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Appropriate Dispute Resolution:
Different Approach – Different Dynamics

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I. Different Approach

Appropriate dispute resolution – any of many ways to place control of the resolution of a dispute in the hands of the parties themselves.

Not a judge or jury.
Not even the lawyers.

Sometimes litigation is necessary.

Litigation will not disappear.
Trials will not vanish.

Often, litigation is not necessary – or appropriate.

> "I am absolutely surprised that you have left this incredibly important and significant decision to the court. ... I have always thought that this decision, in the end, was a business decision."
>
> Judge James R. Spencer in NTP v. RIM, *NY Times* Feb. 25, 2006

How do we know whether or not litigation is necessary?

Identify the problem.
- Business problem.
- Personal problem.
- Litigation problem.

Identify the players.
- Your side.
- Each other side.
- Client v. counsel.
- Third parties.
- Visible and invisible.

Identify each side's real interests and needs.
- Business standpoint.
- Personal standpoint.
  - Client's personnel.
  - Other side's personnel.
  - You.
  - Your personnel.

Identify each side's BATNA.
- Client's.
- Other side's.
- Each player's.

Brainstorm options.
- Litigation's costs and outcomes.
- Alternative processes' costs and outcomes.
  - The process.
  - The substance.
- Understand alternative processes.
  - Do not be limited by semantics.
  - Do not be limited by misunderstandings.
- Do not be frustrated by historical relationships.
- Be creative.
- The greater the number of differences in interests and needs, the greater the opportunity to create value.

Can you help the other side let you, in its own interest, have what you want?

Can you turn a protagonist into a partner?

Do you know what processes are appropriate?

> *Arbitration* – By agreement, a third person resolves dispute within agreed upon parameters.
>
> *Mediation* – By agreement, a neutral facilitates communication, negotiation and dispute resolution – by the parties.

Know the vocabulary.

Factors to consider.

> Control.
> Cost.
> Cultural needs.
> Create options.
> Create and claim value.
> Create and re-establish useful relationships.
> Cooperation v. confrontation.
> Common sense.
> Confidentiality.

Always be aware of distinction between –

> Party and
> Party representative (including lawyers, agents).

II. Different Dynamics

Sea change in attitude.

Rambo mode.

Prosecute, defend or negotiate with no prisoners taken.
"Litigation: A machine which you go into as a pig and come out of as a sausage." The Devil's Dictionary, Ambrose Bierce

Cooperative mode.

What is the real problem?
What if you owned both sides (or every side) of the problem?
What is a rational solution?
Can you persuade the other side(s) to participate in joint problem solving?
Can you persuade your side?
Can you persuade the other side(s) it is in their interest to find a solution that satisfies your interests as well as their interests?
Can you persuade the other side(s) that disparate interests and needs need not be altered and reconciled – only need a solution that satisfies all interests and needs to an adequate degree.

Some process issues.

Preparation.
Players.
Problem.
Perspective.
Persuading people to participate.
Yours.
Theirs.
Identifying interests and needs.
Identifying BATNAs, not bottom lines.
Creating the process.
Choosing a neutral.

Some barriers to mediation.

Lack of preparation.
Failure to focus on real interests and needs – everyone's.
Failure to focus on BATNA's – everyone's.
Confusing BATNA with bottom line.
Corporate culture.
Counsel's culture.
Lack of respect and trust.
Other emotion.
Need for a "win".
Vindictiveness.
Strategic needs.
Personal needs.
Absence of important participant.
Party withdraws.
Change in personnel, market, technology, economics.
Virtues over-sold in the past.
Principle overshadows practicality.

The mediator.

- Preparation.
- Characteristics.
  - Facilitative.
  - Evaluative.
  - Directive.
- Experience.
- Cultural sensitivity.
- How many?
- Financial arrangements.
- Who approaches the mediator?
- How do you prepare the mediator?
- How does the mediator prepare the parties?
- How does the mediator prepare counsel?
- Why not accept the other side's candidate?

Organizing the process.

- Preparation.
- Initial communications.
- Initial conference.
- Place.
- Space.
- Time.
- Amenities.
- Written submissions.
- Attendees.
- Who speaks?
- Confidential.
- Without prejudice.
- Various sessions.
- How much do we share?
- Cultural needs.

Mediation.

Preparation.
Stand in the other person's shoes.
Your side.
Their side.
Parties participate.
Listen and reframe.
Assure all understand each predicate point and each subsequent point.
Take into account cultural styles and needs.
Do not expect to reconcile all interests and needs.
Understand and respect different interests and needs.
Prepare to explore solutions that satisfy all interests and needs.
Brainstorm
Joint sessions.
Private caucuses.
Private-private caucuses.
What to do while another side is caucusing?
Expect surprises.

Impasse.
Avoid it.
Shared problem solving.

Break it.
Shared problem solving.
Non-cash compensation.
Structured payments.
Give something of little value to you, but of large value to the other side.
Reality testing.
Baseball arbitration.
Mini-trial.
Summary jury trial.
Mediator's number.
Mediator's opinion.
Obtain further information.
Apology.
Change the players.
Top people meet.
Lawyers meet.
Further communications with mediator.
Let time pass.

Completing the deal.

Resolve dispute.
Signed, binding, written agreement.
Don't leave without it!
Who prepares?
Bring draft and laptop to mediation.

Not resolve dispute.
Agree re future activity.

Post-mediation communications.

If settlement – mediator sends a bill.
If no settlement – mediator sends a bill AND
Telephone inquiries/suggestions.
Further meetings.
Parties.
Lawyers.
New players.

What to do if –

Wrong people attend.
New problem arises – substantive or personal.
One side (or both) not prepared.
One side (or both) not negotiating "in good faith".
One side walks out.
Personalities clash.
One side (or both) poisons the well.
One side (or both) does not listen.
One side (or both) opens with a outrageous position.
One side (or both) will not move off its original position.
One side agrees orally and says it will sign tomorrow.
One side is in it only for "free discovery".
One side does not honor confidentiality.
One side subpoenas the mediator.
One side offers a job to the mediator.

Lessons from Some Examples

Two corporate parties – NH and Japanese.
Japanese distant personality.
Language difficulty.
Patience

Two corporate parties – Singapore Chinese and Taiwanese.
Right players at the right time.
Don't be surprised at Western style even when all parties are Asian.

Multiple corporate parties – German, French, UK, US.
Many sessions.
Discovery, then substance.
Be prepared for the unexpected.
Be prepared for many sessions.
Try dinner.

Multiple corporate parties – Israeli, UK, US, Japanese.
Many sessions.
Baseball arbitration.
Know Japanese customs.
Know specific characteristics of person across table.
Have check interpreter/translator.

Two corporate parties – US (Israel).
Settlement approved by Rabbi in Jerusalem.
Do not overlook absent third parties.
Multiple corporate parties – Italian and US.
Let emotion erupt.
Then calm it.

Two corporate parties – Japanese and Finnish.
Knowledgeable third person intermediary.

Two corporate parties – US and Indian.
US party returned payment.
Opportunity to talk, to listen and to learn may be vital.

One large corporation; one individual – U.S.
Patent "terrorist".
Do not poison the well from which you must drink.