TRANSFORMING DISPUTES INTO VALUE ADDED PROFIT OPPORTUNITIES [1]

Submitted By

Dr. Antony D Robb

Sydney, Australia

PRINCIPLES PROCEDURES PRACTICES

First may I thank Professor Jassim Ali Salem Alshamsi, Dean, of the College of Law at the United Arab Emirates University College of Law for his invitation to present this paper to this distinguished audience.

Litigation arbitration, solution-focused negotiation, expert determination, facilitation, and refereeing are growth industries with a discrete litigation finance industry to support them.

What does business expect us to accomplish? This paper suggests that our goal should always be to transform disputes into value added commercial opportunities [2].

Do our arbitrations accomplish this?

---

[2] On the other hand, if it is not – then it should be!

They once did. That was when conducted by respected traders applying industry protocols. Under today's litigation-style practices and procedures – maybe not.

Could we accomplish our goal of transforming disputes into value added profit opportunities? – Yes, we certainly could – and some still do.

How can we transform disputes into value added profit opportunities? – This paper describes a proven effective methodology.

It takes just nine words, to communicate it. The secret is this – *conduct a solution-focused commercial negotiation in an arbitration framework.*

CAVEAT

This paper is about resolving all commercial disputes using processes and protocols that are well-and widely understood, effective and sustainable for all systems of law. A feature of international disputes is that parties often include disputants from more than one system of law. Even where they use the same underlying legal philosophies and legal system they may nonetheless operate under different local law.

The suggested processes are designed to apply to all disputes irrespective of these differences. The recommended processes, avoid controversy, debate and impediments to resolution by -

1. Giving prime emphasis to business solutions for the business problem.

2. By agreeing what business steps each party needs to take to fix the business problem.

3. By designing a business solution that includes every required business step set in a new business transaction

4. By structuring the transaction in ways that allow for different contributions to the solution and that sit side by side in the same transaction without any need for the parties to debate and agree, or even agree to disagree, on legal issues that do not affect them.

5. That allows each party to observe its domestic law in comfort.

The paper is written from the perspective of disputants coming from Common Law countries. Hopefully, people attending the conference from countries operating under the Civil Law will forgive the author for the limitations of the paper that flow from that choice and comfortable with the suggestions while, at times, perhaps puzzled by the documented Common Law observations on them.

The author is significantly ignorant of Islamic Shari' law. Notwithstanding this hopefully temporary limitation he did conduct a resolution process in which seven participants were from a nation that observes the Islamic Shari' traditions and, interestingly, at no stage did anything happen that caused them any discomfort of any kind. Without any prior briefing, the author ensured that no resolution meetings prevented the participants from attending to their prayer traditions. Because the author initiated the opportunities for their traditional observances, the participants responded to him with respect, empathy and total support for the process.

APPEARANCES & REALITIES

Three often hidden or unrecognised influences matter more than we appreciate - surprises; appearances; and *face*.

No matter what our culture or heritage is, "*face*" moves us *all,* profoundly. *Face* can prolong disputes for far too long. Identifying it and finding the way through, is one of the greatest challenges for a negotiator.

Appearances and realities are sometimes the same, often different, and always of the most profound impacts. Appearances are even more powerful than realities. To most people appearances *are* reality. They choose what they "hear", and choose what they do not "see", and act on their selection of facts in priority to all the facts. They believe what they "hear" and "see". They "hear" and "see" what they believe. The negotiator has ninety seconds at the most to break the pattern of thought and action. Selecting, crafting and asking non-threatening questions, can release new thoughts and new perceptions that help the audience "see" their own position differently, and come to a different answer for themselves based on the facts they already know are true.

Debating is the wrong communication method to use. By making the first bid in an auction of competing ideas, the audience is more determined to prove the negotiator incorrect than to fix the problem – albeit on highly advantageous terms. This is one influence of "*face". Skilled negotiators never debate – much less debate to win.*

Debating is highly ineffective and utterly incompatible with successful commercial negotiating.

HIGH COST FOR LOW COMMERCIAL VALUE

Most executives, other than professional litigants, regard litigation and arbitration as being far too strategically and financially expensive. They destroy brand name value in markets far, far beyond the disputants. They distract senior management from managing for today and tomorrow to

manage a yesterday that is gone. The direct professional costs and disbursements do not deliver.

Litigation resolution professionals are unaware of the distaste and contempt that are the clients' true perceptions. The contempt of chief executives of large organisations is such that the chief executive is usually inaccessible to litigation lawyers. This brings domino penalties for the disputants. The direct damaging consequence is that right from the start; the disputants abdicate their control over their own case. They abdicate control over the process, the content, and the outcome. They abdicate control over the litigation tactics to their lawyers, who have no connection with, nor understanding of, their business strategy and the adverse impacts of the unrestrained tactics upon their corporate strategies and brand name. Litigation and arbitration must be compatible with corporate strategy and brand name considerations and subject to them. But they are nowhere to be seen.

