Conflict Resolution Policies, Reputational Risk, and Enterprise Risk Management

What Directors Need to Know and Should Be Asking Management

By Jim Reiman

Introduction

It is now well established that a company's reputation is one of its most important assets. It is equally well established that conflicts, and how a company resolves them, impact all elements of a business. What is less well established is the interrelationship between reputational risk and conflict resolution practices.

How and when a company responds to the inevitable disagreements that occur affects the company's culture, its relationships with its customers, vendors, and neighbors, and its employees and shareholders. The methods and processes employed by a company to respond to these conflicts impact not just the parties to each specific conflict, but the company's reputation. As a result, a company's conflict resolution practices should be crafted not just in the context of an economic and legal risk analysis, but also a reputational risk analysis.

It is the thesis of this article that a company's practices for addressing and resolving conflicts should be an integral part of a company's risk management strategy, and as such merits the attention and consideration of directors. This conclusion stands on two pillars: i) managing conflicts (be they internal employee matters, vendor contract conflicts, product liability claims, conflicting patent claims, or other legal disagreements) is an integral element of managing risk and in particular reputational risk, and ii) good evidence exists to support the argument that a strategic rather than *ad-hoc* approach to conflict resolution materially improves all aspects of a business and thereby strengthens the enterprise, whether the measure of "strength" is bottom line profits, enhanced employee relations and performance, product reputation, vendor relations, or just about any other metric.

Questions Directors Should Ask Management

Directors need to know:

1. Does the company have a comprehensive or *ad-hoc* approach to anticipating conflicts and resolving those that occur?
2. If a comprehensive conflict resolution strategy, what are the goals of the strategy? Reduction of litigation costs? Speed of resolution? Containment of negative publicity? If multiple goals (usually the case), how are they prioritized? If an *ad-hoc* approach to conflict resolution and no well-conceived or defined strategy, why not a comprehensive strategy? Who within the company is responsible for these decisions?

3. Is the conflict resolution strategy consistent with the company's overall marketing, branding and customer relations strategies? Has it been incorporated into the company's enterprise risk assessment and risk management plan, and is it consistent with and coordinated with that plan?
4. Does the conflict resolution program have metrics that can be used to ascertain the effectiveness of the strategy?
5. In today's world, conflict resolution can be achieved via multiple well established procedures and methodologies. Does the company's conflict resolution strategy use the best methodology?

Interrelationship Between Conflict Resolution Strategies and Risk Management

It was noted in the introduction that a company's reputation is one of its most important assets. Consistent with this recognition is the attention paid to reputation and reputational risk by boards. According to a 2013 survey conducted by EisnerAmper, "[T]he most significant concern for boards today is the issue [of] . . . public perception or, as it's become known, reputational risk."[i]

The concern of directors for their company's reputation is well placed. Consider the findings of the following studies reported by the Conference Board Governance Center[ii]:

- In a modern, service-oriented business environment, intangibles, such as corporate reputation, can constitute the bulk of an organization's assets [iii]
- Public perception of a business positively affects corporate profitability, market-to-book value, and total sales [iv]
- Corporations ranked high in reputation benefit from an average annual stock price increase of 20.1%, whereas the shares of the 10 companies ranked lowest in reputation suffered an average annual decline of 1.9 % [v]
- About 35 % of investment decisions are based on factors such as reputation and image [vi]

While managing a company's reputation has always been challenging, in today's world of social media and instant communication the challenge has increased exponentially. Every individual with a computer or smartphone and a "bone to pick" today presents a potential threat to a company's reputation. William Akel put it succinctly:

> "Twitter reportedly has more than [241] million active users [posting 50 million tweets each day]. Facebook users post over 60 million status updates a day. Obviously, social media offers unprecedented opportunities to connect with customers, enhance reputation and build brand. On the flipside, if inadequately managed, social media use can result in reputational damage and substantial financial consequences for your organization."[vii]

How a company responds to conflicts that occur – the tone of the response, the people assigned the task of resolving or "dealing with" the conflict, the forums the company employs to address and resolve the conflict – all potentially impact the company's reputation. Moreover, in today's

world of instant communication and the potential for even the smallest and seemingly most innocent of matters to "go viral" and create a material threat to the company's reputation and bottom line profits, efficient, *effective* conflict resolution practices are critical. Moreover, they can avoid the escalation of a conflict into full blown dispute or worse – a crises. The *ad hoc* approach to conflict resolution of days past is a dangerous practice in today's world, which requires alacrity, agility, and a strategy that integrates financial, reputational, legal and other associated risks into the practices employed.

