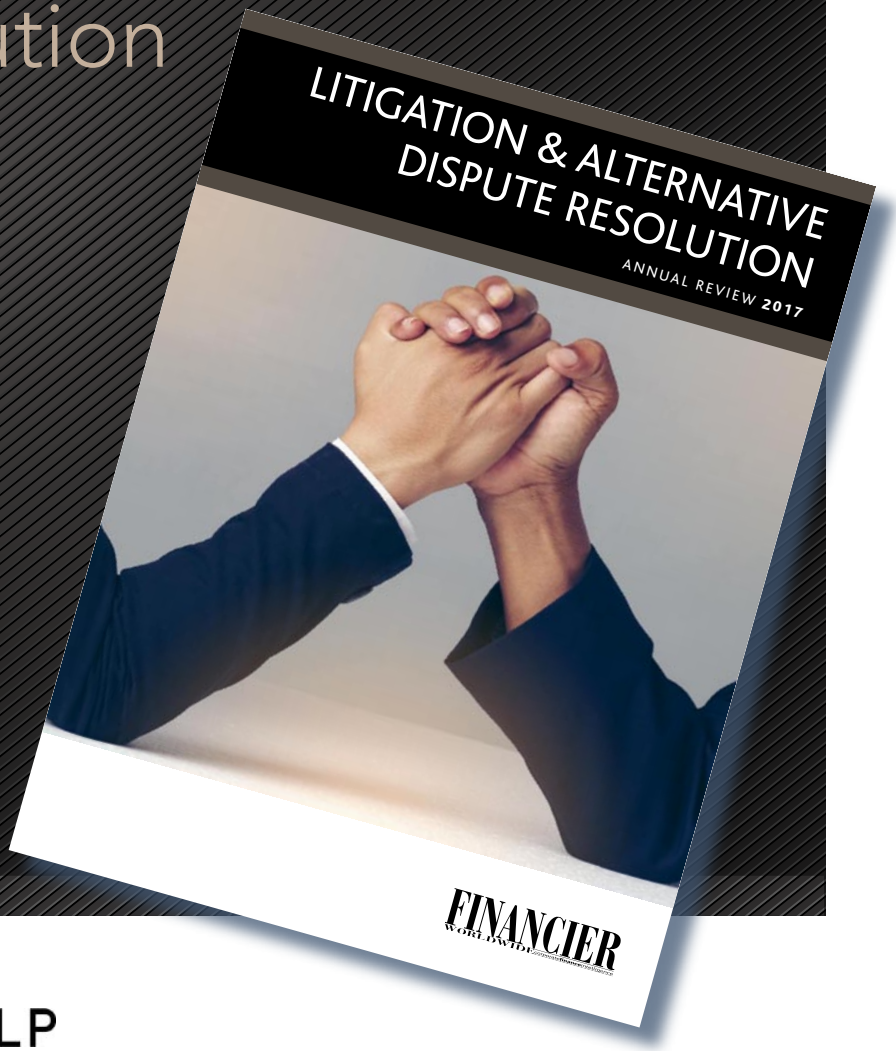
REPRINT FINANCIERWORLDWIDE.COM

ANNUAL REVIEW

Litigation & alternative dispute resolution



REPRINTED FROM
ONLINE CONTENT
NOVEMBER 2017

PREPARED ON BEHALF OF

COHEN & GRESSER LLP

FINANCIER WORLDWIDE corporatefinanceintelligence

UNITED STATES

MELISSA H. MAXMAN
COHEN & GRESSER LLP

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN THE US? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

MAXMAN: There has been a lot of activity in the federal agencies due to the change in the US presidency. With newly appointed executive branch officials, companies must adapt to quickly changing agency policies and priorities in all areas, from environmental regulations to competition laws. The hot areas for dispute are in the healthcare and high tech industries, often with an emphasis on intellectual property rights. One area of particular concern is what will happen to the Affordable Care Act (ACA) under the new president. Although Congress has failed to repeal or modify ACA several times in 2017, Trump has signed a new executive order on healthcare. The order directs federal agencies to consider loosening rules controlling the issuance of health coverage by groups of businesses, as well as the duration of short-term health plans that do not currently meet ACA rules. The administration could go further and make other changes related to ACA's penalties in coming weeks. These shifts in healthcare regulations will result in uncertainty and confusion until the new requirements are identified clearly – and thus, no doubt, will result in litigation.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF MEDIATION, ARBITRATION, LITIGATION AND OTHER METHODS?

