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Interview with Noah Hanft: The Future of ADR in Business

Noah Hanft is the President and CEO of the International Institute for Conflict Prevention and Resolution (CPR). He previously served as General Counsel and Chief Franchise Officer for MasterCard, where he was responsible for overseeing legal and regulatory affairs, public policy and compliance. While at MasterCard, he spearheaded the successful resolution of major litigations through mediated settlements. He currently serves on the boards of the Legal Aid Society and the Network for Teaching Entrepreneurship (NFTE) and is a member of the Council on Foreign Relations. Mr. Hanft has a LL.M. from NYU School of Law, a J.D. from Brooklyn Law School, and a B.A. from American University.

How has the public perception of ADR changed over the years? Specifically, how has it changed among lawyers versus among the general public?

A meaningful change has occurred over time as the public's perception of ADR has evolved. Indeed, there is a proliferation of mediation in different settings whether it be business, community, divorce, labor, etc. Today not only does the public recognize the value and importance of ADR, but lawyers as well. What they share in common is a recognition of the importance of ADR and a desire to sustain long term client relationships. That recognition takes into account the fact that they want to be focused on what their clients care about, which is finding the best solutions in the most efficient and effective manner possible.

What do you find to be the core cause of business conflicts? Is there a "best practice" for approaching this kind of conflict? If so, please explain.

Business conflict is inevitable. Sometimes it is caused by honest disagreement and sometimes by wrongful conduct. For the most part it is driven by the reality that differing interests will very often give rise to different perspectives, creating friction and the potential for conflict.

I have a strong belief that conflict is often caused by the failure of parties to have a clear understanding as to objectives, outcomes and processes. Clarity in a contract and a genuine meeting of the minds is critical. That is why I believe best practice calls for agreements that clearly articulate the expectations of the parties on the overarching business issues, as well as how potential business disagreements can be avoided and, if unavoidable, how they can be effectively managed. A focus on early dispute identification and resolution is increasingly becoming the hallmark of successful companies. I often say that your adversary of today (even if it is your current competitor) might be your licensee, joint venture partner or even acquisition target of tomorrow so avoiding fractious and expensive legal battles is good business.

To the degree that you can disclose, please describe the most difficult conflict you have encountered. What made it so difficult? How did you approach finding a resolution? Were you successful?

At MasterCard I dealt with many conflicts each of which was difficult for different reasons. They included conflicts with competitors, governments, the merchant community, and occasionally customers. As you would expect, I can't provide detail on the many confidential mediations and other negotiations I encountered, but I'm happy to discuss the commonalities between them and approaches for dealing with them in general terms.

The most difficult disputes tend to be those where either or both parties feel they were

wronged and there is a matter of principle involved in addition to dollars. Just like disputes are inevitable, so is emotion. What is critical to dealing with challenging disputes is to do several things. First, it is to find the right time and process under which the parties can dialogue. Generally, I have found that the earlier in the process a dialogue is established the better. In most situations the use of a trained mediator is the best way to go, especially where both principle and emotions are at stake. Next, finding the right mediator is extremely important and, in making that decision, one must take into account the type of dispute it is, the need for subject matter expertise and many other factors. That is why organizations like CPR, that have carefully vetted highly qualified mediators and arbitrators, play such an important role. Approaches to resolution tend to be very case specific. Having said that, as a mediator I have found that regardless of the nature of the dispute, the mediation process is most effective when the parties embark on the process with openness to finding solutions and avoid locking in to litigation positions. In this respect, I think the key is for all parties (not only the mediator) to truly take the time to explore in a genuine way what the interests are of all parties (as opposed to the purely legal arguments) and ultimately to find ways to address those interests.

I believe that if we are as zealous about finding solutions as we tend to be with respect to fighting lawsuits, success rates will be astonishing.

You worked with MasterCard for over 20 years in various legal counsel positions. What role does ADR play in the day-to-day work of in-house counsel? How have you seen the role of ADR change over the past 20 years?

ADR skills play an important role for all in-house lawyers. All lawyers handling disputes and litigation must understand and know how to effectively utilize ADR. In many mediations the most important participant is the in-house counsel, particularly where relationships between outside counsels are extremely adversarial and/or strained.

At MasterCard, I renamed the litigation department, the “Dispute Resolution” team, to emphasize the importance of a solution focus. Perhaps the most important role of in-house counsel is what I refer to as “preventative lawyering.” Skills that allow in house counsel to identify potential disputes and utilize mechanisms to address them early on are invaluable to corporations.

When I first began practicing as a corporate counsel at MasterCard (well over 20 years ago) there was little reference to ADR. Twenty years ago we were just beginning to utilize mediations, but candidly it was then more of an afterthought as opposed to a focus and objective as it is today. Today the companies that are leaders in their industries and have a focus on innovation and customer service see ADR as an important element of an integrated commercial approach.

As general counsel did you encourage the use of arbitration? Why or why not?

As general counsel I viewed arbitration as one alternative for disputes arising from cross border transactions. My decision would take into account a number of factors including the counterparty and what jurisdiction we were doing business in. Of course, that pre-dates CPR’s new rules for administered international arbitrations which came into effect at the end of last year. Because of the benefits they bring to the international arbitration community from an efficiency, expense and integrity perspective I would have encouraged the use of CPR arbitration generally, but particularly in the case of international transactions. I also was, depending on the magnitude

and importance of a matter, not always supportive of using arbitration because of the absence of a right of appeal. But now that CPR, as well as other providers, offers an appellate right that would be less of a deterrent. I was never a fan of party appointed arbitrators. The notion of arbitrators feeling some degree of loyalty to the party that chose them always gave me pause. That is another reason why I believe CPR and its screened selection process, by which parties can suggest arbitrators, but they are appointed by CPR without the arbitrator knowing which party designated them, provides a basis for encouraging utilization of arbitration.