We can find the reasons for this by pausing to acknowledge that lawyers "see" their commercial documents as "the transaction" when the documents are absolutely not the transaction. Creating transactions is what happens between the two chief executives and it is not the lawyers' document.

When lawyers craft commercial agreements they assume that commercial dispute resolution is only about *legal rights and remedies.* Commercially effective ***solutions*** are ***never*** about *legal rights and remedies*. In the world of business, commercial solutions exist in the world beyond legal rights and remedies.

When we approach dispute resolution as a purely legal, problem-focused procedure, and not as a commercial solution-focused process some of the most helpful commercial solutions are never considered.

In short, litigation and arbitrations solve nothing and deliver no value. For as long as the arbitration is an exclusively lawyer-driven process, it comes at a higher cost than litigation and does not avoid litigation. Arbitrations do not fix commercial problems. They do no more than debate the legal rights and remedies generated by the commercial problem. Who else but lawyers really care about legal rights and remedies? Executives do not! They are a total waste of resources.

ARBITRATION WEAKNESSES

By themselves, litigation and arbitration are inadequate, intangible, high strategic cost, high financial cost, commercially damaging processes. They subject the disputes, the businesses, the executives, and the participants to a process modelled on the criminal law trial. Each of these items is business-destructive and adversarial -not business - building. We need to really understand the damage we do through our profession.

The number, range, subjects and cost of appeals from arbitrations to courts are significant. They provoke a challenging question, "How relevant are arbitrations?" What do they save? Mr Justice Simon ruled that a challenge to the jurisdiction of an investment treaty (or indeed any international arbitral panel) under section 67 proceeds by way of a re-hearing of the matters before the arbitrators. "The proper approach is to interpret the agreed form of words which, objectively and in their proper context, bear an ascertainable meaning."[3] Commercially unhelpful decisions like this make the cost of the original arbitration hearing, a total waste of resources. It leaves the problem without a legal solution and

[3] Paragraph 19 Czech Republic v European Media Ventures SA (2007) EWHC 2851 (Comm) (5th December 2007).

without a commercial solution. What does it accomplish? It accomplishes nothing for trade and commerce. What does it cost? Significant damage to trade and commerce generally;[4] significant damage to the standing of arbitration in the business world; proof that arbitrations are neither cheaper than litigation nor helpful in resolving the commercial dispute – much less the underlying commercial problems causing it.

Regrettably, one outcome from awards is to embolden the development of novel jurisprudential applications and practices that are both much beloved of lawyers and looked upon by trade and commerce as facile and business-destructive.

Arbitral awards are subject to treaty shopping, tribunal shopping, and enforcement difficulties – even following the improvements made through the New York Convention of 1958.

This paper makes a simple suggestion. Appoint an arbitrator who, after crafting a draft award and before handing it down conducts a solution-focused negotiation to encourage the disputants to make their own deal so that they can continue to trade together in the future and to ensure performance.

If the disputants create a new transaction the negotiator does not hand down an award.

If the disputants do not create a new transaction, the negotiator, as arbitrator, hands down an award.

BUSINESS IS DYNAMIC

Business conditions *always* change over time. When changes are unseen or ignored, financial loss and disputes

[4] In the commercial world generally - outside the parties – as well as at least one party.

follow. Ignore them and they deteriorate into litigation or arbitration. Our strategic goal is to transform disputes from the litigation/arbitration path into amazing profit opportunities.

LITIGATION/ARBITRATION LIMITATIONS

Almost all business disputes are about people and things – *not law*. Judges can adjudicate debates between lawyers about competing legal rights. Judges do not have the legal power to fix business problems. They cannot raise capital; change management; write computer software; treat trauma; or deal with non-parties. Yet these are the stuff of real business problems. The law is not and although courts and arbitrators cannot fix business problems, business can!

HOW BEST? – SOLUTION-FOCUSED NEGOTIATION!

Each stakeholder meets the negotiator one-on-one in a non-adversarial, discrete, safe harbour.

SOME POINTS OF MAJOR SIGNIFICANT DIFFERENCE

- Execution of the resolution process is relationship building. Business depends more on strong relationships than it depends on anything else.
- Debating in court and out destroys relationships.
- The pace of post-war trade governs the pace of post-war recovery.
- Neither litigation nor arbitration can fix business problems. Business can.
- Litigation destroys relationships and business whereas business builds relationships and business.
- Litigation remedies are limited to remedies provided by law – chiefly damages. Business solutions are unlimited.

