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ADR – PART OF THE DEAL NOT AN AFTERTHOUGHT

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INTRODUCTION

The development of the Alternative Dispute Resolution (ADR) Masters programme being delivered by Bursa Uludag University in Bursa, Turkey exemplifies the success that can be achieved when stakeholders act co-operatively.

In February 2020, at a Bursa Chamber of Commerce and Industry (BTSO) conference in Bursa, a question was raised regarding a contractual dispute. The contract signed by the entrepreneur business owner contained a dispute resolution clause, but the company management had no concept of how it was to be operated. The company found itself with not just a contract dispute but also a dispute as to interpretation of the dispute resolution clause, a double whammy. ADR, or dispute avoidance, dispute management and dispute resolution should be thought about right from the outset of any commercial relationship. The need for a practical, pragmatic approach is clearly required.

Disputes are disruptive and costly. The direct costs of commercial claims resolved through litigation, for example, are estimated at approximately $870bn globally, according to the US Chamber of Commerce. '*Corporate Disputes Jan – Mar 2020.*' In addition, the time spent by management could well double the true cost to business.

1. DISCUSS and NEGOTIATE

The first step in dispute avoidance will always be for those on the ground to discuss potential problems that may be looming in the background and work out ways around those bumps in the road before they erupt. Differences of opinions between those with day-to-day management of a commercial project can degrade into issues of personality. A mechanism is

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required to take the heat out of such a situation by facilitating an objective discussion at a more senior level. The civil law concept of negotiating 'in good faith' has much to commend itself in this scenario.

2. CONFLICT AVOIDANCE BOARDS (CAB)

Accepting that there will be moments of tension in any substantial or long-term contract, the provision of a Conflict Avoidance Board will smooth the way through the project. Involving neutrals at the inception of a contract areas that might cause problems can be anticipated and by choosing appropriate experts who are involved with the contract from its start to conclusion the CAB can act rapidly with an intimate knowledge of the parties' original concept progress of the project, advising or if required, provide a binding decision. To put the CAB in perspective and highlight the saving to a business, arbitration costs vary from 3% to 37% of the overall value of the amounts in dispute, with an average of 12.75%. The typical cost of a CAB on a project is 0.005% to 0.25% of the final cost of a project. Frees internal staff time.

3. MEDIATION

At the contract stage, in the absence of a CAB, the use of a mediator should be considered. This is when the parties need to identify the style and expertise that they would like from a mediator to avoid disputes arising, avoiding the problems created by distrust between the parties inflicting a secondary dispute on the appointment of a mediator when the need arises. A mediator will not provide a binding resolution but facilitate the parties to reach their own solution. There are different shades of mediation; facilitative, transformative and evaluative being examples. A mediation is more than a facilitated negotiation and it is certainly far more than a step in the litigation process.

As mediation has grown in popularity enforcement of the agreed outcome has become a topic of concern. The Singapore Convention, signed by 46 countries, is a UN Convention providing for the recognition of 'International Settlement Agreements Resulting from Mediation'.

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4. EARLY NEUTRAL EVALUATION AND EXPERT DETERMINATION

A dispute having arisen here the expert is instructed by the parties to provide a non-binding opinion on a dispute or particular issue causing difficulties; interpretation of a legal point or providing professional expertise. By its nature this is more often an approach arising on an *ad hoc* basis. By the time that it is appropriate the parties are facing problems.

A step further than Early Neutral Evaluation and Expert Determination provides a mechanism to obtain a binding decision to a dispute or specific issue.

5. ARBITRATION

Originating from the need to resolve disputes in the mercantile community, arbitration has been the preferred dispute resolution mechanism for centuries for international trade. Providing a mechanism for selecting the neutral(s), venue and rules to be followed in resolving disputes, arbitration provides a binding award in a timely manner at reasonable cost. It retains its position at the forefront in the international arena due to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This UN convention has been signed by 167 States and as its name suggests, provides a vehicle giving teeth to arbitration.

CONCLUSION

Meeting the challenge of resolving disputes and operating in the commercial and mercantile communities, BTSO and its members are the prime users of dispute avoidance, dispute management and dispute resolution techniques. Providing them with the skills required to face their business challenges is a key component in the missions of Bursa Uludag University and the Chartered Institute of Arbitrators. Now with its second cohort the course has set the standard for those concerned with ADR. The dynamic partnership between three leaders in their respective fields is bearing fruit. It has been an exciting project that can only be a powerful resource for business organisations to promote trade, locally and on the international playing field.