A recent article was released in the New York Times that was heavily critical of corporate arbitration. Do you think criticism of corporate arbitration, especially that related to class actions, is warranted? Why or why not?

I think any adjudication process is subject to abuse, but I don't see that as a basis for condemning the practice. I have yet to find a general counsel that did not find themselves in a situation where abusive litigation practices, including lawyer-generated class actions, caused major anguish and often harm. And, of course, as we all know in so many of those cases, consumer benefit is absent from the equation and the only beneficiaries are counsel.

I did find the New York Times article to raise some significant concerns regarding abusive arbitration practices, but found the presentation somewhat slanted with both the abuses of litigation and the benefits of arbitration buried deep at the end of the articles. But perhaps most important, I think, is the obligation of providers to ensure its rules and practices are above reproach. CPR arbitrations have very clear due process requirements and it is no surprise that none of the examples provided were CPR cases.

Some have said that many companies don't imagine relationships ever souring, which is why so the dispute resolution clauses could often be tighter. Have you found that more companies are contemplating dispute resolution mechanism when drafting agreements now compared to in the past?

An increasing number of companies, particularly CPR members, are treating disputes with a commercial mindset and as a component of doing business. As indicated earlier, progressive companies are recognizing the inevitability of disputes and, as such, a thoughtful approach to disputes incorporating contract language providing for a multi-step approach to contractual disputes is becoming the norm. These agreements generally call for a negotiation process followed by internal escalation. Failing a resolution, the next step is for a mediator to be utilized. There are many variations on the theme, but in most instances, should mediation fail, the next step is some form of adjudication, arbitration or litigation. CPR has in its toolkit an "economical litigation agreement" allowing for the parties to elect litigation, but control the process by agreeing on streamlined litigation in advance of disputes.

Do you find that mediation is gaining importance in cross-border disputes? If so, how? For either answer, why do you think this is?

Absolutely. In Europe, the EU Mediation Directive is encouraging member states to foster the development of mediation and in jurisdictions such as Brazil, where courts are terribly congested and delays of many, many years are commonplace, mediations are proliferating. There is, unsurprisingly, an increasing number of commercial transactions extending across borders and

due to the added complexity of adjudicating disputes between foreign parties, mediation provides obvious benefits. This is particularly the case where there is an interest in preserving business relationships.

What do you see as the future of international arbitration?

As commerce between nations will undoubtedly continue to grow so too will the importance of effective dispute resolution mechanisms. We at CPR see international arbitration as a very clear growth opportunity, which is one of the reasons we went through a major effort to get leading practitioners and users to work with us in developing and implementing innovative and practical rules and protocols. The future of international arbitration is, I believe, very bright and can be that much more compelling if the concerns about arbitration are addressed. Those concerns relate to expense, efficiency and the integrity of the overall process and it's been a priority for us to find workable solutions to those concerns, which we are confident we have done.

You recently took the position as the President & CEO of the International Institute for Conflict Prevention & Resolution. How has the work with CPR differed from your work with MasterCard? How is it similar?

The work is similar in the sense that managing people and a budget requires the same skill set and rigor whether it is with a nonprofit entity or a public corporation. It differs in a very predictable way in that the two organizations have very different missions and objectives. MasterCard is appropriately focused on maximizing shareholder value, while CPR exists to pursue its mission, which is to continually seek better ways to prevent, manage, and resolve disputes. One ironic similarity is that CPR is all about finding better alternatives to traditional litigation, while MasterCard is focused on electronic payments as a superior alternative to cash. What I enjoy about both roles is that they call for making strategic decisions, getting involved in public policy issues and staying abreast of legal developments. I am fortunate to have worked with smart, strategic, and high integrity folks at MasterCard and have experienced the same quality of individuals in the CPR organization.

I know CPR is headquartered in NY. Does its work extend to Canada and elsewhere?

Absolutely. CPR is a global organization seeking to fulfill its mission around the world. Many of our member organizations have major operations in Canada and we have law firm members based in Canada as well as those based elsewhere with offices in Canada. A strategic focus for CPR in 2016 is growing its presence and initiatives in Canada. To that end CPR will be holding a Regional Meeting in Toronto in June focused on how in house counsel and outside counsel can best collaborate in driving effective dispute resolution. This has been a consistent area of focus for us and of interest to our members. Of course, we will also cover developments in Canada on the ADR front. CPR has been active throughout Europe as well. A good example of our work is the newly released CPR European Mediation & ADR Guide for in house counsel which is an informative and practical resource to help corporate counsel understand and realize the benefits of ADR and the many resources CPR can provide.

How have you drawn on your experience with MasterCard in your new role?

At MasterCard I learned the importance of both strategy and execution and of having a

strong customer value proposition in order to be successful and the need to communicate it well. At CPR today we've expanded our member benefits in terms of tools, training and incentives and experienced a resulting dramatic increase in membership.

What advice would you lend to law students looking to make ADR a significant part of their careers after they've finished their education?

My advice to law students and young lawyers regardless of their perceived interests is to be open to experiencing different types of practices. For example, getting involved in an international arbitration early on in your career is, at a minimum, great experience and might serve to stoke your interest in establishing a practice. I strongly believe that increasingly dispute resolution skills will only become more important and serve to increase the value you bring to your clients, your firm, and your individual development.