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Alternative Dispute Resolution (ADR)

(This is an abridged version of the full report which is available for purchase. The 37 page report may be used throughout your company.)

“... the King Committee continues to believe that there should be a code of principles and practices on an ‘apply or explain’ basis. Boards have to comply with their duties such as acting in good faith and in doing so, have to apply their minds in the best interests of the company in regard to any recommended practice, subject to the above qualification.”

King III: Preface



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Executive summary - Alternative Dispute Resolution (ADR)

(This is an abridged version of the full report which is available for internal use within your company.)

“It is accepted around the world that ADR is not a reflection on a judicial system of any country, but that it has become an important element of good governance. Directors should preserve business relationships. Consequently, when a dispute arises, in exercising their duty of care, they should endeavour to resolve it expeditiously, efficiently and effectively.”

King III: Preface

SPECIAL NOTICE: For the purposes of this presentation, CGF Research Institute (Pty) Ltd (CGF) has drawn much of its desktop research from the draft Code of Governance Principles for South Africa (2009) and the draft Report on Governance for South Africa (2009), amongst other areas. Please note the contents within this presentation should not be considered exhaustive, but rather a guiding reference to key concepts pertaining the subject. It would be in the best interests of the reader to consult the Institute of Directors in Southern Africa (IoDSA) or The Arbitration Foundation of Southern Africa to obtain additional information on this subject. CGF observes the copyrights of the Report and the Code publications which rests with the IoDSA.

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The new Companies Act together with changes in corporate governance trends have resulted in the issuing of a new Draft Report on Corporate Governance - King III - by the King Committee on Corporate Governance

Introduction: ADR

- Recognising that there are emerging governance trends worldwide, King III introduces some new topics which include:
 - shareholder approval of remuneration policies
 - directors' performance evaluation
 - business rescue
 - Alternative Dispute Resolution (ADR)
 - fundamental & affected transactions
 - IT governance
- ADR refers to a wide range of processes aimed at identifying & pursuing the most effective means to avoid or resolve disputes without having to resort to litigation
 - ADR is flexible & specific processes can be designed to suit complex disputes in almost any situation
- ADR processes include:
 - arbitration, judicial appraisal, expert determination, ombudsman services, med-arbitration, neutral fact finding, early neutral evaluation, mediation, executive tribunals, independent interventions, assisted stakeholder dialogue, brokered talks, independent review & relationship building
- King III favours mediation or conciliation as methods to resolve disputes & only if these alternative methods fail, then arbitration

“Our dispute resolution lawyers believe that where there is willingness to resolve a dispute or to take the necessary steps to prevent a dispute from arising, there is always a process that can be found or designed that is suitable to achieve that end.”

Bowman, Gilfillan Attorneys

ADR can save companies time, money & stakeholder relationships - as well as alleviate pressure on the courts . . .

King III: ADR

- Companies must ensure the effective use of:
 - the courts, independent mediation & arbitration services, and formal dispute resolution institutions created by statute, that are empowered to resolve disputes by mediation or conciliation & by adjudication
- Directors have a “duty of care” which includes a duty to manage stakeholder relationships and in so doing, preserve business relationships. In Chapter 8, King III covers:
 - managing stakeholder relationships
 - ❖ “Principle 8.1: The board should take account of the legitimate interests of stakeholders in its decisions”
 - ❖ “Principle 8.2: The company should proactively manage the relationships with its stakeholders”
 - dispute resolution
 - ❖ “Principle 8.8: Companies should establish a formal process to resolve internal & external disputes”
 - effectively managing & preserving business relationships
 - ❖ “Principle 8.9: The board should ensure disputes are resolved as effectively, efficiently & expeditiously as possible”
 - selection of appropriate persons in ADR process
 - ❖ “Principle 8.10: The board should select the appropriate individual (s) to represent the company in alternative dispute resolution (ADR) processes”
- King III does not stipulate a particular set of rules that directors should utilise when selecting the most appropriate method to resolve a dispute. Each case should be carefully considered on its merits

... the Companies Act provides the option to refer a dispute to the Companies Tribunal (“Ombud”), or an accredited entity for resolution by mediation, conciliation or arbitration

Companies Act (No. 71 of 2008): ADR

- The Companies Act (“the Act”) provides for a Companies Tribunal (“Ombud”), which will be an independent organ of State & will have a mandate to serve as a forum for voluntary ADR in any matter arising under the Act
- Section 156 of the Act allows a person seeking to address an alleged contravention or to enforce a right in terms of the Act, four different procedures or remedies. In terms of this section the person:
 1. may attempt to resolve any dispute with or within a company through Alternative Dispute Resolution;
 2. may apply to the Companies Tribunal for adjudication where permitted;
 3. may apply to the High court; or
 4. may file a complaint with the Panel or Commission
- Section 166 of the Act deals with ADR
 - as an alternative to bringing a matter before a court or filing a complaint with the commission, a matter in dispute may be referred to the *Companies Tribunal* or to an “accredited entity” for resolution by mediation, conciliation, or arbitration
- The resolution of a dispute may be recorded in the form of an order of court
 - whilst this facility is not available to parties who resolve a dispute by mediation & conciliation outside the terms of the Act, a High Court can make a mediation resolution an order of court

Mediation is often suggested as an ADR method, provided that the parties are willing to engage fully in the process

Mediation & arbitration

- When parties are involved in a dispute but need to preserve their relationship because of ongoing interests, mediation is often a recommended route
 - mediation is not in itself a binding process, but once consensus is reached, a contract is drawn which keeps the parties to their agreement
 - the benefit of mediation is that the parties arrive at a win-win solution, as opposed to a win-lose outcome found in adversarial processes
- Where mediation is not successful in resolving a dispute, parties may resort to arbitration as an alternative ADR method
 - an ADR clause in an agreement should make provision for arbitration as a secondary resort should the mediation fail
- Arbitration is:
 - a private judicial hearing with an outcome that binds the parties & puts an end to the dispute between them
 - the parties choose their arbitrator
 - the matter is heard privately at a time & place that is agreed upon by all parties
 - parties choose a system that promises a fair and private resolution in a venue and in circumstances most suited to their needs
 - disputants ought to have the security of an administered system as well as suitable Rules for Arbitration
- ADR has been shown to be a most effective & efficient methodology to address the costly & time consuming features associated with more formal litigation

How to order this report

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