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Prepare Yourself, the Storm in Disputes is Coming – Wolf von Kumberg

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Like the sudden arrival of COVID-19, businesses now have to prepare for another onslaught just as critical to their survival. While at the moment attention is rightly being paid to employee safety and virtual means to simply keep business turning over, from SMEs to Multi-nationals, plans must be put into place now to deal with a slew of brewing disputes in the future. For nearly 30 years I was a senior inhouse counsel for a number of Multi-nationals, responsible for the resolution of many types of disputes, but never have I seen anything like this coming cataclysm. Its time to review old institutions and ideas.

One can postulate businesses going through 3 stages as COVID-19 begins to bite:

1. Survival
2. Rebuilding
3. Restructuring

Each stage will have its own potential for disputes which will also feed into the next stage. The sources for these disputes will be many and include:

Employment
Contracts
Subcontracts
Shareholders
Joint ventures
M&A activity
Financing and Loans
Insurance
IP and Licenses
Property agreements (P&S and leases)
Regulations

The catalyst for these disputes is varied and include:

Employees
Shareholders
Customers
Subcontractors

Suppliers
Financial Institutions
Creditors
Intermediaries (agents, distributors, resellers)
The Public
Regulators

While business has to deal with all of these sources of disputes on a regular basis, the current environment is anything but normal. The sources and catalysts for these disputes will come all at once as each in turn looks for ways to survive. Much like a drowning man, each will seek to grasp anything that will keep it afloat. In the same vain as the drowning man pulling down the one he grasps, businesses that survive the initial economic impact of COVID-19, will find it hard to stay afloat under this potential deluge of disputes.

Survival

Many businesses, particularly the smaller ones will likely not survive, despite efforts by Government to keep them afloat. These businesses, even when filing for bankruptcy, will still be the source for many disputes from creditors, employees and regulators.

Those businesses fighting for survival may use tactics and methods to survive that may themselves become the source of future disputes with employees, shareholders, customers, suppliers, financial institutions, landlords and other stakeholders. We know that the decisions made by Boards today, even if for the best intention of survival, will be scrutinized by stakeholders once this is all over claiming that they have been discriminated against to their detriment and bringing a claim for compensation.

Rebuilding

As businesses emerge from the initial stage of survival, they will begin to rebuild. This will include looking at taking steps to secure their current and future business base. Steps taken during this phase will inevitably affect the stakeholder base in potentially negative ways, some leading to conflicts and ending in disputes. On what basis will customer contracts be continued, amended or terminated, will employee benefits be affected, should dividends be paid to shareholders, should long term supply agreements be altered, should facilities be closed and where, should management be replaced? These are but few examples of decisions that Boards will have to take as they seek to rebuild their businesses after the Crisis is technically over, that will in turn become the catalyst for disputes.

In addition, businesses will be consulting with their lawyers to determine where they in turn might bring claims. Insurance is a clear target. Most businesses have business interruption cover, but there are many technicalities in the way policies are written that will give the insurer wiggle room to deny cover. This, short of Government intervention to regulate the situation, will cause a deluge of claims across the World for years to come.

Global trade will be another source of much friction and because of issues around proper jurisdiction, legal forums and the interpretation of disputes clauses will create many claims.

Restructuring

In this phase businesses will look for ways to take advantage of the Crisis to restructure themselves, often at the expense of weaker rivals. One can postulate that M&A activity will be a large part of this restructuring. Yet what liabilities, arising out of the Crisis might unwittingly be acquired as well. Private equity now employs close to a quarter of the American workforce, yet how will it emerge from economic downturn and what claims will it face from stakeholders, in particular as it takes advantage of the economic turmoil. Increasingly we have seen Environmental Social Governance (ESG) principles playing a larger role in the way stakeholders and Government expect businesses to behave. Investment, employment and funding decisions are made based on these principles. Will failure to comply with one's own ESG stated goals, become the catalyst for disputes. At the very least, will enhanced notions of Corporate Social Responsibility (CSR) force businesses to deal with disputes arising out of the Crisis in a more equitable manner, than winner take all litigation?

Opportunities Arise out of Crisis

Reading all of this is enough to make most business managers throw up their hands in despair. Having been capable enough to weather the storm caused by the Crisis, they now have to deal with a crippling onslaught of disputes. Viewing dispute resolution through the narrow prism of traditional state court litigation, they would most likely be correct. Our court systems across the world were already creaking before COVID-19. Most systems were short on funds, court houses were crumbling, judges were overloaded with backlogs of cases, the system too expensive for even the largest businesses and even when successful many plaintiffs had to then seek enforcement, particularly hard if the defendant was in another jurisdiction. Today most legal systems are closed, the court houses shuttered, and one can simply imagine them collapsing under the load of cases yet to come.