Consider the recent debacle of Toyota arising out of their response to the "runaway car/sudden acceleration" problem that arose. Toyota initially denied that a problem existed with their vehicles, and when presented with overwhelming evidence that "something" was happening, they blamed their customers – the drivers – and issued technical explanations "proving" that their vehicles weren't defective.

While crisis management experts will study the debacle and opine as to what went wrong and what should have been done differently, consider this: what existed at its most fundamental level was a conflict. Customers claimed a product defect, and Toyota disputed the existence of a defect. Customers wanted Toyota to effect some change and compensate them for their injuries, and Toyota disputed the need for it to provide compensation and wanted to continue the *status quo*. Had a conflict resolution strategy (or a different conflict resolution strategy) been in place – one that focusses on brand management as well as litigation costs and risks – Toyota would likely have acted differently and the probability of the harm to its reputation, bottom line, and share price lessened.

Four Facts Directors and Senior Executives Need to Know

In crafting and assessing a company's conflict resolution practices and policies, directors and senior managers need to know four facts:

1. Alternatives to State and Federal Courts Exist for Resolving Conflicts

Multiple forms of conflict resolution exist. While the American way of "calling in the lawyers" and filing (or threatening to file) a law suit when a conflict arises is often appropriate, many times alternative means of resolving a conflict are far more effective, far less costly, and much more consistent with the company's branding and marketing strategies. Such alternative forms of conflict resolution include arbitration, mediation, and a host of combinations of these two basic forms. Usually they involve lawyers, but not always. Crafting a corporate conflict resolution strategy or assessing an existing strategy should include assessing whether the best methods of conflict resolution are used.

2. A Conflict's True Cost is Much Greater Than Just the Cost of Defense/Prosecution

There are two primary costs to a conflict:

i) the cash expended as a direct consequence of the conflict, including legal fees, expert witness fees, and the myriad other fees and costs paid to prosecute or defend the conflict, and

ii) the opportunity cost resulting from management focusing on winning/defending a conflict rather than building the business and identifying or pursuing profit opportunities – the "cost of distraction."

When management is meeting with lawyers or sitting in deposition rooms or courtrooms, they are not doing what they were hired to do. They are not thinking about how to enhance the business and build shareholder value. There is a cost to the business resulting from such distraction, and often the cost of distraction is far greater than the cost of the conflict's defense/prosecution.

3) The US and Many Other Countries' Court Systems Are Broken

While Americans rightly pride themselves in our legal system, the impartiality of our judiciary, and the lack of corruption within our courts, our system is nonetheless broken. Funding cuts and reduced budgets have severely affected the Federal Courts. U.S. Supreme Court Chief Justice Roberts, in his 2013 year-end report, stated:

> *The combined effects since July 2011 of flat budgets followed by sequestration reduced on-board court staffing levels by . . .14 percent . . ., the lowest staffing level since 1997, despite significant workload increases over that same period — and reduced federal defender offices staffing by 11 percent in fiscal year 2013 alone.* [viii]

Exacerbating the general reduction of funding is the increasing impact of the Federal Speedy Trial Act[ix], which establishes time limits for completing the various stages of a federal criminal prosecution. This act, which correctly requires the prompt adjudication of criminal matters, in combination with increased Federal prosecution of criminal matters[x], has placed huge burdens on our Federal courts. Reduced staffing due to reduced funding and multiple judicial vacancies due to political gridlock are worsening the problem. The result: Federal judges have fewer and fewer hours to devote to business conflicts. Trials of business conflicts are delayed, and when they do occur they are protracted and impaired by multiple and often lengthy interruptions while criminal and other more pressing matters are adjudicated. Judges, let alone lay juries, are hard pressed to remember relevant facts and the critical interrelationships of events and people.

