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Dispute Management Systems - How They Can Add Value

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This article discusses the cost-savings and other benefits that may be achieved by organizations through the implementation of a dispute management system comprised primarily of the systematic application of ADR practices and tools.

Introduction

Corporations are attracted to best practices. Systems-oriented approaches have taken hold in many parts of business. For example, Six Sigma was originally developed to minimize manufacturing defects. Some Fortune 500 and other companies have come to view protracted litigation and attendant costs as a “defect”. They are taking a systems-oriented approach to dispute management by developing “Dispute Management Systems” (“DM Systems”).

What is a Dispute Management System and Why Implement One?

DM Systems are sometimes referred to as “ADR” - alternative dispute resolution - systems. They involve a systematic application of internal and external subsystems of primarily ADR practices and tools deliberately designed to efficiently and effectively deal with conflicts experienced by and/or within organizations. DM Systems can be of use for large numbers of similar disputes and also for one-off, unique conflicts. A DM System potentially allows organizations to make significant reductions to their litigation costs, both before and after they retain external counsel.

Some disputes need to be litigated to a trial judgment but the vast majority end in a settlement. The longer a litigation case is unresolved, the higher the overall costs (outside legal spend plus settlement payments) are likely to be.¹ A DM System focuses on prevention, early intervention, and the alternatives to litigation that ADR provides.

In addition to legal costs, litigation has other drawbacks including:

- (a) opportunity or “distraction” costs which arise when corporate personnel are required to divert their time away from the main goals of the organization by litigation tasks like questioning;
- (b) potentially irreversible damage to and loss of the working and business relationship of the litigating parties; and
- (c) loss of process and outcome control resulting from a judge having to choose a winner and loser in the lawsuit.

Corporate Use of ADR Generally

Corporations have recognized these serious and other concerns posed by protracted litigation:

¹ Slaikeu, K. and Hasson, R., Controlling the Costs of Conflict. San Francisco: Jossey-Bass Inc. Publishers, 1998 (“Controlling Costs”)

“Most of the participants in our study believe that there are economic reasons to use ADR processes; compared with conventional dispute resolution processes, they save their companies time and money. But there is strong evidence that regaining control of the dispute resolution process is an important motivation as well”.²

Corporations are increasingly using ADR to deal with their disputes.³ However, it appears that they tend to employ ADR on an *ad hoc*, as opposed to a prevention-oriented and early intervention-focused, comprehensive and systematic basis: “... mediation and arbitration processes are not institutionalized...”⁴

Implementing a DM System

The most effective DM Systems require buy-in at the highest levels of a corporation and align with corporate culture. They likely involve changing the way all parts of the organization approach and deal with conflict as well as coordination with ADR proficient external counsel who understand the objectives of DM Systems and that litigation is most often a means to an end, not the end itself.

Elements of a DM System may include⁵:

- (a) developing a corporate ADR policy;
- (b) intra-corporation training to increase negotiation competence;
- (c) early dispute identification and intervention mechanisms;
- (d) use of multi-step ADR contract terms;
- (e) use of ADR suitability screens;
- (f) use of decision tree analysis;
- (g) implementing pilot projects;
- (h) early case assessment; and
- (i) early and enhanced coordination with ADR trained external counsel.

Some Reported Experience With DM Systems

Fortune 500 and other corporations have implemented DM Systems for some or all categories of their disputes, including AEGIS, AT&T, BASF, Bank of Montreal, BC Hydro, BellSouth, Brown & Root (a Halliburton subsidiary), Burger King, Chevron, Ford, General Electric, Georgia-Pacific, GM, Halliburton, Motorola, NCR, Ontario Human Rights Commission, PECO Energy, Shell, Toro, Union Carbide Corporation, Whirlpool, and Xerox.⁶

In the case of Toro, from 1992, when it implemented its “Pre-Litigation Intervention Program”, through 2004, over 1150 product claims were handled through that program and Toro experienced:

- (a) a 59% reduction in average claim lifespan (from an average of 24 to 9.9 months);
- (b) a 76% per claim reduction in costs and fees (resulting in savings of over \$41 million); and
- (c) a 58% reduction in settlement amounts paid to resolve claims amounting to over \$45 million in additional savings over the period.⁷

In Chevron’s case, after selecting ADR as its primary goal, it reported dispute transactional cost savings of well over \$1 million during the initiative’s first year.⁸

² Lipsky, D.B., and Seeber, R.L., *The Use of ADR in Corporations*, Ithaca N.Y.: Cornell/PERC Institute on Conflict Resolution and PriceWaterhouse LLP, 1997.

³ Lipsky, D.B., Seeber, R.L. and Fincher, D. R., *Emerging Systems for Managing Workplace Conflict*, San Francisco, California: Jossey-Bass, 2003 (“Emerging Systems”).

⁴ *Supra*, note 1.

⁵ *Ibid.*

⁶ Controlling Costs; Cronin-Harris, C. *Building ADR into the Corporate Law Department*, New York, New York: CPR Institute for Dispute Resolution, Inc., 1997 (“Building Corporate ADR”); Stitt, A.J., *Alternative Dispute Resolution for Organizations*, Toronto, Canada: John Wiley & Sons, 1998; and *Emerging Systems*.

⁷ “Using Compliance for a Competitive Advantage”, ACC’s 2005 Annual Meeting at <http://www.acc.com>.

⁸ Building Corporate ADR.

Conclusion

Organizations can benefit from assessing their current approach to disputes and considering how a DM System might add value in terms of cost savings, process control, and advancing business interests generally. External counsel with knowledge about ADR, including DM Systems and their aims, can be a valuable resource and an important component of any DM System.

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