- Litigation is a one-size fits all process. That one-size-only creates additional new damage.
- Different stakeholders have different legitimate needs. Litigation obstructs separate solutions. Negotiation encourages and facilitates them. Without separate solutions, solutions are not sustainable.
- In business solutions, strategic considerations come first. In litigation and arbitration, litigation tactics come first; and business strategy and brand names are the first casualties.

IT'S SAFE

Each stakeholder meets the negotiator one-on-one in a safe harbour. They can freely and safely, tell it all without damaging (much less foregoing) their existing legal rights; and each party keeps control of the outcome for itself.

IT WORKS

The unique solution-focused negotiation has been successful in many types of cases (including fraud) over many decades by publicly listed companies, government, professional firms (including law firms) joint ventures, and sole traders. It works for small business as for large – for the start-up enterprise and the mature organisation.

WHY USE UNACCOMPANIED LITIGATION AND ARBITRATION THAT FAILS WHEN LITIGATION & ARBITRATION ACCOMPANIED BY NEGOTIATION SUCCEED?

A medical metaphor illustrates the need. In treating infection, when the patient has bacterial infection and the focus is primarily on killing that infection, many medical professionals overlook the fact that antibiotics kill essential beneficial bacteria at the same time as they kill the targeted

infection bacteria. For this reason, patients need supplements to restore the essential, beneficial, bacteria killed by the antibiotics. Patients taking antibiotics must also always take yoghurt (or possibly acidophilus[5]) to restore the essential life-enhancing bacteria. Yet far too few doctors prescribe them.

Similarly with litigation and arbitration. Litigation and arbitration are sometimes essential and helpful. Successful litigation and arbitration may sometimes accomplish benefits. However, when used in isolation, they almost always damage all disputants at the same time. Litigants abdicate all resolution processes to lawyers who neglect negotiation like doctors neglect yoghurt and acidophilus.

Our explicit negotiation objective is to transform the dispute into amazing new commercial benefits. This requires a range of business skills. They appear simple in the hands of the expert but the skills that are essential in litigation and arbitration are disastrous in commercial negotiation. Solution-focused negotiation is very different from settlement and mini-trial processes. It is not about compromise. It is most importantly about relationships, innovation, and explicit business goals.

trade & commerce

Trade and commerce govern the human condition in every community. The greater the economic activity, the higher is the standard of living for all citizens. This principle places a primary obligation upon professional advisors to facilitate (and not frustrate) legitimate trade and commerce. We should work with management and recognize that disputes are opportunities for nurturing worthwhile commercial

[5] The safety of Acidophilus is still undergoing and subject to extensive evaluation.

relationships, amazing opportunities and transactions. We need to abandon our destructive processes.

Commercial disputes are a normal part of trade and commerce. Resolving them is important in maintaining and rebuilding shattered political and commercial relationships. Commercial negotiation is especially helpful in resolving multi-party commercial disputes that embroil large numbers of disputants in complex litigation and arbitration. This being so, while adversarial processes are in train, solution-focused commercial negotiations should be an active, principal part, of the solution therapy.

Similarly, when we litigate and arbitrate we do something commercially lethal. The adversarial processes that saturate litigation and arbitrations also kill relationships that are essential to maximize trade and commerce - a strategic business blunder.

Yet, some lawyers, based upon ignorance of the business significance of business strategy, and being over-concerned with intellectual logic, see their professional obligation is to obstruct solution-focused negotiation rather than encourage it. Many so-called mediation processes are not solution-focused negotiations but instruments for delivering the disputants back to litigation. As with medicine and antibiotics, it follows that when litigating and arbitrating we may have a professional obligation to encourage the disputants and participants to ensure that solution-focused commercial negotiation is part of the solution-focused therapy.

AUTOMATION

Three discrete technological advances working together in tandem have significantly increased trade and commerce. The three elements are-

- The speed of communication through Microsoft and the Internet (and the like).
- The speed of delivery through UPS and DHL (and the like).
- Payment bank to bank or through MasterCard/Visa (and the like).

This means that for all of us, for every individual, the globe is our market place.

DIFFICULT TO BEGIN

How do entities and people begin to resolve commercial disputes? In many situations, a party or indeed, all disputants, may be unable to effectively initiate solution-focused negotiations (much less fix the commercial problem), without external help. National and international Chambers of Commerce can play a significant, pro-active, independent role, in initiating solution processes for commercial disputes. Traditionally they did.

A dispute may arise from the action of a non-involved third party or from the conduct of a party. But whatever the source, disputes happen and need to be treated.

Just as there are a range of treatments available for human diseases, so too there are different kinds of therapeutic solution-focused procedures for managing and fixing commercial problems. Some are very good. Some are quite appalling. Many are misguided. Even contemporary professional wisdom can be misguided.

