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Managing disputes in an evolving business landscape

Disputes escalate from controversy, to conflict, to dispute. The point of intervention in the evolution cycle matters. BY DARIUS CHAN AND SAPNA JHANGIANI

GLOBAL trade has increased exponentially in recent decades, as commercial transactions have grown in number, value and sophistication. Tracking this growth, businesses have seen an increase in the volume, size and complexity of their cross-border disputes, and dispute resolution mechanisms have had to adapt to keep pace with the change.

Traditionally, all disputes were settled by court litigation, but domestic litigation was ill-fitted to international disputes: domestic courts were presided over by national judges; only had jurisdiction within their borders; and passed judgments that were not easily enforceable in other states.

International arbitration emerged to fill this gap, allowing parties to appoint a neutral tribunal of one or three persons, often with specific industry expertise, and with the sole or presiding arbitrator usually of a different nationality to the parties. Arbitration procedures are flexible and can be adapted to suit the dispute and the parties. Following the entry into force of the New York Convention of 1958, which has now been ratified by over 170 state parties, international arbitration awards can be enforced with relative ease in most countries worldwide. Arbitration quickly became the preferred dispute resolution mechanism in international contracts, and chambers of commerce worldwide began to offer arbitration services to assist the businesses they support.

In the meantime, domestic courts adapted to meet the demands of international trade by tailoring their procedures to suit complex global disputes. The commercial divisions of courts in leading financial centres such as London and New York have seen a significant increase in such disputes, as parties increasingly hold assets outside their home jurisdiction. Further, we have seen the emergence of international commercial courts such as the Singapore International Commercial Court (SICC) and the Courts of the Dubai International Financial Centre, to name just a couple, each of which has a judiciary comprised of senior experienced judges from around the world. The regime for enforcing foreign judgments has evolved in several jurisdictions, and a commercial court judgment now has a better prospect of enforcement abroad than ever before, though much will depend on the jurisdiction in which enforcement is sought.

Alongside litigation and arbitration as binding dispute resolution mechanisms, seeking an amicable settlement of a dispute has always been a popular option for commercial parties. The benefits include minimising the risk and cost of legal proceedings; finding solutions beyond what may be ordered by a court or arbitral tribunal; and the potential for maintaining a commercial relationship. Parties often appoint a mediator or facilitator to facilitate their settlement discussions.

International businesses should proactively put in place policies and plans on resolving disputes. PHOTO: PIXABAY

The International Chamber of Commerce (ICC) was established in 1919, and commenced providing international arbitration services through the ICC Court of Arbitration in 1923, later adding on mediation, dispute boards, and other ICC ADR (alternative dispute resolution) expert services (including non-binding neutral evaluation). The ICC's evolution as a service provider of ADR reflects the growth of global commerce. With the ICC Court celebrating its centenary this year, the ICC's dispute resolution think tank, the ICC Commission on Arbitration and ADR, has released its "Report on Effective Conflict Management", based on feedback from business users.

Dispute avoidance requires early intervention in the dispute evolution cycle. Resolution, or de-escalation, calls for deploying appropriate modes of dispute resolution, whether sequentially or cumulatively, after disputes have crystallised.

As observed by the report, disputes do not happen spontaneously. They evolve from controversy, to conflict, to dispute. The point of intervention in the dispute evolution cycle matters. Avoidance requires early intervention in the dispute evolution cycle. Resolution, or de-escalation, calls for deploying appropriate modes of dispute resolution, whether sequentially or cumulatively, after disputes have crystallised. Because of the increasing sophistication that is required to manage the lifecycle of a cross-border dispute, the traditional term ADR (or "alternative dispute resolution") has been increasingly referred to as "appropriate dispute resolution".

To resolve disputes appropriately, investing resources in the drafting of appropriate dispute resolution clauses at the outset plays a vital role. For instance, it is increasingly common to see dispute resolution provisions that provide for the use of more than one mode of dispute resolution in a sequential series – what is commonly referred to as a multi-tiered dispute resolution clause. Multi-tiered clauses generally create a process of escalation, for instance beginning from amicable discussions, to mediation and eventually to litigation or arbitration, such that each successive step may be taken only after engaging in the prior stage.

Even if a dispute is not entirely resolved through the initial stages of the multi-tiered clause, a greater understanding of the dispute that flows from the initial stages can be beneficial to narrow the scope of the dispute. For example, it may enable subsequent arbitration proceedings to be more focused, and enable stakeholders to justify the time and cost of arbitration in knowing that pre-arbitration avenues to settlement have been explored.

In long-term contracts where it is in the interest of all parties to maintain a working relationship, parties can also consider including in their dispute resolution provisions the use of a dispute board or standing mediator to de-escalate disputes early. Once constituted, standing dispute boards serve as a dispute avoidance mechanism by giving parties immediate access to experienced experts before issues escalate into full-blown disputes. For example, standing dispute boards can provide the parties with well-informed job-site opinions in a very short time, allowing contract execution to proceed without undue interruption, while preserving the parties' rights to seek a formal resolution of a dispute that cannot be avoided.

A similar technique is the use of early neutral evaluation. Early neutral evaluation, followed by facilitated negotiations or mediation, involves bringing the parties to the negotiating table, but only after they have been equipped with better insight into the relative strengths and weaknesses of their case. The objective is for the early neutral evaluation to clarify issues, and help parties re-align their expectations with the realities of their transaction before positions harden or become entrenched. The facilitator or mediator can facilitate the parties to reach agreement on commercial solutions which would not otherwise be achieved through an adversarial process.

Even if parties have commenced litigation or arbitration, they can continue to explore settlement. Some techniques include the use of arbitration-mediation-arbitration or litigation-mediation-litigation (LML) clauses and protocols. For instance, under the LML Protocol of the SICC, disputes commenced in the SICC are to be referred for mediation. A case management stay of the SICC proceedings may be granted for the mediation to take place. Where a full settlement cannot be reached during the mediation, the parties can resume the SICC proceedings. If any settlement can be reached, the parties may record the terms of the mediated settlement as an order of court.

A similar technique is the express inclusion of a mediation/negotiation window when an arbitration tribunal designs the procedural timetable of an arbitration. For instance, after parties have filed their first round of substantive submissions, parties can assess the merits of their positions, and consider to what extent the differences between the parties can be bridged during a specified time period that had been set aside for that purpose.

Instead of simply allowing a tribunal or court to decide the outcome of a dispute, it is in the interest of international businesses to put in place considered policies and clauses to proactively engage in appropriate dispute resolution.

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