ALTERNATIVE DISPUTE RESOLUTION – CREATING VALUE OUT OF CONFLICT

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Abstract:
The paper is deemed to present the advantages of resolving a dispute or a potential dispute throughout negotiation. This alternative of dispute resolution to legal proceedings in front of the law court may be considered as more favorable to the parties in conflict, from an economical perspective. Therefore the scope of the paper herein is eventually to establish that a conflict may generate value by negotiation.
Further to the conclusion that by negotiation, a conflict may be solved more efficiently, the objectives of the paper are to identify (i) the role played by the legal counsel in identifying the values thereto and (ii) the mechanisms leading to such effect, as well as (iii) the intrinsic connection between law and economics in an adequate approach of the negotiation throughout a commercial dispute. Not lastly, the paper has as objective identifying the key elements of a settlement agreement that are reflecting the added value.

Key words: *negotiation, dispute, alternative, value, settlement*

Introduction

For obvious reasons, the dispute resolution is generally analyzed in relation with litigation. As lawyers are most of the times the designers of the entire dispute solution process, the most reachable instrument foreseen by them is the one allowing them control and the one mostly related to their command of law. Such approach may not be the most valuable to their clients that may lose by entering into conflict with the counterparty the personal interrelating enabling the further business relations.

Consequently, with the cope to achieve added value, the alternative dispute resolution approaches may be taken into account as well, assessing on a case by case basis which one would be most appropriate in each case.

The alternatives to dispute resolution are, in an order corresponding to their strength and enforceability, arbitration, mediation and negotiation. The Romanian Civil Procedure Code also provides the conciliation as a distinctive procedure to be followed prior to any litigation of commercial nature in certain cases that are brought to the attention of the ordinary commercial courts. Such conciliation procedure is not however a distinctive alternative *per se*, as it only indicates the necessity of an amicable resolution attempt from the claimant instead of providing the means that are availed to the parties in dispute. This means that both negotiation and mediation may be used in reaching the result and only the minimal formal proofs of summoning for a conciliation meeting is not equivalent of using the very means of alternative dispute resolution instruments.

Choosing the proper alternative in settling a dispute is also a key element in determining the resolution strategy. Sometimes the very alternative to litigation is not reasonably conceivable. Such are the situations in which at least one of the parties are mostly concerned to either clear its name (for an instance in an intellectual property infringement), or want to make a powerful statement prone to discourage other possible claims against the company that may cast an unfavorable light upon the company itself (such being the case for instance of the large multinational companies in a tort case).

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Other times, the arbitration is a proper instrument. Not only that sometimes the arbitration is mandatory due to an arbitration clause previously agreed upon by the parties in dispute, but the more facile and less complex in proceedings the process may be. In practice the arbitrators are retired judges that are reluctant to apply strict procedural rules in favor of a more substantial overview of the case. The time limitation also may help in electing this course.

Mediation is a process that implies, as well as arbitration, a third party in settling the matter. Mediation presents the undeniable advantage to enable an added value outcome in opposition to litigation. In principle is also less expensive than litigation, nevertheless it never provides an absolute solution to the dispute and there are no guarantees that a mediated conflict might not be eventually brought to the court by a discontent party.

Finally, the negotiation is the instrument more likely to bring to the parties the added value that is able not only to save money and time but also to enable the further continuation for business relations, not altered by resentments that always arise from litigation and arbitration.

Therefore, this extremely important issue of relating dispute resolution to the alternatives the parties may have in order to create value out of conflict and mitigate losses and even achieve gains is to be analyzed from an economic perspective: the paper present the key role of the legal counsel integrated in identifying the added value thereto and also the mechanisms leading to such effect. Such approach enabling the link between law and economics presents the manner of turning by negotiation a commercial dispute into a settlement agreement reflecting the added value.