THE MENU IS NOT THE MEAL

Imagine we are sitting in a restaurant reading a menu. We can "see" and "taste" the meal. We select what we want.

When the food arrives at our table it is not what we imagined. We cannot eat it and return it to the kitchen. The menu is not the meal.

Many people describe litigation and arbitration as the "*dispute".* The litigation and arbitration are ***not*** the dispute. In litigating and arbitrating, the parties do not do the fighting themselves. The fighters are professional soldiers ("lawyers").

Whereas litigation and arbitration devote large chunks of time attempting to force the participants to agree the facts, the facts are almost never the same for the participants – and the differences are mostly legitimate, relevant, and significant for the solution. They are different because the context is different for each participant. It follows that the most constructive process destination is not an agreement but a new transaction. The agreement is not the transaction – in the same way that the menu is not the meal.

THREE ESSENTIALS

Fixing the commercial problem depends upon the solution-focused negotiator encouraging the disputants to do the following three things:

- Accept responsibility for both the dispute and the solution.
- Implement their business strategy in the solution.
- Only use tactics that are consistent with the business strategy and that strengthen brand names.

MONEY & MANAGEMENT

Although accepting responsibility for the dispute is the prime responsibility of management and the Board, dispute-resolving professionals are particularly remiss in failing to accept responsibility to fix the commercial problem that will resolve the dispute. Commercial disputes are never really

about law. No matter what anybody says, they are always primarily about money and management.

Quality sustainable solutions may depend upon new capital. The dispute is often a symptom of insufficient capital, a need for changes to systems or management. Ordinarily, litigation lawyers do not raise capital or undertake business management. This is one of a number of reasons why adversarial resolution processes (including arbitration) are far from ideal for use in commercial disputes. If adversarial processes must be used (as indeed they sometimes must) they always need to be accompanied by commercial solution-focused negotiation. Solution-focused negotiation between the parties can proceed contemporaneously with arbitration[6] and litigation in lawyer-free zones. Several types of solution activities (technical, financial, cultural and legal) that need both declaratory decisions and solution-focused negotiation can be accommodated within the same overall strategic process in which the tactical steps are all consistent with the business strategy. The business negotiations are for businessmen not lawyers.

ONLY ONE PARTY

"It takes in reality only one party to make a quarrel. It is useless for the sheep to pass Resolutions in favour of vegetarianism, while the wolf standing by, remains of a different opinion."[7]

On the other hand, for some disputants *litigation* is the reason for litigation. In 1955, L Ron Hubbard[8] wrote, "*The*

[6] It is also true that mediation and solution-focused negotiation processes need to have access to pre-agreed declaratory technical and legal rulings to overcome some technical or legal impediments to resolution.

[7] Dean Ralph Inge (1860-1954); Outspoken Essays; First Series (1919) The Little Oxford Dictionary of Quotations 1994.

[8] The founder of Scientology.

purpose of a lawsuit is to harass and discourage rather than to win[(9)]*."*

WHEN SPARKS DON'T FLY

Thinking about the philosophical jurisprudential dimensions of disputes, of itself, solves nothing. Let us use a metaphor to illustrate this.

When spark plugs in a motor vehicle do not spark, the car remains motionless.

While we analyze, reflect and debate the legal rights and remedies generated by the spark-plug failure, the car remains motionless.

It is only when new plugs replace the worn-out plugs that the vehicle can spring to life. Yet many litigants are slow to realise that except for well-crafted injunctions, neither litigation nor arbitration can fix commercial problems. Fixing commercial problems calls for physical action – replacing the worn plugs with new plugs.

WHAT DOES BUSINESS NEED?

Business needs to fix the commercial problems underlying disputes. The commercial problems are often the finance, the systems, and the activities. Those who can solve the commercial problem or who caused the commercial problem may not even be parties to the arbitration or litigation.

Let me illustrate with a description of an unreported case.

A sovereign State was engaged in a bitter, long, acrimonious dispute with a college. The State contended that

(9) Quoted by David Marr in the Sydney Morning Herald 19TH 20TH January 2008 at page 29.

the college had committed fraud by making substantial claims for re-imbursement of the costs of providing authorized services to the community it served. The State, having audited the claims, concluded that the claims were false because the college had not provided all the services they claimed. The State asked the police to investigate the fraud. The parties appointed an expert to prepare a non-appealable expert determination and rule on which entity was liable and to quantify the amount due by one party to the other. Each party provided a separate written brief to the expert without giving a copy to the other party. After studying each submission, the expert summoned each party to separate one-on-one conferences. One day before each conference, the expert provided the attending party with a list of written questions that he intended to ask it. The party was entitled to bring as many of its people and solicitors, as it wished, to the session.

