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Remarks On the Current and Future Use of Alternative Dispute Resolution in the United States

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It is said that ideas, including dispute resolution ideas, pass through four evolutionary phases. First, the idea is a "waste of time"; second, the idea "will not work anyway"; third, the idea "costs too much"; and fourth, "it was a great idea all along." This article discusses how employers in the United States currently resolve employment problems. Court litigation, for instance, is in the "waste of time" phase. Everyone is in agreement about that. Although not perfect, arbitration, generally speaking, is in the "great idea" phase. Furthermore, grievance mediation, which is a side-step attempt to resolve a matter short of and without mediation, is between the "waste of time" and "it will not work anyway" phases. Since grievance mediation is largely untested, only 4% of agreements provide for grievance mediation.

Beyond my formal paper, this afternoon's remarks will focus on the reasons for using alternative dispute resolutions ("ADR") and what the ADR future in the United States may hold. Why is it important to discuss the different forms of dispute resolution found in the United States and in other countries? In the employment context, there is a critical need for workable solutions and fast workable alternatives to costly (in terms of time and money) and disruptive (in terms of decreased employee morale and productivity) court litigation. In a very real sense, it can be argued that an employer never wins an employment case. First, by the time an employer wins, that employer and its employees have spent prodigious amounts of time and money. Time that could have been spent improving and driving that business forward is spent preparing and presenting the case. Second, the legal expenses will likely be high. Third, and perhaps most importantly, an employer may be unintentionally sending a message to his employees to "Take it or leave it - do it my way or leave." This is the absolute antithesis of the team concept so necessary in today's economy.

Fourth, if an employer happens to lose the case, it is probably looking at a damage figure well in excess of six figures. And fifth, one needs to consider selfishness. One must never forget that employees are people. They can either help the business or they can ruin the business, depending upon their mind set. Employees possess valuable insight into their work duties. That insight, communicated to and considered by an em-

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ployer, can contribute to efficiency and other productivity. Even if that insight is not always helpful and is not always used, the mere consideration of it is an important message to send to employees because it tells those employees that they have worth. Furthermore, this consideration improves the employees’ morale and helps to improve their focus. If this has not been your experience, your business is probably so new or unique that it has not yet had to face competition. But it will happen soon.

If employee ideas and morale are important, employee problem avoidance is crucial. In an imperfect world, however, problems are going to arise. It is therefore necessary for a company to put those problems behind it by recognizing, addressing, and resolving the problems as quickly and as effectively as it can. From there the company can get on with its business at hand.

This leads to the consideration of ADR. Current ADRs are certainly not perfect, but they can and will be improved. ADRs are fast, inexpensive (particularly when compared to court litigation), and ideally final. It must not be forgotten that courts and juries are far from perfect as well. Furthermore, in employment it is easy to agree to and to put in place an ADR procedure at the inception of the employment, prior to any specific problem arising. That is not the situation, however, in many other areas, such as product liability.

In the United States there are four main developments in the ADR field. One is the non-union company’s complaint resolution procedure. A complaint resolution procedure is different than an arbitration procedure. The key in complaint resolution is to recognize, address, and resolve problems. Only as a last resort does one need to proceed to arbitration. Analogous to the complaint resolution procedure is an arbitration provision in a written employment agreement.

Two other developments are on the legislative drawing board. First are the pending amendments to the federal employment discrimination laws, the so-called omnibus civil rights legislation. Second is the so-called uniform state law that guarantees, by resort to some form of arbitration, that employment terminations be for “good cause” only.

Why are these new or expanded concepts needed? Eighty-three percent of the employees in the United States are not represented by a labor organization. Eighty-three percent of the people who do not have a labor agreement covering them need more than a pat on the head, a paycheck every week, and a twenty-five year pin to drive that business forward and to induce them to give 100% of their effort. Statistics tell us that most of the employee lawsuits arise from the non-union represented people and that those suits are exploding both in numbers and in jury verdicts. For instance, in California, plaintiffs win over 70% of the time, and the average verdict in an employment context, in a single employee case, is $500,000.

But the bad news is that this is only the tip of the iceberg. Most
employee problems and concerns do not reach the courthouse. They fester and add to a company’s mediocrity; and companies in this day and age cannot afford to be mediocre. That is why more and more employers of the 83% percent unrepresented employees are creating and maintaining complaint resolution procedures. The best of these provide for final and binding arbitration; a clear signal to all employees, even those unaffected by a particular complaint, that they and their rights are important.

Equally important is that these resolution procedures are designed to get to a problem and to get it behind the employer as quickly as possible to avoid its “eating” at the employees. Similarly, more and more employers are using written employment agreements and not just for their highest level employees. The best of these agreements provide for confidential arbitration of all employment disputes. Included should be such issues as covenants not to compete, trade secrets, and customer lists. Put simply, everything involving that employee’s employment should be subject to resolution by arbitration. The key words are “confidential” and “arbitration.” But unstated is the other important key idea - fast and final resolution.

It is important to consider the omnibus civil rights amendments. Focusing on the Bush Administration’s version, a version definitely not to be confused with the labor-supported version, one finds it contains a very interesting provision. The provision provides that an employer and an employee can agree to resolve employment discrimination disputes by resort to ADRs such as arbitration. Obviously, there has been a groundswell of attack by civil rights proponents and the labor community against this ADR provision. I, however, happen to like it. Why? As I said before, the ADR provision is simple, it makes sense, it gets to the problem, and most importantly, it resolves the problem.