Alternative Dispute Resolution – Creating Value Out Of Conflict

Legal disputes initiate with the grievance perception, sometimes with communications and end to a resolution that may be negotiated, mediated, arbitrated or litigated. There are of course the grievances that not necessarily lead to resolution due to the reluctances of the party that has suffered the nuisance to further pursue claims against the other. It is nevertheless almost certain that even not duly resolved, a dispute does not lack the capacity to generate added value but, most of the times, as the claiming party may want to discontinue the relations with the other, is event worse than the situation where satisfaction may be obtained by resolving the conflict[1].

For instance, in United States of America most cases settle[2] due to the fact that the lawyers are well trained in order to explain to their clients the risks and opportunities ensued by the dispute. A legal valuation is crucial to such purpose. Each lawyer assesses the chances to win the case and the assessment exercise may go further to the point that each piece of evidence is counted in; each element contributing to the success of its case is accounted for. Neither the assessment nor the other objective instruments availed to both the client and the lawyer are able to provide certainties, nevertheless, the result of valuation represents the grounds for the standpoint they are to assume and the election of a certain dispute resolution method.

The valuation in the settled cases results from certain elements that, combined, indicate the substantive endowments (i.e. the applicable laws and how they influence the value of the conflict by litigation), procedural endowments (what procedural incidents are applicable and how are likely to affect the value of litigation), transaction costs (the expenses incurred, including lawyers' fees and legal taxes), risk preference (how do the client's preference is likely to lean towards litigation or settlement)[3].

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[1] "Trying to Resolve a Dispute? Choose the Right Process" in *Negotiation, Helping You Build Successful Agreements and Partnerships,* Program on Negotiation at Harvard Law School, volume 12, no 8, August 2009, p. 5-6, "Negotiate or Litigate" by Deepak Malhotra in *The New Conflict Management: Strategies for Dealing with Tough Topics and Interpersonal Conflicts, Special Report*, Program on Negotiation at Harvard Law School, 2009, p. 1-4.

[2] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, 101-107.

[3] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, ibid.

Hence it results that all these elements, including some that are of subjective nature and imply a good knowledge of the client's decisional process and the emotional side of the case, are required in order to even consider the possibility of advising on the very matter of election.

Contrary to this hypothesis, the case where a party is forced not to settle takes into account the same principle and criteria as described in the prior situation, in a formula that is most likely to have a larger amount of uncertainty about the outcome of litigation. The distributive elements of the bargaining tend to split between the parties in conflict in the Zone of Possible Agreement (for instance arguments in the vicinity of "you have no actual case", "we can hurt you worse than you can hurt us" and, most of all, "we'll fight to the bitter end" may be decisive where the information about the substantial and procedural – still slight chance! – endowment are scarce and enable the perception influences alter the decision).

Moreover, the perception shifting by using of arguments such as "we'll see you in court" is less likely to lead to settlement, as both parties adopting extreme positions have unreasonable perception about the chances in court. Their antagonism may be avoided only by disclosing certain information, the risk exploitation being absolutely necessary for the benefit of an added value result.

In principal, a lawyer may advise its client that information disclosure is an expensive endeavor and presenting the information to the unlimited exploiting of the counterparty is necessary to be strictly monitored (e.g. the fact that the client may need in the future the similar service or goods that are currently provided by the counterparty is sensitive information that may be used prudently). Moreover, the lawyer depending on the fee that is agreed with the client, the lawyer may be inclined to protract the litigation.

The main challenge in alternative dispute by negotiation is how to transform the actual conflict into a settlement agreement that ideally includes an added value thereto. From this perspective, the negotiation of a dispute very much resembles to a contract negotiation as the final result of the bargaining is the settlement agreement, an agreement having certain particularities to the other contracts that may be commercially negotiated.

The litigation dynamics leading to settlement is explained by the fact that a settlement is more rapid than any litigation consequently reducing the expenses, and also by the fact that the litigation is not oriented towards adding value thereto. There is no contest to the fact that litigation may also bring to light certain advantages and value-creating opportunities. They are most of the times overlooked by the fact that the litigation is less conducted by the client, as during the negotiation are expected to lead, but by the lawyer whose litigation strategy even if submitted to the client for approval and input, most of the times is simply endorsed without actual censorship by its client.