The expert thereafter summoned all disputants to a joint meeting. He gave them a copy of his draft determination and invited them to make on-the-spot submissions. They did. He ruled on the submissions, immediately. Corrections to the draft were made where the draft was incorrect; where the submissions were rejected they were documented in the final determination and reasons for rejection documented.

In addition to determining which body owed which body how much money, the expert reported that he had identified the existence of a systemic data classification flaw in the State's data classification system. In short, the State had allotted the same identification number to several different items of the same class. The expert recommended that by allotting a unique, discrete number to each member of the same class, the commercial problem would not continue to happen in the future.

In this case, neither organization had caused the dispute. The system had.

The State and 133 organizations that had processed weekly claims for re-imbursement used the incorrect system for many decades without noticing the flaw. An external sub-contractor had supplied the classification system. No user could identify the systemic flaw because one person needed access to three levels of records whereas each had access to two records only. That was until the third party expert arrived and gathered the facts severally in a manner that both extracted the full story and prevented debate between the disputants about apparently conflicting facts. If debated, the debate would have propelled the disputants to the wrong answer at speed. Meanwhile, both disputants had engaged in decades of destructive disputes.

The process truly fixed the underlying commercial problem recommending the new data classification system. The college's original claim was correct and paid. The actual dispute between the disputants had been acrimonious, lengthy, and destructive. It affected 132 additional colleges.

Every element of the foregoing illustration accompanies most commercial disputes.

The case illustrates the generic flaws in the litigation and arbitration processes. They do not attempt to fix the real commercial problem. They do not focus on sustainable commercial solutions. They cannot do so because they do not really know sufficient facts faced by other disputants. They can only guess and in guessing, they ***over-think*** their assumptions relating to the other parties and by so doing shut out access to the solution. They debate the legal rights and remedies that ***appear*** to be the essence of the dispute according to law – and that commercially are not the essence. Ending an argument by identifying and correcting the real

commercial problem is business - building. Debating to win is business – destructive and does not fix the real commercial problem.

SOMETIMES A HELP SOMETIMES A HINDRANCE

The foregoing illustration demonstrates the proposition that the principles, logic, and processes of the law sometimes help and sometimes hinder commercial dispute resolutions at the fundamental level. They tend to isolate each element of the dispute out of the context of the whole and excluding the key ingredient – the unique business strategy.

They use just one process at a time notwithstanding that it is essential to use more than just one process at a time. They fail to give the disputants what they need. We professionals have a professional obligation to take a fresh look at what we do and how we do it. We need to work together as a team with other solution professionals having a range of skills that they use in a truly independent high-quality expert way.

A NEW ARBITRATION MODEL

This paper recommends modifying the contemporary declaratory arbitration model by combining arbitration with a variety of solution techniques. We need and can use a variety of diverse effective processes in a hybrid process when moving to create a new-transaction that solves the business problems. It is sometimes called, "med/arb." This hybrid process can deliver more valuable business solutions. More solutions of the physical commercial problems, means more first instance resolutions made by the parties themselves and fewer appeals.

It is helpful to think in terms of physicians and surgeons treating the sick and injured. They use a variety of methods,

technologies procedures, and practices at any given time. Think of the modern public hospital bringing to one location physicians, surgeons, anaesthetists, pathologists, pharmacists, prosthesis manufacturers, ambulance officers, radiographers, nurses, plumbers, cement workers, electricians, timber workers, cleaners, accountants, lawyers, publicists, and so on, using their unique specialized skills in a harmonious approach to the total human being under the leadership of one lead professional. Nothing essential is withheld by partitioning processes and allowing the patients access to only one skill set at a time. The emotional security of lawyers may need fortifying for the profession to grow in this way. When we partition dispute solution processes by using just one technique at a time, we impose limits to what we can accomplish and thereby make it impossible to deliver what business needs. We restrict and frustrate trade and commerce when the principal need is to facilitate it.

NEGOTIATORS negotiate & NEVER DEBATE

There is a world of difference between negotiation and debating to win. Lawyers in court can accomplish a favourable award only if they debate to win and do win. On the other hand, negotiators *negotiate.* Trade and commerce call for negotiation not debating to win.(10)

To succeed, traders work together *as a team* to maximize the quantum and quality of trade and commerce. The adversarial skills of debating to win are essential in adversarial proceedings and highly damaging to commercial relationships, successful trade negotiations, and future business. Adversarial

(10) If the force of this observation is obscure, Tom Hopkins and Zig Ziglar have written insightful books on professional selling. They are practical, highly educational easy to read and have a strong human, intellectual, and psychological foundation.

