Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute for Conflict Prevention & Resolution
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ADR Systems/Part 1 of 2

Will a Hybrid Attack Affect Your Firm?

BY CHRISTOPHER HONEYMAN AND ADRIAN BORBÉLY

Spoiler: We believe the answer to the headline inquiry is yes.

Not only that—we are using "firm" as shorthand, to cover all kinds of organizations that are not national governments. So, if you work for an NGO, a hospital, a university, a law firm or think tank, a municipal government, or many other kinds of entities, you're not off the hook.

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CPR JURIS LEGAL INFORMATION

This admittedly bleak start to our two-part series is itself a conclusion, reached by a study group of some 50 members over several years. In what was till recently known as Project Seshat—now succeeded by the Council on Countering Hybrid Warfare (CCHW)—a dozen security experts with backgrounds in military, intelligence, cybersecurity, police and other environments worked with about 40 experts in conflict management from legal, business, international relations, planning and

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About the Authors

Christopher Honeyman is Managing Partner of Convenor Conflict Management, a consulting firm based in Washington, D.C. He served as Principal Investigator of Project Seshat, which did pioneering work on hybrid warfare, and chaired its steering committee from 2019 to 2023. Among other roles, he was primary designer of the case specifications and of five project teams, which wrote eight cases that became the foundation for *Hybrid Warfare: A Collection of Scenarios* (DRI Press January 2026) (available at https://bit.ly/4uXZ00Z), from which these articles are adapted.

Honeyman previously directed or co-directed a 30-year succession of conflict management research-and-development projects of national or international scale; wrote or co-authored more than 100 articles, book chapters, and monographs; and co-edited seven books, including the most comprehensive work in the field, the two-volume *Negotiator's Desk Reference*. He has served as a mediator, arbitrator or in other neutral capacities in more than 2,000 disputes, including issuing some 500 arbitration awards and administrative law decisions.

Adrian Borbély is Associate Professor of Negotiation at emlyon business school, Lyon, France. A litigation lawyer by training, he has been teaching and developing negotiation theory and pedagogy for more than 15 years. He is a trained mediator, an entrepreneur, and an administrator of the French nonprofit, PRONEGO-DBS, which gathers negotiation and conflict management practitioners, trainers, and theoreticians.

Borbély has been writing on hybrid warfare for a few years and is a founding member of the Council for Countering Hybrid Warfare. His research interests cover agency in dispute resolution, the organization as a negotiator, negotiation theory and the adaptation of negotiation thinking in hybrid warfare situations. He holds a Ph.D. from ESSEC business school, a French master's in law and a master's degree in public affairs from Indiana University's O'Neill School of Public and Environmental Affairs.

CPR News

Satellites, Drones & Data Center Disputes: Highlights from a CPR European Advisory Board Event

BY DANIEL GERL, SALOME KAMENETSKAIA & CHRISTIAN M. THEISSEN

On June 18, the International Institute for Conflict Prevention and Resolution and White & Case jointly hosted a panel discussion, "The New Frontier of Arbitration: Satellites, Drones & Data Center Disputes," where practitioners examined how these sectors form an interconnected system and the legal challenges that follow.

The key takeaway was that lawyers advising in this area must understand the underlying technology, prioritize confidentiality, and build robust dispute resolution mechanisms into contracts from the outset.

The program was presented in the Frankfurt, Germany office of White & Case in conjunction with a meeting of CPR's European Advisory Board and CPR's Y-ADR program.

The evening opened with brief remarks from Knar Nahikian (CPR's Vice President for Global Initiatives), who set the institutional context and highlighted CPR's role in developing arbitration best practices and industry alliances. Mediator/arbitrator Torsten Bartsch, co-chair of CPR's European Advisory Board, then welcomed attendees on behalf of the board and situated the program within CPR's broader mission of advancing industry alliances and practical research.

The event was moderated by Velislava Hristova, a member of the CPR Y-ADR Steering Committee, and co-author Christian M. Theissen, a White & Case partner, who completed the opening and guided the audience's attention to three technology sectors that–as the evening would make clear–form a single, integrated system.

Keynote Speaker

Dr. Marco Buschmann, White & Case Berlin-based counsel and Germany's former Federal Minister of Justice, set the scene for the event with a lively anecdote. He recounted a visit to Kyiv during his time as Justice Minister, where his meeting with Vitali Klitschko, Kyiv's mayor, was interrupted by a drone attack, resulting in a rush to an air-raid shelter.

This incident, along with the information he received during his visit to Ukraine, made it very clear to him just how much the use of drones has changed the nature of warfare and, consequently, the security situation.

Given this new "normal," it is easy to overlook how profoundly modern conflicts depend on a broad and complex infrastructure: Drones rely on technological support systems, therefore access to satellite communications is invaluable to conflicting parties.