While the eyes of litigation lawyers the world over may be watering at the prospect of all of these cases, if they take a step back and truly consider the impact they will understand that there is no turning back to the way things were done before. If this Crisis has taught us anything, it is that things will never be "normal" again. There has simply been too much damage done in loss of life, economic hardship and damage to traditional institutions, to put the Genie back into that bottle. This, however, gives us the opportunity to reflect on what has to be changed in society, in order to ensure something like this Crisis will not happen again. The same reflection will have to occur respecting traditional methods of dispute resolution. Prior to this Crisis, great strides were already being made in accepting alternative methods to traditional State courts. Mediation and arbitration have both been widely used in general commercial disputes, while the practice of using dispute boards in various types of long term relationships, outside of the traditional arena of construction, was also growing. In other words, these are acceptable, well proven ways of effectively resolving disputes but legal professionals being naturally conservative, were slow to fully exploit them.

The Crisis will be a catalyst for accelerating the use of ADR. At first because the need to avoid of face to face contact, will necessitate the use of online ADR platforms. As business users discover the efficiency, cost saving and speed in resolving disputes this way, particularly for cross border disputes, they will see it as an effective way to continue to deal with their disputes. Afterall, who wants to go back to the horse and buggy after having experienced a jet plane.

The advantages of using ADR online platforms in the future are too stark to ignore:

- Allows parties to meet virtually and not expose themselves to COVID-19;
- Deal with issues as they arise real time within a process agreed by the parties not courts;
- Allow parties to structure deals that meet their actual needs and interests, rather than looking only at legal obligations;
- Allows for pragmatic business solutions for struggling businesses now. Who can wait for full recovery sometime in the future, when perhaps the business you are dealing with has gone bankrupt by then.
- Provide access to parties who might not otherwise be able to afford traditional legal remedies;
- Brings together the decision makers, who structured the deals in the first place;
- Allows for all necessary stakeholders to be brought together to agree a comprehensive resolution, rather than dealing with them piecemeal in several courts or jurisdictions;
- Is a platform for spanning multiple jurisdictions and legal systems;
- Allows parties and their legal counsel to prepare cases, witnesses and experts virtually, thereby alleviating the expense, time and complications of trying to get everyone physically together;
- Whether through cross border arbitration awards under the New York Convention, or now cross border mediated settlements under the Singapore Convention, there is a simplified method of enforcement that generally works.

Practical Steps for managing COVID-19 disputes:

So, what practical steps should business now be taking to be properly prepared to manage these coming disputes:

- Review with your lawyers the appropriate actions to be taking during your survival stage to ensure that they are properly and adequately supported, as well as documented for future evidence;
- Review your company policies, as well as EFG and CSR commitments to ensure survival actions taken are consistent with these. While perhaps strictly speaking not legal obligations the reputational harm done might be enormous;
- Review legal obligations and commitments including insurance policies, contracts, subcontracts, banking and other financial instruments, leases, shareholder and joint venture agreements, union and employment agreements, M&A agreements etc. that may need to be revised due to COVID-19;
- Engage in structured negotiations facilitated by a neutral, to review the possibility of amending or even terminating existing legal commitments on a mutually agreed basis, rather than attempting to unilaterally repudiate them;
- Where there is the possibility of making claims against third parties such as insurers, contractors, suppliers, customers etc. review ultimate objectives in determining your interests and needs, not simply legal obligations and decide whether an attempt to resolve these matters now doesn't make more sense than to wait until some point in the future;
- Again, engage in structured negotiations facilitated by a neutral, to attempt to achieve your needs. This Crisis will provide scope for resolution not normally possible, simply because reality dictates that a compromise today is worth more than the uncertainty of achieving full legal vindication sometime in an uncertain future;

- Failing achievement of a negotiated settlement suggest online mediation, through a reputable ADR platform. This will provide the opportunity to quickly and inexpensively use the assistance of a neutral to help facilitate a settlement determined by the parties themselves;
- Mediation can be combined with expedited online arbitration, so that failing a settlement being reached by the parties within an agreed period, a final and binding resolution can be achieved through an arbitral award. The process itself will be agreed by the parties with the added benefit that an arbitrator with the appropriate expertise for the case, unlike a judge provided by the court, can be chosen.

This Crisis is forcing businesses and their legal counsel, to think outside of the box and take pragmatic actions. Dispute resolution can effectively be dealt with by virtual means with the right preparation and experienced neutrals. Dealing with current disputes virtually, means far more of them can be dealt with expeditiously and in a cost-effective manner now, avoiding the inevitable backlog that will result after the Crisis is over. For those who claim that these methods of dispute resolution simply do not offer justice, one must ask business leaders whether they want to pay for justice, or for a resolution. When I became an inhouse lawyer, after having been a litigation lawyer, I understood that justice is a legal concept, resolution a business reality. At no time has this rung truer for business than at this time of crisis.

The Author spent nearly 30 years as global inhouse Counsel for Northrop Grumman Corporation and before that Litton Systems, Inc. He has spent the last five years as a commercial mediator and arbitrator in London, England and has recently joined Int-Arb in opening a Washington DC office. He specializes in aviation, aerospace, technology, insurance and investor state disputes.