processes are the least effective way to negotiate sustainable solutions for commercial disputes. The fixed litigation style arbitration and mediation models that begin by using the litigation summons as the basis for discussion are commercially indistinguishable from litigation. Through lawyer dominance, the arbitration of today is more a debate about legal rights and remedies than the *commercial process for resolving disputes that it originally was.*

THE STAKEHOLDERS[(11)] UNIQUE NEEDS

EACH DISPUTE AFFECTS EACH OF THE STAKEHOLDERS IN THE DISPUTE, DIFFERENTLY. THAT IS BECAUSE -

- EACH OF THE STAKEHOLDERS HAS DIFFERENT NEEDS.
- EACH OF THE STAKEHOLDERS NEEDS STAND-ALONE SOLUTIONS FOR ITS' INDIVIDUAL NEEDS.
- WHAT EACH STAKEHOLDER DOES AFFECTS AND MAY BE DRIVEN BY ENTITIES BEYOND THE DISPUTANTS. SOLUTION-FOCUSED NEGOTIATORS CAN DEAL WITH THEM. COURTS AND ARBITRATIONS AS WE USE THEM CANNOT. ARBITRATIONS CAN HAVE AN ARCHITECTURE THAT PERMITS, FACILITATES AND ENCOURAGES IT.

(11) Some significantly affected stakeholders are not parties to the dispute yet and enter the dispute or be beyond the reach of any party by the actions or inaction of the disputants.

SOLUTION-FOCUSED NEGOTIATION CAN DELIVER THE INDIVIDUAL SOLUTIONS NEEDED BY STAKEHOLDERS SEVERALLY, WITHOUT DAMAGING THE LEGITIMATE NEEDS OF ANY OTHER STAKEHOLDER.

FREQUENTLY, CONTEMPORARY RESOLUTION AGREEMENTS ARE AGREEMENTS ABOUT YESTERDAY. THAT FORMAT CAN ACCOMMODATE DIFFERENT NEEDS BUT IS OFTEN COMPLEX AND INELEGANT.

WHEN THE PROCESS RESULTS IN A NEW AGREEMENT FOR TODAY AND TOMORROW, ACCOMMODATING THE SEVERAL DIFFERENT NEEDS OF MANY DISPUTANTS IS MUCH EASIER AND MORE ELEGANT THAN AN AGREEMENT ABOUT YESTERDAY.

SOLUTION-FOCUSED NEGOTIATION CAN BE USED TO AVOID LITIGATION AND ARBITRATION OR TO PROCEED CONTEMPORANEOUSLY WITH THEM.

self examination

We have a fundamental professional responsibility to measure, control, and constantly improve our professional work. The questions that arise from this obligation include –

- How do dispute professionals really know whether their work is beneficial?
- Can we measure our results?
- What measures apply?

WHAT SUCCESS LOOKs LIKE

Commercially, there are five readily accessible, useful measures of the quality of solution processes namely:

1. Is the actual physical commercial problem fixed?

2. Did it cost more to fix the facility than it cost in the first place? Did the extra money provide additional value improvements?

3. Did the disputants spend more on the dispute process itself, than the cost to fix the facility?

4. Have the disputants restored and strengthened their relationship so that they will continue to conduct trade and commerce regularly in the future?

5. Did the solution cause a new commercial problem?

Are these measures familiar? Do we always use them? Do we ever use them? On the other hand, do we measure conflict solution success, solely in terms of a favourable declaratory ruling?

The powerful messages underlying these questions alert us to the business reality that a favourable ruling from a judge or arbitrator may be both a forensic victory and a commercial disaster. In addition to significant direct and indirect costs of the process itself it may be both a tactical victory and a strategic business-destructive long-term commercial disaster and -

6. Leave the actual physical commercial problem, damaged and unusable.

7. Worsen the relationship between the disputants so that they cannot continue to conduct trade and commerce. When this happens, brand name damage is not limited to the parties themselves but extends throughout the market place in which the disputants generally trade.

8. Cause a new commercial problem.

9. Did the process cost more than the repairs?

THE NEGOTIATION TO NEGOTIATE

In hybrid processes, one or more professionals may undertake a number of different procedures, within the arbitration. They may declare and impose an obligation; negotiate a sustainable solution; quantify a sum of money; rule on an appropriate technology and so on. For simplicity and elegance we use the description "the negotiator". The negotiator observes the following effective protocols –

1. A critical element is for the negotiator to ensure that there are no surprises at any time in the process by signalling in advance, what will happen next.

2. The negotiation method comprises one-to-one negotiations between the negotiator and each participant separately.

3. The negotiator immediately breaks the prevailing pattern of thought and behaviour by exploring the universe beyond the dispute.

4. The negotiator immediately introduces a new strategic solution focus, focusing all managements on the hidden profit opportunities that their dispute provides.

5. The negotiator does not carry information from one party to another unless essential for the new transaction. There is rarely a need for this.

