Transactional Lawyers and Mediation

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The quiet child of the legal brood is the transactional lawyer. They are a group that offer hidden wells of future development for mediation. This group of lawyers has extensive and close ongoing relationships with the individuals clients–the people who work in corporate, government and commercial clients. Transactional lawyers are the ones who document their clients' new and optimistic contracts, leases purchases or other agreements. They design agreements and arrangements to keep their clients out of trouble, keep the agreement on the rails, and productive to the parties throughout the life of the agreement. It is the transactional lawyer who inserts dispute resolution clauses in the agreements. They are the starting point for the use of ADR and mediation in particular in commercial arrangements.
The transactional lawyer has to think of everything that could go wrong before it happens and account for it in the contracts before the deal is sealed. In commercial arrangements it is the transactional lawyer who works out how the deal can operate without dispute. It is also the transactional lawyer who prescribes the type of ADR to be used and the law to be applied if a dispute does blow up.

Transactional lawyers tend to run a mile if their matter has to go to Court; and they will often take the view that the litigators don't understand the deal that was designed. They do however watch the outcome of disputes to see how they can be avoided or controlled or minimized in the next contract. To some extent transactional lawyers look to see if the emergence of a dispute in their contracts is a fault in their design of the deal.

In fact transactional lawyers are most lawyers. The litigation lawyer—the Perry Mason and all the TV lawyer characters that followed, are the minority of lawyers. Court lawyers are usually at the other or "wrong" end of the transaction. They deal with the fallout after the transaction has gone into dispute. Their relationship with a client is often limited to that dispute and their interest in rescuing the transaction is often limited by their lack of experience in putting such deals together in the first place.

When the work of a transactional lawyer does end in a dispute it may be quickly dealt with through use of the ADR mechanisms they put in the documents of the transaction. If that fails and the matter does go to the litigators, the litigators may then take the matter through ADR processes not specified in the transactional documents. They do that because courts require them to attempt settlement before the Court will embark on a hearing.

Much of the focus of court rules and the mechanisms of mediation is rightly on the process of litigation and how to avoid the cost and damage of litigation. Litigation produces a determination of a dispute but almost always at the cost of the commerciality of a transaction. Its profitability and its raison d'etre are lost once the parties are forced into adversarialism. It is no accident that disputes of English legal historical past were once legally settled by physical battle. It had the merit of producing a determination; a decision. Modern adversarialism has the merit of flushing out all arguments in favour of opposing positions but it does put the parties into a staged conflict. We are used to that idea but if we look at what a good transactional lawyer does it is quite the opposite.

The transactional lawyer's work is to assist and bind the parties into a mutuality of interest that is beneficial, productive and profitable for all parties. "A good business deal is profitable for everyone in the deal." There may be vigorous negotiation to reach the deal but there is no conflict once the deal is reached. The parties are agreed as best they can be on the information they have at the time. Every party expects to benefit from the deal otherwise they would not agree. If they agree to the deal because their hand is forced then the deal may go astray; a deal like that is certainly is not a "good" deal. A dispute is more likely to occur.

Good transactional lawyers tell me that the main source of disputes is the unavoidable one; namely, the factor that was unknown and especially the one that could not be known when the deal was being made; "the left field factor". It's that sort of factor that transactional lawyers work to identify as best they can before the deal is signed. It is of course not possible to accommodate every mishap that could occur in a deal but it is possible to prescribe how the parties might deal with such an event if it occurs.

Most commercial and insurance contracts in common law countries these days try to provide mechanisms for dealing with disputes that use almost any mechanism for resolution before the parties go to Court. A binding opinion from senior counsel is one mechanism, arbitration is very common in some industries, dispute boards are spreading like wildfire in the construction industry and mediation is increasing as a first means of resolution provided for in a contract in every field.

I venture to suggest that mediation will increase in this role and may exceed arbitration as a first mechanism. The benefit of mediation is that it has the capacity to preserve the commerciality of the relationship and provide a mechanism for re-negotiation of a troubled deal but one capable of commercial rescue. That is far less available in say arbitration or almost any form of evaluation. It has the added benefit of being infinitely cheaper, far quicker, more flexible and less likely to produce an outcome that all parties may dislike. Dislike of an outcome by all parties is quite a common outcome of forced determination such as judicial or arbitrated outcomes.

For those interested in promoting the use of mediation the line of sight has so far been towards those involved in dispute determination and principally the litigator. Courts have traditionally been active supporters of mediation. They have provided that support for the quite reasonable purpose of reducing court lists. It may turn out that the next biggest supporter of mediation is the transactional lawyer. They need to be encouraged to include mediation as a necessary first call in the event of a dispute. It need not exclude arbitration but it should precede it. In that way there is a chance to save the deal by re-negotiation. If that cannot occur, mediation may be able to save the commerciality of the deal by finding the best fallout method with the least loss to the parties. If that cannot occur it may be that the parties can save the commercial relationship and live to contract another day.

The transactional lawyer is not in my experience a person who would much want to attend mediation. I suspect they would be very good at mediation but would find damage control or dispute management contrary to their usual mental framework. Mediation and especially commercial mediation, involves a considerable amount of negotiation. Negotiation is how transactional lawyers get their deal in the first place—they just don't like being there when the fallout occurs. Persuading transactional lawyers of the commercial merits of mediation seems therefore to be a good goal and one to which they should be attracted –so long as they don't have to do it themselves.

Where are theses transactional lawyers? You will find them grouped together, away from the noisy litigators and grumbling about the fuss they make. Transactional lawyers are often good golfers and know a lot about wine. They are quietly gregarious, know their clients well and they like the expression "litigators might get all the glory but transactional lawyers have all the power".

We should find them and convert them. Do we play golf or drink wine?