Consider next the model state law. The model state law provides all employees, even those covered by a labor agreement, with the guarantee that their employment will be terminated for nothing less than “just cause,” “good cause,” “good and sufficient cause,” or “cause,” all of which are synonymous. But the chances of that law being passed by a significant number of states, at least in the near future, are far from certain. The problem with the uniform state law is that it really does not go far enough because it covers only terminations and layoffs. There are many other issues besides termination, such as, wages, hours, and working conditions that can “eat” at employees’ minds and therefore hurt productivity.

Some commentators argue that it is preferable to allow private employers to decide for themselves what they need to do, and then draft their own employee handbooks to accomplish their goals. These individuals assume the employer would include a complaint resolution procedure in the handbook. I am more skeptical. I believe it is necessary for all employers in the United States to move in the same direction. To accomplish this it would be necessary for legislation to force the employer's
hand. What is good about the uniform law is the suggestion that the uniform state law may not apply when the employer has a bigger and better vehicle to handle complaints.

Another important question is whether current or future ADRs encourage more complaints because they make complaining easier. I would prefer to address and resolve a molehill in an ADR setting than a mountain in a court setting. In addition, remember that ADR is a complaint resolution process. Issues do not automatically go to arbitration. Involved in the procedure for the company must be people who realize the importance of employees, even from a selfish viewpoint, and who are willing to work to resolve or at least answer those problems. In the past twenty years, I have observed that employees are typically more interested in obtaining answers than necessarily winning. In sum, employees want to be heard, to be considered, and to be answered.

What if the employer loses in ADR? The answer is that, first, everybody loses sometime. Second, the employer can also lose in court, normally at a much higher price tag. Third, losing occasionally may send the best possible message to the employees: “Employers are not perfect - employers are a lot less than perfect.” Finally, employers can learn from their losses because, the sooner they lose, the better prepared they are to fix the problem and avoid future losses.

Resolving problems at the place of employment is easier than at a courthouse. Prior to any problem, appropriate handbooks can be drafted. Furthermore, an employer can draft appropriate contracts to make sure that it obtains the most skilled and most experienced arbitrators possible. In fact, contract language can demand that specific arbitrators be members of the National Academy of Arbitrators, which guarantees experienced arbitrators. The contract can provide that no arbitrator will be acceptable unless he has handled a certain number of cases in a particular industry. In sum, an employer can write whatever it wants. All this will enhance the chances, not necessarily of a win, but of a fair result from an experienced, qualified person.

What must U.S. corporations do if they intend to compete nationally and internationally? They need to develop working conditions that are fair and which appear to be fair. In the employment context, fairness is in the eye of the employee. Part of being fair and appearing fair is a complaint resolution proceeding that gives an employee a right to contest something that he considers unfair. That sends the right message and it helps people pull together. There are really only two choices: employees can pull together or they can pull apart. Together is better.

One issue which has been omitted so far is “court ADRs” or “quasi-court ADRs.” The leading proponent of that form of ADR, among companies, is the Eaton Corporation. In the March, 1991, issue of The American Lawyer, there was a long article on ADRs and Eaton. I will summarize what I consider to be its important parts.
Eaton, for those of you who are unfamiliar with this Cleveland-based corporation, has sales of about four billion dollars a year. At any given point in time it has about two hundred live cases pending. Last year Eaton resolved 100 of them. Over 25% of those were resolved through ADR or the threat of ADR. Some were employment cases and most involved non-binding mediation. One of the employment cases was handled in California by Eaton's General Counsel, one other in-house counsel and one outside counsel, and was mediated and resolved in two days by a former state judge in California. Eaton, in its outside counsel retention letter, requires that outside counsel agree to explore and view favorably the ADR option, and not immediately race to the courthouse. To further this policy, Eaton brought in half-a-dozen outside law firms for ADR sensitivity sessions.

Lastly, I will discuss court ADRs. It has been found that ninety-three percent of the cases filed in court settle at the courthouse steps. This fact leads to the question: Why not at least try and settle them earlier?

There are a couple of different versions of court ADRs. One is the mini-trial, mentioned earlier by Malcolm Wheeler. In addition to what Mr. Wheeler said is that the mini-trial before a judge normally requires the principals to sit through what is often a two day trial, one day per side. The mini-trial is non-binding. There is a fifteen minute limit on cross-examination of a witness. Depositions are used just by handing them to the judge. The judge renders his findings with the principals present. While the decision is non-binding, in two cases in which I have been involved, one settled within five hours, and the other settled within two hours, of the decision. This saved over five million dollars in combined legal fees.

Another form of court ADR is the summary jury trial. The summary jury trial involves jurors, who do not know that it is not a real trial, and it runs basically the same way as the mini-trial. After the non-binding jury verdict, most cases settle.

There are still other ADR variations in state courts. A case involving less than $20,000 in Allegheny County in Pennsylvania goes immediately to arbitration. One problem with this type of arbitration is that it is staffed by a three-person court. Typically, two or three plaintiffs' lawyers serve as the arbitrators. That is a problem.

Other ADRs include non-judicial mediations such as "rent-a-judge," major league baseball salary arbitrations, and the so-called "wise man" procedure in the oil industry. The "wise man" procedure involves senior executives meeting for thirty to sixty days to try to resolve problems. If that fails, they mediate the dispute before a third-party neutral. The parties can also go to binding arbitration if mediation fails. If they fail to agree on a solution by August 1st or January 15th, of any year, I suppose they could use the Hussein approach and invade one another. That solution, I do not recommend.