6. Through a solution focus on explicit new goals; profit opportunity mindsets work fast; energise everyone to fix the commercial problems; the solution removes the need to argue; future continuing new business is highly likely. By creating prospects of future business, it eliminates claims for consequential commercial loss.

7. The negotiator details in writing the unique the process to which all participants subscribe in writing and agree the process cost.

FIRST FORMAL STEPS

The foregoing preliminary steps have significant, beneficial, impacts upon the ambience and outcomes. The unique points of difference in the following format are specifically to minimize opportunities and platforms for destructive activities and behaviour. When participants (not limited to the parties themselves) act destructively, litigation and arbitration can cost more than the value and original cost of the physical facility.

Solution-focused dispute professionals ensure they immediately establish a mutually empathetic solution focus with all participants. After the formalities, the process moves to the first formal stages. The five first steps can be summarized as follows.

First, even before knowing what the dispute is about, the arbitrator physically inspects the subject matter of the dispute.

Second, each party prepares on just one page, a single sum direct physical damage monetary quantification of the *direct costs of physical restoration only*, and the full original cost of each affected facility and the full direct cost of physically fixing each commercial problem. Only the arbitrator/mediator receives a copy – not the other disputants. These quantifications enable all involved to focus everyone on how much the disputants can afford to invest in the solution costs. Prepared in this way the reports may be either similar or very different. By not circulating the reports, they more effectively tell the arbitrator where to find the solution and they do not generate unhelpful debate. Common law lawyers

tend to demand that disputants should agree the facts. This approach derives from the criminal law. It is highly abrasive, time consuming, irrelevant and counter-productive to resolution. In commercial disputes, the facts are mostly legitimately different for each party and there is no benefit in insisting on factual agreement on all facts. This problem is much more a Common Law problem than a Civil Law problem where litigation processes and the roles of the judiciary are very different from the Common Law processes and judicial participation.

Third, the disputants prepare written descriptions describing not more than three principal ***commercial needs*** they have and on a second sheet, not more than three commercial wants they would like to have if they can accomplish them, also. NOTE: The commercial needs should not include reference to legal rights and remedies. Each description to be not more than three lines for each of needs and wants (nine lines in all). *The arbitrator and not the other disputants receive them upon calling for them*. *This format minimises debating and transforms the approach of all participants from a commercial problem mindset to a solution focus.*

Fourth, the arbitrator thereafter designs a solution-focused solution process, designed to help all stakeholders accomplish a sustainable commercial solution by creating safe harbours by the signing of the agreements.

Fifth, the arbitrator looks a second time at the site of the commercial problem. The two visits are invaluable. An experienced commercial dispute resolver can often identify where a sustainable commercial solution is without, at that stage, knowing what it is.

The intentional use of the words "*disputants", "stakeholder", and "participant"* recognise the non-disputants that have a legitimate interest in the solution.

The commercial dispute resolver may have to fix issues involving non-party "participants". This is so, when solution depends on resolving the associated commercial problems as a condition precedent to resolving the dispute actually referred. In commercial disputes, the "participant" governing solution may be a non-party bank, financier, insurer, or other formidable influence.

THE POWER OF HUMAN BEHAVIOUR

Human behaviour, *face,* concern for the reaction of others, the influences of depression, paranoia, Asperger's Syndrome, debt, tax, family political job security are powerful influences present at every dispute.

RESPECT FOR "FACE" ACCOMPLISHED WHAT LAW COULD NOT

For a long time, China and Japan engaged in a heated dispute over the ownership of gas reserves in the East China Sea.

The negotiators accomplished a significant breakthrough using diplomatic solution-focused negotiation resulting in the solution for sharing and jointly exploring the disputed resource. The huge forward step was only possible by implementing the solution without requiring China to cede ground on territorial or legal questions. If Japan had demanded that, a solution-focused agreement documenting territorial entitlements and legal rights the dispute would not have been resolved!

By training and education, we prefer to document everything. We assume that when it is, no commercial

problems arise. Lawyers fear someone suing them in negligence, if they fail to document. If the assumption were universally true in life, then black letter law would work – and it does not! It asks too much of lawyers practicing their profession to consent to the more laissez-faire approach of the diplomats. Had the influence of law prevailed in the Sino/Japanese territorial dispute, the lawyers would have inured themselves from suit in negligence and the cost to the world would have been continuance of an underlying territorial dispute that would have inevitably lead to war.[12] Debating the law would have obstructed solution and increased ill will. Focusing on the solution allowed relations to rebuild, restore, and ***save face***. Consumers and citizens of both countries are winners. Law can prevent solutions and can facilitate solutions. Choosing the right way at the right time accomplishes most.

