



## The law is an elk

Disputes happen. The automotive testing industry is project-oriented and, as has been demonstrated too many times, projects can go wrong. Take a fictitious example: suppose you are supplying the suspension system for a new 4x4 with your new 'ActivDamp' feature. Suppose this product incorporates a revolutionary new valve that you have sourced from Tier-Two Automotive, Inc., following a lengthy collaboration. For a few months all seems well but, unfortunately, after exposure to destructive in-service forces, ActivDamp starts to show material failure rates.

The problem, it seems, is the valve supplied by Tier-Two Automotive Inc. Suddenly you find yourself in unfamiliar territory. You are in dispute. Enter the law men...

Your dispute with Tier-Two Automotive Inc., seems to have a number of legal issues. For example, what remedial costs are you liable for, how much should Tier-Two Automotive contribute, should you have mitigated your loss, and so on. Here the law can help because none of these questions is original. Even if the legal advice is unfavorable, it still helps because you must know where you stand with both the customer and Tier-Two Automotive.

Now suppose you need to rely on Tier-Two Automotive's warranty but the company argues that its liability is limited to the cost of the valves. Your lawyers strongly disagree. Privately your guys advise that the warranty is badly drawn and that the governing law is unclear. It seems that what Tier-Two Automotive is saying is at least arguable. Your dispute is headed for a mediation, a popular form of ADR and at the heart of it lies a big legal question. At this point, the law is an elk.

To understand this situation, it is worth exploring the architecture of a dispute. Disputes can only be about the facts and the law. As regards resolving factual disputes, the law is plainly irrelevant. As regards resolving complex legal disputes, the law is, again, irrelevant. In other words, some legal points simply call for a robust and convincing explanation by one lawyer to another. But, if there is a genuine and significant legal dispute, where both parties have received credible but differing legal advice, this will not work. It will lead to entrenchment, not resolution.

The process generally plays out as follows. You are comforted by the support of your lawyer. But your customer is comforted by his. Your lawyer attempts to talk round the customer's lawyer who, in turn, will attempt the reverse. Like anything that is energy dispersive for your lawyer, it will be expensive for you, and will probably fail. I have heard many strange things over the years from fellow lawyers, but I have never had one turn to me and thank me for explaining the law to him or her; never had one say: "That was really enlightening. You know what? I am going to call my client right now and tell him I was wrong."

So, if a significant legal issue is at the heart of your dispute, how do you resolve it? You have a trial, of course. In the unfortunate event that matters get that far, you will then find out which lawyer was right. But is this really in your interest? The trial will render you a definitive statement on an area of law about which you care not. You don't want to know what the law is. You want to know who won and how much. You are not hoping for an attractive legal statement so much as an attractive bank statement.

The more vexing the legal question, the more reason to avoid it. For the mediation, plan in advance to assert the point robustly, then park it. ADR is ideal for side-stepping tricky issues of law. It is not about finding a winner but finding a compromise – one that avoids a full-blown trial. How much comfort does this give you if you have been sued by a customer or supplier who is hell bent on having a trial? ADR suits cases like that perfectly. It also suits parties like that, even if it takes them a while to realize it. Very few companies, when they stop to think about it, want a trial to establish a legal principle. I have never seen a CEO standing on the steps of the court, rubbing his hands, and saying: "Am I glad today has come, two weeks out of the office, total disruption, ruinous costs, and a lottery of a result. Bring it on." ■

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