Therefore, in such circumstances the lawyer's tendency to focus on the legal matters (over substance and procedure) as natural as it may be considering its formation as a legal counsel will leave little room to the business aspects that are overcome.

The system of legal negotiations involves multiple relations between each party and its lawyer as well as between the lawyers and clients in terms of legal culture (implicit expectations and impact at the bargaining table)[4].

Sometimes the negotiation itself is a target towards which the parties direct, and the subject of negotiations. The negotiation of how to negotiate is a common phenomenon for adversarial proceedings as well. Where a parallel scenario is depicted in order to emphasize the positive effects is effective to such scope. Most of the lawyers may be inclined to describe the alternative of opening proceedings in the court. Such mistake is often immediately sanctioned by retaliation or even civil action from the counterparty's lawyer.

A productive process of discussing the law is more efficient: as most of the times the process of negotiation is led by the lawyers as a veritable boxing match, by attacks, fight backs an retorts, the

[4] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, 4-5.

dynamics of the negotiation, even if arguments well presented and explained, they are not likely to lead to a satisfying result. The unlikely situation where one lawyer simply assumes the other party's lawyer position is not to be accounted for.

It is then self evident that the lawyer are influencing the negotiation process to a degree sufficient to obviate the essential in negotiations, that is identification and putting into effect the value that would lack in a litigation. As a related observation, it becomes that wherever the legal discussion are extended to a degree that indicates the business issues are overwhelmed by the legal approach, no swift efficient solution is on its way. Consequently, the legal added value may be of use solely provided that a reasonable ratio is maintained within the equation. I estimate that negotiations where legal issues exceed 50% of the issues in discussion are to be subject to drastic re-evaluation in order to design a new path enabling the business elements to intervene and generate the additional value.

When proceeding to negotiation, some assumptions are limiting and lead to less value, others are more helpful. Also, sometimes the mere discussion of benefits and costs of the alternative approaches is recommended in order to identify the added value in the transaction. If the most efficient solution may be reached by negotiation, however the counterparty is reluctant to proceed to negotiations due to various reasons it has to be made a distinction between the case in which they provide the grounds for denying bargaining, and the case where such reason is presented. Adopting a problem-solving attitude towards the resolution process is not only the key to the success but also makes possible the disclosure from the other party and therefore establishes a process that supports the problem solving approach[5].

The value creating opportunities reside in reducing the transactional costs and trading on differences, as shall be presented hereinafter[6].

The sources of value in a conflict may be either: differences between the parties, noncompetitive similarities, economies of scale and scope. The conflicting parties are individually interested to identify such elements that may be used as a golden bridge towards the other, as follows.

Differences are often expressed in different resources of reciprocal interest, different relative valuation (what is most important to one of them is of less relevance to the other) – nevertheless such difference may not be induced by manipulation or similar as it would become of no effect to the added value concept -, different forecasts, different risk preferences (the risk intolerant party may always lose gains counterpart to predictability comfort), different time preferences and so on.

Also, from the distribution of noncompetitive similarities (such as a common interest) added value may be found. This may result of the basic lower interest to increased legal costs entailed by the litigation to more complex issues. Either production or consumption can create value, as well as the effect obtained by the same elements to achieve a different scope, as further explained by Mnookin, Pepper and Tulomello.[7]

Moreover, the negotiation indicates how the added value may be distributed between the two parties. The added value consists not only in reducing the costs of dissolving the conflict but most of the times is also in the form of the proceeds of a new venture of the parties equilibrating the possible gains of one in constructed gain of the other. At the basic level, the distribution of the gains starts from a simple formula. For instance, if A claims 1000 and expects to win in a percentage of 90%, B is willing to pay 100 and estimates it has 10% chances to win the dispute in court, than the formula

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[5] Michael L. Moffit and Robert C. Bordone, *The Handbook of Dispute Resolution*, Cap. 18: Negotiation, p. 279-303, Jossey Bass, 2005.