MAXMAN: The success of mediation, in particular, depends largely on personalities – meaning those of the in-house counsel and employees doing the negotiating, the lawyers representing them and even the mediator. Often, the real motivation behind the opposition's position is not necessarily what meets the eye. If one can sift through the 'atmospherics' and precisely identify those motives, the likelihood of an out-of-court settlement increases. The biggest benefits to any type of alternate dispute resolution over continuing litigation are speed, efficiency and cost savings. Clients generally prefer mediation to binding arbitration because mediation enables them to maintain full control

over any settlement terms. A skilled mediator can help both parties see the flaws in their own arguments and be more realistic about their chances of getting their best day in court, which often helps put clients in a more cooperative, rather than combative, state of mind.

Q IN YOUR EXPERIENCE, ARE COMPANIES IN THE US MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

MAXMAN: Absent a contractual provision requiring ADR prior to litigation, ADR usually occurs after litigation is under way. Most companies are willing to work out a settlement prior to litigation of a business dispute, but not through a formal ADR process. I have been in situations with certain parties where we draft a complaint, send it to the opposing party prior to filing it, and reach a settlement on our own without ever involving the court system. This tactic is most successful in two different situations. The first is when there is an ongoing business relationship between the parties, but for some reason the business people cannot work it out – often when an unexpected problem arises and the business people negotiating are new or different than in the normal course. In this case, taking the dispute to the next level of management can cut through misunderstanding or confusion. The second situation is when one party clearly has a better legal claim, for example, when contract provisions are clear or even stipulated, and both parties recognise that costs associated with full litigation are not warranted by the amount in dispute.

UNITED STATES • MELISSA H. MAXMAN • COHEN & GRESSER LLP

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE US? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

MAXMAN: Arbitration is the dominant method of resolving disputes in certain industries in which complex contractual provisions include arbitration clauses. Reinsurance law leaps to mind as it involves intricate contractual provisions between sophisticated parties. Similarly, long-term requirements contracts also often have ADR provisions.

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

MAXMAN: No one can ever precisely anticipate what might give rise to a dispute in the future. We are all human – lawyers and business people – and there are no 'bullet proof' commercial agreements. This is why it is critical to get the perspective of a litigator when negotiating commercial agreements, as litigators can advise on issues that have resulted in litigation and help identify potential areas where the parties should clarify terms. Similarly, when I put together compliance programmes for parties, I find it important to get the perspective of business lawyers so the benefits of our comprehensive before-and-after viewpoints are offered.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

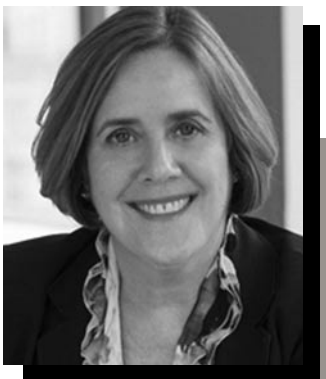
MAXMAN: A long-lasting corporate relationship between trusted business partners is the best way to avoid a dispute turning into litigation. This is for two reasons. First, when business partners work together over time, there are fewer unhappy surprises. Second, in the event that a dispute does arise, companies that wish to continue to do business together are more likely to work things out cooperatively.

"When external advisers become trusted over time, they can be effective counterweights to a business taking an unreasonable or unnecessarily risky position that will result in litigation."

Q HOW IMPORTANT ARE EXTERNAL ADVISERS TO HELP COMPANIES NAVIGATE THEIR WAY THROUGH A COMMERCIAL CONFLICT?

MAXMAN: Lawyers are in a service industry and thus the personalities of outside advisers – and their 'fit' with clients – make a great difference in the legal conflicts of a business. When external advisers become trusted over time, they can be effective counterweights to a business taking an unreasonable or unnecessarily risky position that will result in litigation. Perhaps most importantly, external advisers do not 'live' the client's problems on a daily basis. Coming in with a fresh, and more objective, perspective can help businesses craft creative solutions to business conflicts without the need of third-party involvement.

COHEN & GRESSER LLP



www.cohengresser.com

Melissa H. Maxman

Managing Partner, Washington DC
Cohen & Gresser LLP
+1 (202) 851 2071
mmaxman@cohengresser.com

Melissa H. Maxman is the managing partner of Cohen & Gresser LLP's Washington, DC office. Ms Maxman has decades of litigation experience at both the trial and appellate levels, primarily in the areas of antitrust, RICO, environmental law, complex commercial disputes and white-collar defence. She has extensive experience advising domestic and foreign corporations on global antitrust issues and has represented clients in complex civil and criminal matters before the Federal Trade Commission, the antitrust division of the Department of Justice and in private civil matters.

www.financierworldwide.com