FIVE THINGS EVERY EXECUTIVE SHOULD CONSIDER WHEN FACED WITH A BUSINESS DISPUTE

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Like many lawyers of my generation, I was inspired by the passion, professionalism, and speed television lawyers like Perry Mason brought to delivering justice for their clients. Later, as a young lawyer practicing in Los Angeles, I was bemused, rather than impressed, when cases on L.A. Law somehow got to trial – or at least had an important hearing – the same day it came into the office. It was then taking five or more years to get civil cases to trial in Los Angeles County. Our courts were no longing dispensing justice, they were dispensing with it. It became harder and harder to match client expectations, fueled by the nearly immediate resolution of cases on TV, with what lawyers and the court system would deliver. Today we are again bracing for long delays in the trial courts as a result of budget cuts. The Presiding Judge of the Los Angeles Superior Court predicted "great delays throughout the system" when court closures were recently announced.

As a result of court delays, expense, and unpredictable judges and juries, Alternative Dispute Resolution (ADR) gained widespread acceptance. Arbitration became for many businesses the alternative litigation forum of choice, and remains an important and useful means of resolving business disputes. However, the arbitration process sometimes delivers little in the way of promised cost savings or speed, and arbitration decisions can be arbitrary and contrary law without being subject to review for such errors on appeal.

So what are businesses to do in light of mixed results with arbitration and substantial delays expected from recent court closures?

1. Consider Mediation First

Consider engaging in mediation or meaningful settlement discussions before filing suit, especially if both sides largely understand the factual and legal issues involved and their respective positions. Seeking mediation early on, even before filing suit, is now rarely seen as a sign of weakness. Virtually all civil court cases are ordered to mediation by the judge anyway. Mediation is often less costly than direct settlement discussions. Mediation cuts through the posturing and strictly protects the communications from being used in litigation if no deal is reached. This improves the chances of a binding resolution in one session.

It is worth considering “mediation first” requirements in contract provisions governing dispute resolution. To give teeth to the requirement to mediate first, the failure to mediate often carries a penalty, such as losing the right to recover prevailing party attorneys’ fees in the litigation.

If there are time constraints or concerns about a party taking unfair advantage or losing a claim during settlement discussions or the mediation process, consider using a forbearance and tolling agreement.

2. Consider Judicial Reference Instead of Arbitration

California and other states permit parties to agree to hire a retired judge or attorney to serve as a temporary judge to resolve some or all issues in dispute. This offers the advantage of greater control over the selection of the jurist who will hear the case and the timing of the trial, similar to arbitration, while still requiring the application of the rules of law and preserving the right to appeal.

Agreements to a judicial reference can be made either before or after the dispute arises. So consider requiring judicial reference of disputes in business contracts.

3. Consider Arbitration with Three Arbitrator Panels or Arbitration with the Right to Appeal

One way to mitigate the risk of an arbitrary arbitrator, while keeping the matter private, is to agree that three arbitrators will be required. This makes sense for disputes above a threshold dollar value.

Another way to reduce the risk of an erroneous arbitration decision, while avoiding the lengthy appellate process, is to agree that the arbitrator's decision may be appealed to a three arbitrator appellate panel that has the power to overturn the decision for reversible errors of law in a short time. Several ADR provider organizations maintain rules and procedures for such appeals.

4. If Your Company Must Be in Court, Consider Suing First and Doing Discovery First.

If you know your company is going to be sued and you have legitimate claims of your own, consider suing first. There may be more than one county, state or court empowered to hear the dispute. Suing first allows you the first move in court selection. Suing first also provides the distinct advantages of giving the first and last statements at trial, including helping the judge and jury remember your side best. If you are sued first, consider taking depositions first. States like California allow defendants an exclusive period to initiate discovery at the outset of cases. This opportunity should be exploited requiring the opposition to take positions at a time they are usually least prepared to do so.

5. Consider Contract Litigation Insurance.

Most lawyers and companies know to consider if insurance potentially covers a claim and "tender" the defense of the lawsuit to their insurers. However, business disputes that arise out of contractual relationships often do not give rise to insurance coverage. Moreover, many business contracts contain a "loser pays provision," making the risk of litigation even greater. To manage that risk, consider contract litigation insurance (CLI). Available to litigants in the first 60 days of a contract case, CLI covers any obligation to pay the prevailing side's attorneys' fees if awarded after trial or summary judgment. This enables companies to fight weak or frivolous claims without fear of paying the adversary's fees. CLI, and the other considerations discussed here, can mitigate the risks of litigation and empower you to make businesslike decisions when faced with disputes despite the inherent unpredictability of litigation.

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