[6] Robert C. Bordone and Gillien S. Todd, "Create Value out of Conflict" in *Negotiation, Decision-Making and Communication Strategies That Deliver Results*, Newsletter from the Harvard Business School Publishing, 2005.

[7] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, 13-18.

takes into account their Reservation Value, that is their Best Alternative to a Negotiated Agreement[8] by considering the alternatives, in such a value. The calculation enables a Zone of Possible Agreement that is in the range of the two Reservation Values. That zone may be divided between the two of them into identifying a solution.

Obviously, the techniques that may include asymmetric information, strategic opportunism and hard bargaining tactics are as well utilized during the course of negotiation, in order to maximize profit.

However, the largest source of value is always ensued by mitigating the transaction costs in both time and money and dampening the strategic opportunism. There is a classic negotiation example in which an intellectual property infringement regarding a software product expedited the settlement proceedings as the claimant realized that not only a long litigation but also protracted bargaining may render the intellectual property solution that was making the object of dispute irrelevant in the perspective of the technology advance. In such a process, there are taken into account the so-called "lemon" problems where one party knows the value of the settled issue whereas the other party is not aware in terms of precision and also the moral hazard resulted from the asymmetric information in the possession of the two participants to the settlement.

Another issue that has to be solved in an adversarial commercial negotiation is managing the tension, a particularity source of difference in relation to the other contract negotiation situations.

In strict relation thereto, there is the possible case where the counterparty is not willing to identify a value during negotiations, acting as a tough negotiator holding strictly a certain position, in which case various techniques may be used in order to alter such approach towards the value finding perspective[9]. One solution resides in the extended effort of identifying value and advantage not only form the self perspective but also from the perspective of the counterparty.

It has to be stressed out that although a win-win negotiation, the negotiation regarding a settlement agreement holds the intrinsic fear that the object of bargaining is a problem that may not be resolved. Such approach, besides being one not aimed to succeed and provide the added value both parties should be looking for, it is also less likely to save time and money. It is a case that may never occur if the parties properly prepare negotiations offering BATNA (i.e. Best Alternative to a Negotiated Agreement) to the other in a reasonable fashion. The apparently counterproductive time spent in identifying the opportunities the other side afforded on the occasion of preparing the negotiations could be proven eventually as time well spent: from the other party interests' may result most of the solutions in negotiation. Knowing and improving ones BATNA is however mandatory for a result that allows satisfaction throughout the process. So are interests, resources and capabilities.

An instrument that may be always useful in identifying the adequate solution for achieving value is that any decision may be taken only further to realistic assessment and constructing a joint decision tree[10]. In fact this renders necessary an in depth analysis from the legal and economical perspective where all the hypotheses are properly developed so the risk level may be mitigated to a degree enabling a decision in knowledge.

Also, as the new research has pointed out[11], a well constructed apology is underrated in adversarial negotiations. The mediation also may be designed using not only some of the most common negotiation techniques but the strategic steps to be followed.

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[8] Roger Fisher, Bill Ury, Bruce Patton, *Getting to Yes: Negotiation Agreement without Giving in,* 2nd Ed. 1991, 100.

[9] "What do I do when they Don't Want to Create Value" in *Negotiation, Helping You Build Successful Agreements and Partnerships,* Program on Negotiation at Harvard Law School, volume 13, no 3, March 2010, p. 8; E. Wendy Trachte-Huber, Stephen K. Huber, *Alternative Dispute Resolution, Strategies for Law and Business*, 1996, 51-67.

[10] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, 233-240.

[11] "Why Your Lawyer Could Be Wrong, Avoid Lawsuits with Apologies" in *Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 13, no 6, June 2010,

Eventually, the value is created by the parties alongside the bargaining process, solutions being available by any techniques, including brainstorming, that include sharing of information, lacks ownership and valuation of the idea emerged. When the solution is difficult to be found, setting a principle (e.g. it is equitable to consider the problem rather a risk to be split than a liability to be solved by one of the parties) is a useful tool. Equally, establishing norms to be followed or simply changing the game may be of aid.

