Mediation gets results for in-house lawyers

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MEDIATION IS A POWERFUL TOOL TO USE AS PART OF an effective risk-management policy. It is of great help to in-house lawyers, who constantly need to manage risk and keep costs down. When there is an operational or systemic breakdown, the in-house lawyer will look for a speedy solution to disputes with as little disruption to the day-to-day running of the business as possible, whilst restoring working relations and profit margins. Furthermore, for a business to stay ahead in a competitive market and fill investors with confidence, it needs to have a sound comprehensive risk-management policy that will proactively head off dislocation and therefore save costs.

Mediation has a wide range of outcomes and effects. It can be moulded to suit any business style and its flexible nature makes it the ideal tool for any commercial lawyer, as it can be as commercially creative as you want. The scope of any mediation process can be widened to include any underlying issues and matters, not just the initial dispute, and achievable results are not just confined to monetary settlement. Examples of this include a change in behaviour by an employer to an employee, a promise to work together in the future, or an agreement to share and exploit confidential information.

Once a settlement is achieved, often with a signed agreement, then the terms are binding and enforceable by the courts. Even if mediation fails to obtain an immediate agreement and the dispute is ultimately litigated, the issues will have been narrowed, which will have a positive impact on the outcome and length of the litigation.

In-house lawyers are not confined to a narrow spectrum of law and they have little time. They are expected to cover the legal issues that arise in the day-to-day running of a business. Contracts need to be drafted for suppliers, employees and management. Potential and actual litigation can emerge at any time. In this environment, an in-house lawyer can be reactive or proactive in their approach.

A reactive approach deals with disputes as they arise. One disadvantage of this method is that the in-house lawyer only responds to a problem or dispute when consequences have already started to take place.

A proactive approach analyses why there is a problem in the first place by actually going to the area of the business affected and looking for opportunities to head off disputes. This approach examines whether there is likely to be a problem in the future. For example, if a company has a high propensity to fall out with a particular client, the proactive in-house lawyer will be aware that a dispute is almost certain to arise. Even if the proactive in-house lawyer is unable to head off a dispute, mediation provides a real means to obtain early resolution of any litigation.

Mediation is effective in such situations as it can be used at any stage of a dispute. In particular, it is a key tool in resolving disputes at a very early stage (proceedings do not need to have been issued). A benefit of mediation is, apart from the probability of settlement, an early identification of underlying problems. This enables the in-house lawyer not only to understand the current dispute, but also to identify ways of avoiding such disputes in future. A proactive in-house lawyer will therefore use mediation.

This article will now examine three examples of areas where in-house lawyers can be proactive in using mediation to get results.

EMPLOYMENT LAW

The Employment Act 2002 (Dispute Resolution) Regulations 2004 set down the minimum standards expected for internal dispute resolution policies. The regulations require the employer and employee to sit down and discuss a grievance. If a mediator is involved, as an independent third party, the dispute is more likely to be resolved.

The DTI published an independent review on 21 March 2007 concerning current workplace legislation and its impact on business and employees, recommending that 'employers and employees solve more disputes in the workplace... by implementing and providing early dispute resolution... through greater use of in-house mediation'. Consultations are now underway on achieving this objective.

Employment disputes often involve handling sensitive information concerning age, religion or sex. The confidentiality of the mediation process encourages parties to express themselves without the fear of repercussions. This works both for the employer who wants to avoid bad publicity and for the employee who would not want their fellow workers and the outside world to know their intimate details.

The informality of mediation nurtures a less defensive and blaming environment, where settlement is more likely to occur. This is critical in employment disputes, where it can be one person's word against the other. Bitterness and resentment do not build up to the extent they might through the drawn-out processes of litigation and of the

employment tribunal. Mediation provides a neutral environment for the parties before views become entrenched.

A dispute between employer and employee may be a misunderstanding. This can easily be picked up if both sides have had the opportunity to sit down and listen to each other. A solution is much more likely to be reached through parties working together as opposed to working against each other.

Mediation often only lasts a day or two, thus decreasing the chances of the deterioration or termination of an employment relationship. It is also often a cheaper alternative to litigation. This is particularly noteworthy in an employment context, where there is no cap on damages for discrimination. In such circumstances meditation is a safer alternative, even if it means factoring in the cost of a fully designated person trained in mediation. The DTI report published in March 2007 states that the average cost to business of defending employment tribunals is around £9,000 per claim. This does not include the cost of lost business and opportunities. Further, there are significant non-financial costs to employees, such as stress and damaged work prospects.