State courts are also challenged venues for adjudicating business conflicts. While many highly competent, sophisticated and experienced State jurists exist, many lack the experience and sophistication required to properly adjudicate a complex business conflict. Additionally, like their Federal counter-parts, State jurists are resource-starved.

Bottom line: US courts, considered by many to be the best in the world, are less than ideal forums for adjudicating business conflicts and the likelihood of their improvement in the reasonable future is not high.

4) Winning Is The Wrong Goal

Many incorrectly believe that the goal of a business conflict is to win. Let there be no mistake, winning is important! However, winning for the correct reasons is even more important in a business conflict.

Why? Because conflicts in business are rarely isolated events. Often they are a by-product of corporate policy, marketing decisions, purchasing or design decisions, or other business decisions. One goal of litigating a business conflict is to secure certainty regarding the propriety of a decision

or course of conduct. A conflict which is resolved favorably, but for the wrong reason, fails to provide certainty regarding the questioned decision or course of conduct. Similarly, a conflict which definitively resolves an open question, even if the question is answered unfavorably, provides certainty which the businessperson can then utilize. Thus, an important goal of a business' conflict resolution strategy should be to secure certainty regarding the propriety of conduct or a business decision.

Alternative Conflict Resolution Options: Arbitration and Mediation

It was noted above that alternatives to State and Federal courts exist as forums for the resolution of conflicts, and that these alternatives are often superior to State and Federal courts. The two most common and generally accepted alternatives are arbitration and mediation.

Arbitration

Arbitration is a private, binding adjudication of a conflict. The parties agree by contract to mutually select a neutral arbitrator to hear evidence and arguments regarding the applicable law, and to decide the conflict. The decision is binding upon the parties, and if necessary the winning party may use the traditional courts and law enforcement to enforce the arbitration decision and award.

Arbitration proceedings, while less formal than court proceedings, are much like court hearings. The parties are usually represented by counsel who present evidence, call and examine witnesses, and argue the applicability of relevant law.

Four significant differences exist, however, between an arbitration proceeding and a judicial proceeding. Understanding these differences is critical to assessing their advantages/disadvantages in a particular corporate conflict resolution strategy:

1. Technical Matters: Formal rules of evidence do not apply in arbitrations. Thus, the decision makers receive and hear all evidence that is relevant, and material facts are not excluded based upon legal technicalities. Additionally, motion practice (one of the most significant factors in high legal costs and extended judicial proceedings) is much more limited in arbitration[xi]. Finally, discovery (the legal process of "discovering" and exchanging evidence among the parties) is much more limited in arbitration.
2. Speed: Arbitration's limited discovery and motion practice procedures usually result in a more expeditious pre-hearing process. Similarly, the lack of formal rules of evidence can expedite fact finding hearings in arbitrations[xii]. Moreover, decisions in arbitrations are usually rendered promptly. For example, arbitrators in arbitrations conducted under the rules of the American Arbitration Association are *required* to render their decisions within 30 days of the closing of the hearing[xiii]. While decisions in jury trials are promptly rendered, in non-jury trials it is not unusual for months to pass between the conclusion of the hearing and the issuing of a decision by the court.
3. The Persons Who Decide the Conflict: In arbitrations, the individuals who decide the conflict – the arbitrators – are chosen by the parties. While neutrality is the *sine qua non* of every arbitrator, no less important are other qualities. The parties choose the arbitrators, hence they choose the qualities

they seek in those who will decide their conflict. Note that while arbitrators may be lawyers, they need not be and in many matters (construction conflicts, for example) they often are not lawyers. Usually, the most common and important quality adversaries seek in an arbitrator is expertise in the subject matter of the conflict. Other skills and knowledge commonly required of arbitrators include language skills, cultural knowledge, and specific technical knowledge.

