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REPRINTED FROM:  
CORPORATE DISPUTES MAGAZINE  
APR-JUN 2016 ISSUE



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PERSPECTIVES

# CAN ADR ASSIST THE BOARD?

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**D**isputes are an unavoidable part of doing business. Indeed, businesses are subject to ever increasing risks of litigation; ranging from class actions to employee causes of action to actions by regulators. Traditionally, disputes were resolved by the parties either directly or with the assistance of their lawyers, engaging in positional bargaining discussions with a view to reaching a negotiated outcome. If those discussions failed to resolve or narrow the issues in dispute, then the parties in effect relinquished control of their dispute by submitting it to a judge to determine according to his or her views of the merits and the applicable law.

This article examines processes which provide an alternative to litigation for the resolution of disputes, and makes a case for boards to adopt policies to give prominence to those processes.

## **The shortcomings of litigation**

Litigation is a 'blunt tool' for the determination of disputes. It has a number of features which, as businesses have increasingly come to appreciate, provide a less than ideal environment for the resolution of disputes. These features include the following: (i) the parties lose effective control of the dispute; (ii) the outcome is inherently uncertain;

(iii) it is costly not only in terms of defence and other expenses but also involves the diversion of executive and other resources which could be more productively deployed elsewhere; (iv) the litigation process is conducive to delay, including those associated with appeals; and (v) the dispute is generally determined in a public hearing with all the attendant reputational and other commercial risks to the parties.

### Alternate dispute resolution

Alternate dispute resolution (ADR) describes a series of different processes designed to assist disputants to resolve all or some of the issues between them to achieve outcomes that address some or all of their various commercial, reputational, personal, emotional and other interests. ADR encourages and empowers the parties to work cooperatively with the assistance of an independent ADR professional appointed jointly by the parties. The role of the ADR professional varies depending on the type of ADR process that the parties engage. Regardless of which process is employed, unlike litigation, ADR provides the parties with the opportunity to confidentially explore and address the real issues in a dispute with a view to creating an immediately binding, enforceable, cost effective, timely and lasting outcome. ADR is generally understood to encompass mediation, arbitration,

early neutral evaluation, expert determination and adjudication, of which mediation and arbitration are the most commonly and successfully employed.

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### Mediation

Mediation is a “structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute”. This definition, which is descriptive of the process, focuses on the core features of mediation being: (i) a decision making process; (ii) in which the parties to a dispute are assisted by a neutral and independent party, the mediator; (iii) who attempts to assist the parties in their process of decision making; (iv) with a view to reaching an outcome which each of the parties agree; and (v) without the mediator having a binding decision making capability.

The mediation takes place in private and any outcome is usually confidential to the parties. It is not uncommon for contracts to have clauses requiring mediation before commencing court proceedings.

### **Arbitration**

Arbitration resembles a court process with the arbitrator (or arbitral panel), usually appointed by the parties, providing a determinative ruling in the form of an award. It is less formal than a court process and usually takes place within an agreed time. Arbitration is common in international commercial disputes and in investor-state disputes. A domestic award is recognised under the domestic laws of various jurisdictions whilst an award in a cross-border matter is usually enforceable in countries which are signatories to the New York Convention.

### **Early neutral evaluation**

Early neutral evaluation involves an independent and appropriately qualified person who considers the relative merits of a dispute or proceedings, usually at an early stage, who then issues an assessment which the parties can agree to and which will be either binding or non-binding.

### **Expert determination**

Expert determination involves the parties appointing an appropriately qualified expert, often a legal practitioner, who determines an issue or issues

between the parties. The determination is, at the parties' election, either binding or non-binding. It can occur at any time in a dispute, either before or after the commencement of proceedings.

### **Adjudication**

Adjudication involves an adjudicator making a binding determination as to the rights and obligations between the parties. It is commonly used in disputes involving the building and construction industry.

### **Conciliation**

A conciliator does not make any binding determinations. His or her role is limited to identifying issues in dispute, developing options and considering alternatives. Conciliation can be similar to mediation, although a conciliator's role may be more directive and advisory.

### **How is ADR relevant to boards?**

Oversight of risk is an important function of the board of directors. This extends to oversight of the policies, processes and procedures that the business has in place to manage disputes. This responsibility requires an understanding by the board of the options available when corporate disputes arise. Given the wide-ranging benefits of ADR, and its potential to deliver commercial solutions to business problems in a timely, cost effective and confidential manner, boards should take a more proactive role

in encouraging and supporting the use of ADR by their businesses. A board might, for example, ensure that the business' risk management strategy contemplates ADR. It might also seek to satisfy itself that the organisation is including appropriate dispute resolution clauses in agreements and contracts. Rob Elliott, executive director of the Australian Institute of Company Directors' Governance Leadership Centre, commenting on the relevance of ADR for boards, noted that: "Alternative Dispute Resolution would be more widely used if it were better understood by boards. There is a need for business people to work

out business problems in a business way. Litigation should be the last resort."

### **Boardroom disputes**

It is also important for directors to understand that ADR can play an important role inside the boardroom. The dynamics in a boardroom, and nature of relationships between individual directors on a board, may significantly impact on the performance of that board. Relationships between directors founded on trust, respect, honesty and



camaraderie are essential for optimum boardroom performance.

Yet conflict can arise between individual board members despite best intentions.

This occurs for many reasons, including personality clashes between board members, ideological differences, widely divergent views in relation to the business, and negative perceptions of the performance of individual directors. Relationships and dynamics also evolve and may sour over time as minor disagreements become insurmountable differences. It is also difficult to predict how the appointment of a new director will affect relationships and boardroom dynamics. Boards should have a clear, accepted procedure to follow in relation to routine disagreements arising between directors. Yet when an impasse is reached, the board should have an established set of internal and external conflict-resolution mechanisms at its disposal.

Mediation may be a particularly useful ADR mechanism to adopt, especially given the need to resolve confidentially disputes that are likely to be multifaceted and involve commercial, reputational, personal or personality issues. Also, mediation can usually be organised quickly with the parties at liberty to fashion an outcome expeditiously and which suits the circumstances. Additionally, the parties are free to choose the mediator, who need not be legally trained and could, for example, be a

person who has experience on or interacting with boards.

## Conclusion

Boards should have in place policies to ensure that any disputes between the business and third parties are resolved with minimal resort to litigation. At the forefront of any such policy is for boards to ensure that relevant contracts contain appropriate ADR dispute resolution mechanisms.

Further, disputes between board members may significantly impact on the board's performance, and, in turn, adversely affect the performance of the organisation and shareholder returns. Boards should have in place a dispute resolution policy to deal with situations where their effective functioning is disrupted by conflict between board members. **CD**



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