DO ADVERSARIAL PROCESSES FIX OR MAGNIFY DISPUTES?

Historically, arbitrations were designed to be significantly simpler and much more informal than litigation. They relied on industry protocols. The arbitrators were respected industry leaders. The processes were largely informal. The disputants performed awards without the need to enforce them because industry members voluntarily honored them. They were based on long-established industry protocols that all participants were familiar with and practiced every day.

This form of arbitration sometimes survives. But, to the great cost and detriment of trade and commerce, access to independent non-adversarial, non-litigious, commercial

[12] There was an excellent report of this dispute in the Financial Times of London January 19/January 20 2008 at page 5 The reporters were David Pilling in Tokyo and Mure Dickie in Beijing.

arbitration has become much more difficult to negotiate. They were the heart of many important commercial dispute solution activities of the Chambers of Commerce. They included confirming house facilities for checking the quality, and quantity, of the goods shipped both prior to shipment and re-checking on arrival at their destination.

Over time, the legal profession largely took over arbitrations and transformed them into adversarial processes that mirror litigation in every respect. These models incorporate all the worst features of litigation and have themselves lead to significant litigation growth as the arbitral proceedings and awards have been appealed in judicial forums and/or simply not enforced.

These issues need to be considered by commercial lawyers when crafting and advising on setting up cross-border commercial transactions and businesses.

Many commercial disputes are litigated. As we all well know, litigation is expensive, slow, and uncertain and fixes nothing if it is not injunctive. We live in a world with many diverse systems of law and cultures. This generic reality suggests we need be reserved about approaching dispute solution as a process of the law because that decision in itself can create new disputes that have nothing to do with the substance of the commercial problem.

Even if there be no conflict of laws, finality and enforcement are extremely difficult to ensure internationally.

From earliest times in the history of the world, there have been less formal less expensive more effective solution techniques that existed side by side with the courts. The conflict resolvers were usually *not* lawyers.

The actual thought processes generally used by highly competent businessmen and the actual thought processes

generally used by highly competent lawyers is different. This fundamental difference has benefits and detriments for businessmen seeking solution for their commercial disputes.

Before embarking upon litigation or arbitration the disputants themselves should seriously consider all commercial aspects of doing so.

ESSENTIAL SOLUTION SKILLS

Conflict solution skills are distinct from lawyer skills.

Arbitration panels should include the experience and required skills to design and negotiate sustainable commercial solutions. This requires a panel of arbitrators with diverse skills.

The College of Law of the UAE University at Dubai describes the purpose of the conference in the following terms–

The conference subject is highly important for international trade practices all over the world as it emphasizes the development witnessed in the field of providing commercial solutions for commercial disputes in order to prove reliable to local and international investors and enhance relationships.

This paper focuses attention on a hybrid approach to arbitration that combines arbitration, expert determination mediation and solution focused negotiation in a single process. It maximizes the strengths and benefits of the declaratory power of arbitration with the power and strengthens and relationship building commercial benefits of solution-focused negotiation conducted in a safe harbor.

A wide range of participants from countries with diverse cultures and systems of law are participating in this conference including representatives from Indonesia, India, Malaysia,

Japan, and China, the International Chamber of Commerce, Abu Dhabi Centre for Commercial Arbitration and arbitration organizations in the Gulf Cooperation Council countries and the Australian Centre for International Commercial Arbitration.

The appointment of an arbitrator to make declaratory awards that are not subject to appeal can greatly help resolve disputes. This approach guarantees that there will be a decision. By combining arbitration with solution-focused negotiation, the arbitration rules empower *the disputants themselves to make their own deal. Appeals are unnecessary*. The format encourages the disputants to make a deal – especially when they consider that, they may not like the award!

The hybrid model welcomes all legal systems and opens doors for people of all cultures. The Sino/Japanese solution mentioned above is a recent example.

CHOOSING ARBITRATORS

This is one of a number of very troublesome weaknesses in international arbitration. Who should choose? How should a panel be created? Who should decide who the Chairman will be?

In its origins, arbitration was almost always a lawyer-free process; conducted with a minimum of formality; by experienced traders; who were respected in the trade and commerce communities. It was straightforward and respected by virtue of the quality and standing of the arbitrators; and the simplicity and straightforward process they used; and the simple effective action they selected to reliably fix the real commercial problem.

Some arbitration proceedings adhere to those traditions. In selecting the arbitrators, conducting the process with a

minimum of formality, responding to the physical needs of the situation and adherence to industry protocols, while remaining less concerned with legal rights and remedies throughout the process. They continue to succeed in delivering the help that the trade and commerce communities need. Indeed, they help diffuse political disputes between nations – as we see in the recent Sino/Japanese solution.

They have much to offer and deserve our energetic attention.