4. Certainty of Result - Limited and Fast Appeal: Federal and state statutes prohibit the review of arbitration decisions except in very very limited circumstances, and while the American Arbitration Association has just adopted rules for appeals, such appeals are accelerated and must be decided within 30 days of the filing of the last brief.[xiv] Thus, the decisions of arbitrators are certain and final except in rare circumstances, and when appealed within the American Arbitration Association's procedures the appeal is fast and the decision final. In contrast, following a trial in a traditional court the losing party almost always files one or more appeal which usually drag out the results and continue the uncertainty caused by the conflict for years.

The most commonly cited advantages of arbitration over traditional court adjudication of conflicts are:

A. Time: An arbitration proceeding should be faster and more efficient than a traditional judicial proceeding.

B. Cost: For the same reasons that arbitration proceedings should be faster than judicial proceedings, they should be less costly[xv].

C. Higher probability of achieving the correct result: Matters adjudicated by traditional courts are decided by lay juries or over-burdened judges. Often, such persons lack the skill and experience to fully understand the complexities and nuances of a business conflict. Arbitrators, conversely, are chosen by the parties usually for the specific reason that they possess the requisite knowledge and experience fully understand the conflict and the nuances of the parties' arguments. As a result, the probability of arbitrators correctly deciding conflicts is far greater than courts.

D. Confidentiality: Judicial proceedings are open to the public. All documents and hearings in judicial proceeding are public records viewable by all except in limited circumstances, and in those circumstances judges are usually loathe to order confidentiality since public policy favors openness and transparency. In contrast, arbitration proceedings are confidential and only the parties themselves may disclose what occurred.

Mediation

Mediation, unlike arbitration, is not an adjudication of a conflict. Rather, mediation is an effort to bring the parties together to reach a settlement agreement using a neutral intermediary to facilitate the negotiations and guide the settlement discussions.

The principal advantage of mediation is that the parties themselves resolve the conflict. An agreement, palatable to all parties, is reached. As such, the parties control the result and have certainty as to the outcome. If no agreement is achieved, then all that transpired during the mediation remains confidential and the parties proceed with whatever process they wish – courts, arbitration, or some other conflict resolution proceeding.

It should be noted that mediation on the one hand and arbitration or traditional court litigation on the other are not mutually exclusive. In fact, they can be complementary and many conflict resolution strategies (and even some State court systems' rules – Texas in particular) merge the two, requiring mediation prior to a matter proceeding to trial. Typically, mediation is employed either at the outset of a conflict resolution process, or just before the fact finding hearing begins. Sometimes, mediation is employed at both stages if no settlement is achieved during the initial mediation. When mediation is used at the outset of a process, even if no settlement is achieved, many find the mediation worth the time, energy and expense because it resulted in a narrowing of the issues and a more efficient arbitration or judicial litigation process.

A Case for Arbitration & Mediation

In today's world of globalization, social media, and heightened corporate reputational risk, it is the opinion and recommendation of this author that a comprehensive conflict resolution plan should be a part of every company's enterprise risk management program, and that a combination of arbitration and mediation should be the "default" procedures used. This opinion and recommendation are founded on 5 business trends and needs: the increasing complexity of business; "partnering;" confidentiality; speed, and correct decision-making. Each is discussed below.

Additionally, strong evidence exists that effective conflict resolution policies combining arbitration and mediation not only save companies significant money, they build brand and customer loyalty. The experience of Toro Corporation, also discussed below, illustrates this point.

Complexity

The increasing complexity of today's business world is in part a by-product of globalization. One is hard pressed to identify any product today whose raw materials and components were sourced and fabricated entirely in a single country. Today's business reality is that virtually every transaction requires navigating language, cultural customs and practices, monetary issues, logistics issues, and a host of other complexities. As a result, it is the rare business conflict that is "simple" or purely "legal" in nature.

