arbitration may agree that, in the event a patent which is the subject matter of an award is subsequently determined to be invalid or unenforceable in a judgment rendered by a court of competent jurisdiction from which no appeal can or has been taken, such award may be modified by any court of competent jurisdiction upon application by any party to the arbitration. Any such modification shall govern the rights and obligations between such parties from the date of such modification.

(d) When an award is made by an arbitrator, the patentee, his assignee or licensee shall give notice thereof in writing to the Commissioner. There shall be a separate notice prepared for each patent involved in such proceeding. Such notice shall set forth the names and addresses of the parties, the name of the investor and the name of the patent owner, shall designate the number of the patent and shall contain a copy of the award. If an award is modified by a court, the party requesting such modification shall give notice of such modification to the Commissioner. Commissioner shall, upon receipt of either notice, enter the same in the record of the prosecution of such patent. If the required notice is not filed with the Commissioner, any patent to the proceeding may provide such notice to the Commissioner.

(e) The award shall be unenforceable until the notice required by subsection (d) is received by the Commissioner. (Added August 27, 1982, Public Law 97-247, Section 17(b)(1), 96 Stat. 322.)
APPENDIX D

Dispute Resolution

Notwithstanding any other provision to the contrary herein contained, any controversy or claim arising out of or relating to this Agreement or breach thereof shall be settled first by presentation of the positions of each party being made to the authorized representatives of the other party (non-lawyers) in the presence of an agreed-upon neutral legal advisor, if desired, so that such representatives may confer with each other in an endeavor to amicably resolve the dispute. If the parties are unable to agree, the dispute shall be settled by arbitration in accordance with the rules of the American Arbitration Association or such other rules as it may designate. Any arbitration proceeding shall be held in Houston, Texas, U.S.A. This arbitration agreement shall be enforceable and judgment upon any award rendered by all or a majority of arbitrators may be entered in any court of any country having jurisdiction, and such award shall be final and binding upon the parties.
APPENDIX E

Dispute Resolution

In the event of any dispute, controversy or claim arising out of or relating to this Agreement which may give rise to litigation or termination of the Agreement, it is hereby agreed that no such action shall be taken unless the party intending to take such action first affords the other party an opportunity to meet so that each party may present its position to a senior authorized representative of the other in an endeavor to reach an amicable resolution of the matter.

Either party may initiate the meeting by giving written notice to the other of the controversy and its desire to convene a meeting pursuant to these provisions specifying five (5) dates for the meeting, no earlier than ten (10) days after receipt of such notice by the other party nor later than twenty (20) days after such notice is received. The notice shall also specify the name and title of the senior representative who will attend the meeting. The receiving party shall within five (5) days of receipt of such notice notify the initiating party in writing of the name and title of its senior representative and select one of the days so specified for the meeting. Any such meeting shall be held either at —— or at —— offices in —— as elected by the initiating party. The senior representatives so selected shall be businessmen not directly involved in the controversy. Attorneys shall not be used as the representative.

If the parties so desire, they may agree on a neutral legal advisor to attend such meeting and give whatever legal advice or advisory opinions as are requested of him by either party. The costs for such legal advisor is to be borne equally by the parties.

Each party shall be given equal time at the meeting to make an uninterrupted presentation of its position to the senior representatives of both parties in whatever manner such party deems advisable, including oral presentations by attorneys, experts or by written documentation or visual aids. The parties shall then be given equal time to rebut the presentation of the other party, ask questions of its witnesses or clarify its position. Rebutted presentations and the questioning of all witnesses shall be done by the businessmen and not by their attorneys.

At the conclusion of the presentation and rebuttal period, the senior representatives of each party together with the neutral legal advisor, if any, shall attempt to negotiate a resolution. No attorneys except for the neutral advisor shall be present during this negotiating session. The senior representatives may agree to extend such negotiations to another day or location. The neutral legal advisor may render non-binding opinions assessing the strength and weaknesses of each party’s case. No record shall be made of the proceeding.

If the parties are unable to reach agreement at said meeting or any extensions thereof, the parties shall be free to avail themselves of their
legal remedies, including but not by way of limitation, litigation and termination of the Agreement, but at their own risk.