

ADR Trends For 2008

The Editor interviews **The Hon. William A. Dreier**, Partner, Norris, McLaughlin & Marcus, P.A.; **The Hon. H. Curtis Meanor**, Member, Podvey Meanor Catenacci Hildner Cocozziello & Chattman; **Lee Rosengard**, Stradley Ronan Stevens & Young; **Peter J. Smith**, Connell Foley LLP; **Eric Tuchmann**, General Counsel and Corporate Secretary, American Arbitration Association.

Editor: What factors should corporate counsel consider when establishing an ADR agreement with a business partner?

Dreier: Do not forget that the other party is, and hopefully will remain, a "business partner." There are three resolution stages: negotiation, mediation and arbitration. Most disputes are resolved by negotiation.

If negotiation is unsuccessful, a neutral third-party mediator can assist parties to recognize their long-term interests. Corporate counsel can help with advice and the assembly of relevant information. Only if mediation is unsuccessful should the parties proceed to arbitration.

Corporate counsel should negotiate an ADR agreement that will: avoid time consuming and expensive litigation; agree in advance to meaningful documentary discovery; dispense with unnecessary interrogatories, depositions and lengthy motion practice; choose an arbitrator to resolve issues quickly, and choose arbitration counsel who will share the company's goal that the process does not cost more than the dispute.

Meanor: *Governing Law:* Under the Fed-

eral Arbitration Act it is certain that the grounds for attacking an award are extremely narrow. By specifying the governing law, an award is much less likely to be a compromise, irrational, arbitrary, unreasonable or otherwise of the "split the baby" variety.

Rules of Evidence. It might be a good idea to specify that the Federal Rules of Evidence shall apply. Exceptions can be made, such as direct testimony being presented by affidavit with the right of the opponent to require that the affiant be produced for cross-examination; hearsay would be acceptable if corroborated by otherwise admissible evidence and, if the *Daubert* case is to be applicable, then it would perhaps be wise to specify that a *Daubert* hearing be held in advance of the arbitration so that in case of an adverse rul-

ing, the parties and their counsel would be prepared to proceed in light of the ruling.

Scope of Review. The U.S. Supreme Court has granted certiorari in a case to resolve the circuit court split concerning whether parties to an arbitration agreement may expand the grounds upon which a court can interfere with arbitration award beyond those narrow grounds set forth in the governing statute. In light of this, it might be appropriate for an arbitration agreement to include that an award may be set aside for being contrary to law, arbitrary or unreasonable and without evidentiary support in the record and any such provision should be limited to district court review.

Rosengard: Corporate counsel should consider the question of arbitration versus liti-

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