Nevertheless, it has to be equally pointed out that the most powerful incentive for the two parties in conflict to achieve an added value transaction is the possibility acknowledged by the both to carry on the trading relations. Where by circumstantial coercion the most favorable situation for them is to resume or continue business added value is rendered inherent. Such conduct of negotiations allows a good grasp of reality and mitigates the possibility that the aspiration level is out of frame of actual possibilities.

Also, it is possible to combine the alternatives at hand. As explained in the literature[12], the combination mediation and arbitration allows a practical approach to have the best effect. In principle, parties commence mediation that is non binding and gives the liberty to expedite the process and find the added value maximizing the result. If the parties observe such a first step without the foreseeable success within a short timeframe, they may address the arbitrator/s with the scope to have a mandatory solution that is less controlled by them and more influenced by rules. As arbitration is more formal, its best usage is considered to have occurred where the lack of restraint in procedure has lead to failure.

One question that has recorded various solutions is whether the very bringing of a lawyer at the mediation table (and the arguments is equally valid for the negotiations as well) might hamper the mediation process. As it results from the recent literature[13], the presence of lawyers may contribute to the success of the mediation as the key legal elements are used as a rule during the caucuses and their structuring is crucial for an expedited process.

The early settlement should be the parties' primarily goal, the odd case of failure not being able to be taken into account seriously. However, challenges to the early settlement may always occur where the parties have established different dispute resolution strategies with their lawyers and, sometimes, different retribution systems. The key in such situation is that the client must have the decisional string available (in opposition with the litigations where the lawyers traditionally hold the decisional string). The common fear of the business people that the lawyers "kill" the business may be applied *mutatis mutandis* to the dispute resolution negotiations as well, having as link the fact that in both cases there is an added value to be pursued and protected.

The settlement agreement is the final objective where a dispute is resolved. The alternative of holding fruitful negotiations that may even lead to a new agreement without addressing the initial dispute is not desirable at all. The actual resolution of a dispute, regardless the alternative elected has to include a release of liability, indemnification or similar, depending on the nature of the issue in dispute. In the absence of this cornerstone of the adversarial negotiations, the new structure that is build will lack the foundation and the former nuisances may be reactivated, provided that the statute of limitation may not interfere with the claim.

Consequently, the key elements for the final document concluded by the parties in the course of negotiating throughout a dispute are the ones necessary for such document to be considered a binding settlement agreement.

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p.4; *Mediation Secrets for Better Business Negotiations*, Top Techniques from Mediation Training Experts, Special Report, Program on Negotiation at Harvard Law School, 2010, p. 4.

[12] "Resolve Disputes with <med-arb>, Consider a Practical Approach" *in Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 12, no 11, November 2009, p. 6; "Make Most of Mediation" in *Negotiation, Helping You Build Successful Agreements and Partnerships,* Program on Negotiation at Harvard Law School, volume 12, no 10, October 2009, p. 1-4.

[13] "New Findings on Creativity, Mediation and Emotion" in *Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 13, no 4, April 2010, p. 4

Conclusions

As a conclusion, several elements emerge from the analysis of the topic in discussion: the alternative dispute resolution is an efficient, cost effective solution to the litigation and involves in most of the times a negotiation process. Even where the mediation or arbitration is elected as process of resolving the conflict, negotiation techniques are mostly used. Consequently, the identification of the most appropriate resolution process is crucial in obtaining a good result.

Even though the litigation may in exceptional cases bring an added value to the resolution (that may consist in mitigating the costs, identifying a future partnership or other advantage availed to both parties) negotiation and, in subsidiary, mediation may be considered superior in an economic approach of the problem solving the dispute. The instruments afforded to the parties in solving the dispute are to be observed by further research, in the context of the procedural instruments of mediation and conciliation that have not been properly implemented in Romania, due to little awareness of the benefits of the alternative dispute resolution solutions.

One of the instruments that reflects the advantages resulted form negotiation is the settlement agreement, including all the elements that have been established by the parties further to the bargaining process and, if not valid such an instrument, the dispute itself may not be considered as supervened.

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