



Regulatory: The advantages of alternative dispute resolution *ADR deflects the unwanted regulatory attention brought on by litigation*

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In the face of possible litigation, counsel's decision whether to invoke an arbitration or mediation clause typically involves a complex consideration of cost, timing, fairness, contractual obligations, impact on the desired outcome, the ability to prevail against the other party, and reputational effects on business and consumers. Counsel often consider how customers, investors, and potential business partners may react to public information. However, businesses too often overlook another factor in deciding to opt for alternative dispute resolution (ADR) or court.

Drawing any attention to legal conflicts can be bad for business, but there is an aspect to this obvious point that is often overlooked when deciding whether to pursue litigation: unwanted regulatory attention. Businesses should be mindful that government investigations can begin in many ways; one of the easiest triggers is the contents of a newspaper article. Even a brief, public allusion to a potential claim, much less any mention of an internal investigation or audit, may raise enough law enforcement interest to spark an informal investigation that could turn into something much bigger. It is important to be mindful of this consequence before engaging in any saber-rattling.

For example, according to a former federal prosecutor, federal prosecutors initiated a criminal investigation of a large company in approximately 2004 based on a radio broadcast. The news story was about a civil lawsuit brought against the company which led prosecutors to believe the company might have violated several federal criminal statutes. The prosecutors assigned federal agents to the matter and commenced a covert investigation of the company and its senior executives. Once basic information was gathered, the agents conducted simultaneous interviews of former employees. Eventually the government charged the company with federal crimes.

In most legal disputes, parties will find themselves airing their grievances in a public courthouse, where the media has unrestricted access to the proceedings. While businesses often consider this public scrutiny when deciding whether to invoke an arbitration provision in a contract, it is sometimes too late, i.e., after a lawsuit has been filed. The better course for any business suspecting regulatory noncompliance—or anything the government may construe as implicating regulatory noncompliance—is to consider the regulatory attention a lawsuit may attract if the public or press learns of any suspicions or accusations. By invoking an ADR clause early in the proceedings, a business can investigate facts and conduct discovery in relative privacy, and there is no legal requirement that such proceedings be open to the public.

Drawing unnecessary attention to suspicious but possibly unfounded circumstances may prompt an investigation or prosecution of the business on a scale much larger than the facts of the initial concern. Such wide-scope governmental attention may be avoided by invoking an ADR clause, keeping the conflict out of the public awareness, and learning all the facts before deciding whether to publically pursue justice.

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