Sorting out the complexities of today's business conflicts more often than not requires a level of experience and sophistication similar to the complexity of the conflict itself. Most judges and virtually all juries lack the requisite experience and sophistication. Arbitrators, however, possess it.

When a matter is first submitted to arbitration, the parties identify the skillsets and knowledge bases they wish their arbitrators to possess. A list of potential candidates is then created who possess the identified skills and experience, and the final arbitrators selected from such list *by the parties.* Arbitration, therefore, better addresses the needs of the increasing complexity of today's business conflicts and the concomitant need for a sophisticated and experienced fact finder and adjudicator.

"Partnering"

Current and foreseeable business trends have multiple companies working together to bring to market and service a product. While sometimes these "partnerships" are structured as formal joint ventures, more often than not they are multiple companies working together in purchaser/vendor relationships. Whatever the structure, the time, energy and cost to form the relationship is often material, and the shared knowledge bases of the companies difficult to replicate with new "partners." Thus, when business conflicts occur, the value of resolving the conflict without destroying the relationship cannot be overstated. The common "scorched earth" tactics of litigation and trial attorneys, while often effective at moving an intensely contentious matter along and helping to "win," has great costs beyond the expense of litigation. Trial attorneys typically do not focus on such costs. Business executives and board directors should.

Arbitration often lessens or avoids the "scorched earth" tactics of counsel. While trending to the same hardnosed litigation tactics seen in courts, arbitration has historically been less contentious then traditional litigation and efforts are being made by the American Arbitration Association and other organizations to reverse this trend. Thus, it is more likely that an arbitrated conflict will be less poisonous than a court litigated conflict.

Meditation facilitates the parties themselves coming to an agreement that is acceptable to both, hence there is no place for "scorched earth" in a mediation. Moreover, there is generally a "give and take" in mediation, and the working relationship between the parties is more likely to be preserved. Put simply, mediation (which is an attempt to amicably settle a matter) prevents the use of such tactics and the animus that results. Indeed, it is not uncommon for a mediated business dispute to be resolved by the parties agreeing to enter into a new deal or expand an existing one.

Confidentiality

Business conflicts, by their very nature, more often than not involve confidential information, be it pricing, profitability, delivery schedules, formulas, or other trade secrets. While traditional courts have mechanisms and procedures to protect corporate trade secrets, as noted above courts are public forums and their documents public records. Public policy dictates against barring public access to pleadings and other court papers, hence litigants must establish to the satisfaction of the judge the need for confidentiality. However, even when documents are declared confidential, it is not unheard of for mistakes to happen in the clerks' and files offices where the norm is openness and not secrecy.

The norm for arbitration, unlike the courts, is privacy and confidentiality. Additionally, arbitration is private hence there is no public policy for openness, and the parties themselves determine what can and cannot be disclosed. Bottom line – if a party to a conflict wants to assure that information relevant to the conflict remains confidential, or even the existence of the conflict itself, then arbitration is the superior forum.

Moreover, in today's world of social media and 24 hour news-streams, there is a constant demand for titillating "news." Often, facts and context are ignored and only headlines – often misleading or just plain wrong – are blasted out onto the wires and airwaves. The importance of confidentiality, and the ability to privately resolve conflicts, cannot be overstated. Arbitration and mediation provide privacy; traditional courts do not.

Speed

The business adage is: "time is money." While there are situations when a party to a conflict does not want a swift resolution, more often than not the opposite is the case. For those conflicts, arbitration and mediation are the preferred choice. As noted above, arbitrations' limited discovery and motion practice, and less technical fact-finding hearings, yield a much higher probability of concluding the conflict more quickly than traditional courts. Additionally, as also noted, appeals of arbitration awards are swift and judicial review is very limited, hence the conclusion of the hearing is the conclusion of the matter. A desire for a swift conclusion of a conflict mandates choosing arbitration if mediation fails.

