YOUR SAY

Your Say will be a regular column written by members of other professions, who are independent of Coudert Brothers. This issues' Your Say is written by Steve Lancken a 'Dispute Consultant' at Resolving Matters in Sydney. Steve is a qualified mediator and arbitrator. He recently gave a seminar for the Hong Kong International Arbitration Center on compulsory Alternative Dispute Resolution.

Alternatives to Litigation

A decision to litigate needs to be made in the context of not only the likely result if successful or the loss if nothing is done to confront the issue. Other possibilities can and should be considered.

A good lawyer will assist you not only with the Court case but with the application of those many alternatives. There are no reasons why the alternatives cannot be applied at the same time as you prepare for litigation.

Alternatives to litigation include:

- * Negotiation. As JFK said, "let us never negotiate out of fear, but let us never fear to negotiate". Good lawyers seek ways to strengthen your negotiation position.
- * Mediation. Appoint a trusted "wise counsel" to guide the negotiations and help you and the other party match a negotiated resolution with real needs and interests. Proven track record in many jurisdictions.
- * Expert appraisal. Let an expert give both parties an independent opinion that may assist the disputants to come to terms.
- * Expert determination. Agree by contract that an expert will decide often hearing limited submissions from the parties.
- * Mini Trial. Have the lawyers or middle managers make a presentation to the Chief Executives of the parties and then start negotiating.

* Arbitration. Like hiring you very own Judge but with the advantage that the world does not need to know the result (may be important if you lose).

There are other processes that combine some of the best features of those set out above and that have been successfully applied to commercial, insurance and construction disputes. All have advantages and disadvantages. The secret of success in managing disputes is choosing which case is best suited to which process.

As a general rule of thumb the closer the relationship the more likely it is to be suitable to less adjudicative processes such as negotiation and mediation. That is not to say that mediation is not worthwhile where there is unlikely to be any relationship in the future.

What is needed is an open and inquisitive mind. Do not expect that litigation is inevitable even after the breakdown of relationships or after you are wronged by a complete stranger. The assumption that the other party cannot learn or be convinced about the merits of a sensible resolution is dangerous. After all your litigation opponents probably think the same of you. Are they correct in their thinking or are you always open to sensible discussion and resolution?

Try something different you may be surprised?

If you wish to contact Steve Lancken please email us at: resolver@coudert.com and we will pass on your inquiry.

COUDERT NOTES

Damages for Passive Smoking - In Sydney

On 2 May 2001, in what is believed to be a world first, a women was awarded damages of A\$450,000. 00 (HK\$1,845,000) for passive smoking by a Supreme Court jury in New South Wales, Australia.

Although the women had never smoked a cigarette in her life she developed throat cancer and sued her employer, for whom she had worked as a bar attendant for 11 years. In awarding damages it was found that the employer had been negligent by exposing the women to unnecessary risk of contracting cancer by forcing her to work in areas where smoking was prevalent.