***Integrating Legal, Business, and Mediation Experience***

***Into Pre-Suit International Commercial Mediation***

***and***

***The Advantages of Pre-Suit International Commercial Mediation***

**by**

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**Background**

A corporate client from South America came to my office to discuss a multi-million dollar international dispute it had with another company in Europe and India. My client manufactured and sold parts to a European company, and the European company installed the parts in its engines. The European company did not pay the outstanding balance because the parts allegedly caused problems to the engines. On the other hand, a separate engineering company in India designed the engines, and my client believed that that the engine problems were caused by engineering defects. My client wanted to sue the European company for the remaining balance owed, and the European company threatened to counter sue my client for the alleged damage caused to the engines.

Given my experience as a seasoned international commercial litigation attorney, I was able to quickly ascertain and understand that my client’s case was legally complex with heavily contested international jurisdictional issues, numerous threatened legal counts, and countless affirmative defenses. In addition, several other related legal actions were anticipated: if the European company would have counter sued my client because the parts allegedly caused problems to the European company’s engines, then I (on behalf of my client) would have filed a cross claim against the company in India because the design defects caused the engine problems.

Although my client had funds to litigate the case, the funds were limited and my client also had orders for other parts to fulfill for other vendors. As such, my client was confronted with a dilemma: whether to allocate its money to litigate the case, or fulfill the orders for its other vendors.

Many lawyers, while knowledgeable in the legal field, understandably lack actual day-to-day and executive business experience. Consequently, corporate officers and directors may often be presented with a dilemma: whether to accept an attorney’s conservative legal advice, or simply proceed with established (albeit risky) executive business practices. Under such circumstances, it is important for an attorney to possess and combine both legal and business experience to obtain a balance, and thus propose reasonable real-world business solutions that provide a calculated level of legal protection to his clients.

Given that I was also an Executive Vice-President and General Counsel of an international manufacturing company, my client sought both my legal and business advice as what it should do. An attorney should not recommend litigation automatically. Rather, an attorney’s recommendation should depend on the unique facts of each case. Under some circumstances, filing a lawsuit immediately is warranted. However, under the particular circumstances in my client’s case, I recommended trying to settle the case by attending mediation *before* filing a lawsuit.

**Introduction**

Pre-suit mediation has five key advantages: (1) pre-suit mediation allows parties the opportunity to settle their case early and thus attempt to avoid costly litigation; (2) pre-suit mediation is confidential; (3) pre-suit mediation can be less adversarial; (4) pre-suit mediation can save business relationships; and (5) even if a case does not settle, pre-suit mediation is still important because a party has a better understanding of an opponent’s strengths and weaknesses, as well as its own strengths and weaknesses.

**Preparing for Pre-Suit Mediation.**

Before discussing the benefits of pre-suit mediation, it is necessary to first discuss the importance of preparing for pre-suit mediation. Attending mediation, even pre-suit, requires preparation. Just as a soldier should never go into battle without a well-conceived battle plan, gun, and ammunition, an attorney also should never go into a mediation without a commanding understanding of the law and applicable facts, a strong and clear legal strategy, and supporting evidence. The amount of preparation depends upon the circumstances in each case. Under my client’s particular circumstances, a noticeable amount of preparation was required given the complexity of the international dispute.

**Pre-Suit Mediation Allows Parties The Opportunity To Settle Their Case Early And Thus Attempt To Avoid Costly Litigation.**

Although this advantage is self-explanatory, it should also be mentioned that, in addition to saving money, settling a case early also saves a company’s resources and morale. Discovery, interviews, inspections, and other related litigation tools, often pull people away from their work, thus leading to lower productivity. In addition, prolonged litigation can also impact company morale, which in turn can lead to unintentional lower quality control. Accordingly, settling a case early can save a company more than just money.

**Pre-Suit Mediation Is Confidential.**

Although laws in each country differ, parties can (and must) agree that the international pre-suit mediation shall be confidential. Damaging admissions made during a mediation by one party cannot be disclosed to a court by another party. Similarly, privileged documents that are presented during a mediation by one party also cannot be submitted or disclosed to a court by the other party. Confidentiality is a crucial component of mediation because it encourages more open communication and dialogue, which in turn can assist the parties reach a settlement.

**Pre-Suit Mediation Can Be Less Adversarial.**

A lawsuit, as well as related court documents, contain allegations against another party, and those allegations, and their supporting arguments, often escalate the adversary relationship between the parties. However, although parties are understandably in an adversarial relationship even during a pre-suit mediation, their relationship is generally not as adverse as it would be at the time of trial. Accordingly, reaching a settlement is more possible when the parties are less adversarial.

**Pre-Suit Mediation Can Save Business Relationships.**

I believe that one of the most important advantages of pre-suit mediation is the opportunity to possibly salvage a business relationship between the parties. A court judgment generally will state how much money one party must pay the other party. However, rather than actually exchanging money, the following example briefly illustrates how parties in a mediation can agree to virtually any creative concept.

Example: If a company has cash-flow problems and cannot pay an outstanding balance immediately to a vendor for services rendered, then a vendor can continue to provide services to the company for a longer duration and charge a higher amount. In this example, the difference in the higher amount will not financially cripple the company, and while the vendor would recoup its outstanding amount owed over a longer duration, it is still a win-win for both parties and they both continue to do business together and continue to make money.

**Pre-Suit Mediation Provides Each Party With A Better Understanding of Each Other’s Strengths And Weaknesses.**

A dispute that is not settled in a pre-suit mediation is not a failure – it is an advantage. Important unknown facts may be discovered which can allow an attorney’s legal strategy to evolve into a more powerful one. Just as importantly, if the revelation of such facts exposes weaknesses, then an attorney can revise his legal strategy and advise his client accordingly.

**Conclusion**

Commercial litigation can be costly, time consuming, and mentally draining for a company. This is especially true for international complex commercial litigation cases. An attorney must carefully evaluate the unique facts of each case. While some cases require the swift filing of a lawsuit, other cases may warrant a pre-suit mediation, which requires adequate preparation, but which provides several advantages. In addition to being an attorney specializing in International Complex Commercial Litigation, and a former Vice-President of an international company, I am also a certified mediator and have extensive experience mediating these types of international cases. Accordingly, I combine my legal, executive, and mediation experience to provide innovate and strategic solutions to my corporate clients around the world. I applied these same experiences to the facts of my client’s case and recommended that we participate in a global, international pre-suit mediation with the European and Indian companies. Although confidentiality precludes me from disclosing the names of the companies and what occurred in the mediation, I can state that it was successful, and all three of the companies entered into a global settlement that was fair to everyone, and especially favorable to my client.