Correct Decision Making

Perhaps the most significant advantage of arbitration over traditional courts is that the arbitrators almost always possess expertise in the subject matter of the conflict. While some conflicts occur as a result of an intentional decision to disregard a provision of a contract or a law, rule or regulation, it is far far more common that the conflict arose because of a failure of communication or a failure to understand one or more of the complexities of the particular matter. Arbitrators, who have been selected to hear and adjudicate the matter in part because they have familiarity with the subject of the conflict, are much better equipped to understand the essential elements of the conflict, assign blame to the correct parties, and calculate the real damages suffered. The risk of runaway juries swayed by irrelevant or inconsequential matters is eliminated. Similarly, the risk that a judge won't "get it" and as a consequence make bad law because s/he did not understand the real issues is lessened.

Toro Company Experience

The Toro Company, a Minnesota manufacturer of lawnmowers and snow blowers, began an assessment of its approach to product liability claims and customer complaints in the early 1990's. Led by Andrew R. (Drew) Byers, Toro's Senior Manager of Corporate Product Integrity, Toro crafted and implemented a three step program to address the escalating costs and risks of customer litigation. As Buyers explained: "We decided that we wanted to regain control of our money, of our documents, of our reputation and of our time."[xvi] The results: "We haven't had a single corporate officer be deposed in the last 11 years" Byers reported during a panel discussion in 2002[xvii].

A colleague, speaking at the same conference, reported: "Toro's Early Intervention Program, After Six Years, has saved $50M."[xviii]

More facts:

- Before 1991, Toro's average litigation costs and fees were $47,252. During the period 1992 to 2006, the average was $10,607, a 77% a reduction[xix].
- Before 1991, Toro's average per-claim verdicts/settlements were $68,368. During the period 1992 to 2006, the average was $32,232, a 53% a reduction e[xx].
- Before 1991, Toro's average total cost to close a file was $115,620. During the period 1992 to 2006, the average was $42,839, a 63% reduction.[xxi]
- Before 1992, the average lifespan of a claim was 24 months. During the period 1992 to 2006, the average was just 9.8 months, a 59% reduction[xxii]

The three steps of Toro's program are: prevention, early intervention/accident investigation, and pre-litigation mediation.

Toro is not the only company to adopt in-house alternative conflict resolution ("ADR") programs to short-circuit the litigation process and avoid the escalation of conflicts. According to a 2009 article by Drew Mallick published in the *Harvard Negotiation Law Review*,

> "Research shows that 21 leading "blue-chip" companies, including Shell, Royal Bank of Scotland, Merrill Lynch, KPMG, Zurich, UBS and GE, are focusing more on ADR than traditional litigation and "actively reviewing their ADR policies with in-house lawyers citing their most common objective was to embed the ADR culture in their conflict management procedures." Specifically, mediation was the most favored ADR method. . ."[xxiii]

CONCLUSION

The experience of Toro and other companies who have implemented comprehensive, strategic plans to resolve conflicts provides strong arguments for early intervention by persons skilled in mediation and other alternative conflict resolution practices. Every conflict which is settled is a conflict whose risk has been managed. The financial risk of the conflict is contained, as is its reputational risk. When conflicts can't be resolved through settlement, then arbitration is usually the superior process to manage and mitigate the risk of the conflict.

Additionally, as evidenced by the Toro program, strategic and systemic conflict management programs *avoid* conflicts. They not only contain their costs and shorten the time to resolution, but they are used to create new procedures, product reviews, etc. which prevent future conflicts. The result, *enhanced* corporate reputation and enhanced bottom line economics.

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[i] EisnerAmper, "Concerns About Risks Confronting Boards, Fourth Annual Board of Directors Survey", 2013

[ii] Conference Board Governance Center, "Reputation Risk, A Corporate Governance Perspective," by Matteo Tonello, LL.M., Ph.D., 2007, p. 6

[iii] *id.* Also *see* Baruch Lev, "Intangibles: Management, Measurement, and Reporting," Brookings Institution Press, 2001. Lev, of New York University's Stern School of Business, estimates that corporate reputation can comprise more than 60 percent of a company's value.