Mediation's transformative approach is particularly applicable to employment disputes. This seeks to 'transform' the position of disputing parties by empowering them to understand their situation and that of their opponent. The main outcome is recognition of the situation rather than the sum settled for. This may be just as much of a result as a settlement figure. A valued employee is more likely to remain in a post if their relationship and position within the company is transformed and understood, as opposed to just being bought off. A claimant may put a higher value on an apology or change of policy than a financial reward. Some situations are about behaviour rather than money. A settlement agreement in mediation can provide for an apology, a positive job reference or a change in policy or behaviour.

To make sure that mediation is considered and applied, in-house lawyers should insert a standard dispute resolution clause incorporating mediation into all employment contracts. The in-house lawyer should work alongside the HR department to ensure mediation is written into the company's disciplinary and grievance procedures and is used when needed even if there is no formal complaint, thus enabling issues to be tackled as soon as they arise.

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COMMERCIAL CONTRACTS

All commercial lawyers look to insert dispute resolution clauses into every commercial contract they draft, from construction to franchise agreements.

Mediation or an alternative form of dispute resolution can be exercised without such a clause, but only if the parties can agree independently of the contract. However, it is best practice to incorporate a dispute resolution process as a term in the contract, thus ensuring that parties are forced to go down a predetermined route to maximise the chances of settlement.

A clause requiring mediation alone can be inserted, which will ensure mediation is used. However, 'escalating dispute clauses' are more common. Parties are led through a series of steps from negotiation, through mediation and finally to arbitration or litigation. The advantage of an escalating dispute clause is that a series of steps are stipulated and parties are presented with a road map to settlement. Every party to the contract will know the steps to be taken if there is a dispute, and there is less likelihood of an enraged manager storming into their lawyer's office demanding to sue.

In the absence of an escalating dispute clause, if negotiation failed, parties would be left to move straight into litigation or arbitration. When such a clause is included in the contract, the parties have several alternatives. The courts have enforced such an approach. However, an escalating dispute clause must be certain in its drafting and effect, or it may fail for uncertainty.

A straightforward consumer contract may contain a referral to mediation or an ombudsman, whereas more sophisticated contracts may stipulate more detailed steps. Simplicity is the key. If negotiations break down, there is often a straightforward referral to mediation as the next step. At this stage parties should be reminded that the people involved can be changed. Alternative negotiators can bring fresh perspective and set aside any personal feelings that may have arisen. The final step is whether to choose arbitration or litigation. Each has its strengths, but the escalating dispute resolution ›

clause will recognise that either method will be only be used if parties have tried to settle before.

INTELLECTUAL PROPERTY

In 2005 the government commissioned a review of the IP system. Recommendations followed in February 2007, stating that alternative dispute resolution, in particular mediation, should be favoured due to the high costs of IP enforcement in the courts.

In-house lawyers deal with many IP issues, ranging from ensuring any acquisitions by the company have all the IP rights promised, to providing specific warranties in the sale and purchase agreement, and branding and patent disputes.

Disputes surrounding IP can place the preservation of confidentiality at a premium. This is because product information and branding are critical to the profitability of a company and dangerous if they fall into the wrong hands. Mediation is confidential. It provides in-house lawyers with a powerful tool by swiftly resolving such disputes in an environment conducive to sorting out a workable solution that both sides can live with.

A company's brand or slogan is an important financial asset and should be protected accordingly, but even so, registration of trademarks is voluntary. If a trademark is not registered then there is no statutory right to sue for infringement. In such circumstances the proprietor must look to the common law for protection. Such 'passing off' actions can take a considerable amount of time and money to pursue and cause great uncertainty over the outcome for the business. Mediation proves very effective in such IP disputes, as it provides in-house lawyers and management with the opportunity to control uncertainty in an environment that can give full effect to commercial and business needs. For example, a trademark dispute that turns on an analysis of certain combinations of shapes and colours is often inherently uncertain in outcome. That uncertainty is removed by a mediated settlement, which itself may have been driven by marketing, not legal, issues.

CONCLUSION

A profitable and successful company will want to avoid litigation as far as it can. Litigation, which often clouds judgement with emotion, should be replaced by sound business acumen. During mediation, parties are immediately in control of the outcome, without writing off the money that is spent on court battles.

The common theme in the three examples above is that there are great benefits available through the early use of mediation even as the dispute arises, the analysis of the causes of failure and the deployment of mediation as a tool of rescue when a dispute is in litigation. Mediation will obtain a result for any business.

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