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THE REGISTER CITIZEN

Market Matters:

Alternative dispute resolution: A robust option during COVID-19

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Photo: Contributed Photo; David A. Slossberg

The COVID-19 pandemic has an impact on businesses in a way not often considered. How does a business resolve disputes with competitors, employees, customers or vendors when the courts are providing limited, delayed services? Alternative Dispute Resolution (ADR), including nonbinding mediation and/or arbitration, provides a robust option.

Those of us living in the tri-state area have, for months, been the subject of stay-at-home orders and other government-ordered restrictions. During this time, courts have been closed to the public and providing limited services focusing primarily on criminal cases. Understandably, civil matters have taken a back seat and have been delayed. For now, civil business must be conducted by phone or video conference, which has mostly precluded evidentiary hearings and severely limited resolution of matters requiring oral argument.

While certain government restrictions have been eased in recent weeks, and the courts have aspired to conduct more business, the reality is that the slowdown due to the pandemic is likely to be felt for at least the next year. For example, while the Connecticut Superior Court has just begun, over the last several weeks, to hold scheduling conferences and limited oral arguments by video conference, it is generally scheduling bench trials not to resume until fall. The court is not planning jury trials until 2021, with no guarantee it will be able to proceed even then.

Alternate dispute resolution provides a private avenue to resolve issues not dependent on the courts. Non-binding mediation is a process by which a “neutral” individual facilitates a negotiation between the parties to reach a compromise. The matter can only settle if the parties agree to terms, meaning that either party can walk away if not satisfied with a proposed outcome.

Arbitration, by contrast, is a private trial before an arbitrator who sits as a judge on the matter. In most arbitrations the arbitrator, often selected by agreement of the parties, hears testimony, receives documentary evidence, and issues a binding, written opinion. Unless an arbitrator exceeds his or her authority, or issues a decision that is arbitrary or capricious, the decision will not be overturned by the courts.

Mediation and arbitration can only proceed by agreement of the parties. Indeed, no business can be compelled to engage in either process.

Regarding arbitration, the contract between the parties determines the arbitrability of an issue. The law recognizes “broad” and “narrow” arbitration provisions. Broad provisions, which contain language to arbitrate “all issues arising out of relating to” an agreement, are used to convey the desire to arbitrate all issues between the parties. Narrow provisions, which are limited to a certain type of issue, or category of topics, are carefully tailored by the parties to preserve the right to resolve other issues in the courts.

While ADR has typically proceeded in person at a private venue, mediators and arbitrators have quickly adapted to the need for social distancing during the pandemic. Various video platforms allow convening all parties in one “room” where typical functions of offering evidence, directing testimony, cross-examining witnesses and conducting arguments can take place. In mediation,

the platforms allow for breakout rooms where the parties can be separated and the mediator can move back and forth between rooms to have private conversations with the parties.

The pros and cons of ADR have been debated for decades. Most often, ADR proves less costly to the litigants and moves more quickly than court proceedings. Courts, however, provide more expansive means for discovering facts before trial and provide the opportunity for cases to be heard by a jury of peers. Mediation allows businesses to manage risks, as a settlement provides certainty, while placing one's case in the hands of a jury, judge or arbitrator leaves open an uncertain outcome.

In the midst of COVID-19, if businesses are on the fence between ADR and the courts, the expected delays in litigation may tip the balance decidedly in favor of ADR. If a business does not already provide for mediation or arbitration in its written contracts, it can approach an adversary and suggest mediation or arbitration in the interests of putting their dispute behind them as soon as possible. In that way, businesses can get back to what they do best — serving their clients, customers and owners.

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