[iv] *id.* P.W. Roberts and Grahame R. Dowling, "Corporate Reputation and Sustained Superior Financial Performance," Strategic Management Journal, Vol. 23, 2002, pp. 1077-93.

[v] *id.* M. Qoronfleh and R. Vergin, "Corporate Reputation and the Stock Market," Business Horizons, January/February 1998.

[vi] *id.* Cap Gemini/Ernst & Young, Center for Business Innovation (CBI), "Measures That Matter," December 1997

[vii] William Akel, "Protecting your Online Reputation – Walking the Social Media Tightrope," http://www.simpson-grierson.com/conflict-resolution-protecting-your-online-reputation

[viii] Chief Justice Roberts, 2013 Year-End Report on the Federal Judiciary. His Report further noted:

> *Sequestration cuts have affected court operations across the spectrum. There are fewer court clerks to process new civil and bankruptcy cases, slowing the intake procedure and propagating delays throughout the litigation process. There are fewer probation and pre-trial services officers to protect the public from defendants awaiting trial and from offenders following their incarceration and release into the community. There are fewer public defenders available to vindicate the Constitution's guarantee of counsel to indigent criminal defendants, which leads to postponed trials and delayed justice for the innocent and guilty alike. There is less funding for security guards at federal courthouses, placing judges, court personnel, and the public at greater risk of harm.*

[ix] Federal Speedy Trial Act of 1974, as amended, ---USC ---

[x] Per the Bureau of Justice Statistics, Federal Criminal Case database, the number of defendants charged in Federal criminal cased increased 17.5% from 2006 – 20011 (2011 being the most recent data available on the Bureau's web site)

[xi] While arbitration procedures and processes are intended to limit pre-hearing motions and other legal maneuvering which delays proceedings and increases cost, in recent years many litigants have become much more aggressive in their pre-hearing actions causing some to question whether motion practice is in fact more limited in arbitration. The American Arbitration Association and other groups that facilitate arbitration, along with arbitrators, trial attorneys and academics, are actively pursuing and implementing reforms which address these concerns and assure that this trend is reversed while preserving the integrity and fairness of the proceeding.

[xii] It should be noted that while many attorneys claim that the lack of formal rules of evidence expedite arbitration hearings, others claim that they lengthen such hearings because evidence that would not otherwise be heard is presented. Additionally, some critics assert that the recent increases in motion practice and aggressive legal maneuvering referenced in note xii, above, have rendered arbitration proceedings no more efficient or speedy than traditional court proceedings. It is the opinion of this author that arbitration is the speedier and more efficient process when compared to proceedings in the courts of major US cities where trial times are longer and judicial dockets more strained – the same courts that typically hear commercial cases of the type which are the subject of this article. Additionally, the American Arbitration Association and others are aggressively pursuing new procedures and rules to assure that arbitration remains a speedy and fair process.

[xiii] American Arbitration Association Commercial Arbitration Rules, Rule R-45.

[xiv] American Arbitration Association Optional Appellate Rules, Rule A-19.

[xv] While one of the commonly claimed advantages of arbitration is that is less costly, many lawyers conflict such claim because of the fees charged by the arbitrators and what some believe to be the greater likelihood of a court disposing of a case based upon a dispositive motion. Recent studies have generated mixed findings.

[xvi] New Skills and Renewed Challenges Building Better Negotiation Skills; Dealing with the In-House Client; ADR in Asia and Latin America, and More, 20 ALTHCL 137 (2002), p. 13

[xvii] *Id.*

[xviii] *Id.*

[xix] *http://accord-adr.com/Articles.htm*, "Toro's Alternative Conflict Resolution Program," slide 13

[xx] *Id.* at slide 14

[xxi] *Id.* at slide 15

[xxii] *Id.* at slide 16

[xxiii] Drew Mallick, *Harvard Negotiation Law Review*, March 18, 2009, http://www.hnlr.org/?p=120&preview=true#_ftn4

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