Furthermore, modern coordinated drone swarms require artificial intelligence, which in turn depends on powerful data centers. Against

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Alternatives

CPR | JURIS LEGAL INFORMATION

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SPECIAL SERIES: AI IN ARBITRATION AND LITIGATION—THE JAGGED FRONTIER

ADR Technology/Part 2 of 6

The Surprising Things Artificial Intelligence Can Do: Capabilities and Properties in Dispute Resolution

BY DOAK BISHOP & KARL HENNESSEE

Series Overview: This is the second of six articles examining artificial intelligence in dispute resolution—a series called , "AI in Arbitration and Litigation—The Jagged Frontier." The kickoff article is available at Doak Bishop & Karl Hennessee, "The Nature of AI in Dispute Resolution: Competence Without Comprehension," 44 Alternatives *129 (July/August 2026)* (available on Westlaw). *This month addresses specific large language models capabilities lawyers can rely upon; subsequent articles will cover advanced AI architectures for reasoning, causation, and analogical inference; practical use cases, tools, and prompting techniques; the efficiency paradox—whether AI will make dispute resolution cheaper or more expensive, and the irreplaceable role of human judgment.*

The paradox of artificial intelligence "reasoning" is that AI large language models do not actually reason: they match patterns and predict the next word in a sequence. Nothing more. They simulate human reasoning without actually reasoning as humans do.

Bishop is a Dallas-based independent arbitrator and a retired King & Spalding partner who founded the firm's international arbitration practice 25 years ago. He was chair of the Institute of Transnational Arbitration in 2012-2015; past member of ICCA, LCIA, SIAC, AAA, and ASIL governance boards; past member of the U.S. delegation to the NAFTA 2022 Committee on Private Commercial Disputes, and an adviser to the U.S. Restatement (3rd) of the Law of International Commercial and Investor-State Arbitration. See https://doakbishop.com. Hennessee is a Senior Vice-President, Litigation, and Investigations at Airbus in France, where he leads the company's global activities in these areas. He holds or has held board seats at the ICC (Chair), HKIAC, LCIA, ICCA (Treasurer), AFA and the Queen Mary School of International Arbitration. He is a frequent author and occasionally sits as arbitrator.

LLMs were not programmed to reason, analyze, or understand. They have no knowledge base, no internal model of the law, no comprehension of what a contract means. They predict the most probable next word, then the next, then the next, thousands of times—or more—in sequence.

The concept of "competence without comprehension" is drawn from Daniel C. Dennett, From Bacteria to Bach and Back: The Evolution of Minds (W.W. Norton, 2017). Dennett argues that natural selection produces competence—functional design—without any comprehending designer. The analogy to LLMs is clear: the training process produces functional competence without any comprehending agent inside the system.

And yet AI can draft contracts and analyze arbitration clauses. LLMs can translate legal documents. They can synthesize information from thousands of documents in minutes or hours. They can produce output that looks, reads, and in many cases functions like the work of a knowledgeable legal professional.

How is this possible? And how much should practitioners trust the result? These are the practical questions that every arbitrator, practitioner, and in-house counsel should understand as AI tools become embedded in dispute resolution practice.

The first article in this series addressed the question of what large language models are at a mechanical level: pattern matchers and prediction engines trained on billions of words of text. See Doak Bishop & Karl Hennessee, "The Nature of AI in Dispute Resolution: Competence Without Comprehension," 44 *Alternatives* 129 (July/August 2026) (available on *Westlaw*).

This article addresses the question that follows directly from that explanation: What can these prediction engines actually do that matters for legal practice, and what are the limits of those capabilities?

The answer is more interesting—and more useful—than either the skeptics or the enthusiasts suggest. LLMs exhibit capabilities that no one explicitly programmed into them. These capabilities are genuinely useful for a substantial range of legal tasks. But they are *structurally uneven*—reliable in some contexts, unreliable in others—and the system gives little or no warning when it crosses from one territory into the other.

Understanding why the capabilities exist and why they are uneven is one of the keys to using AI wisely. That is the subject of this article.

Prediction Machine Analysis

If the first article's explanation is correct—that LLMs were designed only to pattern match and predict the next word—then the capabilities described in this subsequent section are mystifying.

A system that merely predicts the most probable words and sentences should produce banal, obvious text: what anyone might say next. It should not be able to draft a *force majeure* analysis or identify inconsistencies in a witness's prior testimony.

The resolution of this apparent paradox is the conceptual key to everything that follows. To predict the next word accurately, the machine had to learn something about the context.

Consider a simple example. If you are reading a contract and the sentence says, "The seller shall deliver the goods within 30 days of ___," you can predict the likely next word—"receipt," "execution," "notice"—only because you have

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learned something about contractual structure, delivery obligations, and commercial practice.

A system that could predict the next word in that sentence with accuracy would need some form of implicit model of how contracts are structured.

Scale that insight across billions of words—across case law, legislation, contracts, treatises, briefs, judicial opinions, transcripts, academic articles, and every other form of written text—and we can glimpse a clue as to what may have happened. In order to make accurate predictions across that volume of material, the model either learned to recognize and remember complex patterns that were not the specific target of its training or built its own internal representations: compressed, statistical models of grammar, logic, and legal reasoning and argument, among others.

(The internal representations that LLMs develop during training are an active area of research. For a rigorous treatment, see Chris Olah et al., "Zoom In: An Introduction to Circuits," *Distill* (2020) (available at https://bit.ly/4vcWAMT); and more recently, Neel Nanda et al., "Progress Measures for Grokking via Mechanistic Interpretability," ICLR (2023) (available at https://bit.ly/4xjvVPM), demonstrating that neural networks develop genuine algorithmic representations during training.)

Prediction was the training method but what emerged from that training was statistical analysis that transcends merely word choice.

In practice, this means that when you ask an LLM to analyze a *force majeure* clause, it draws on patterns encoded across hundreds or thousands of similar clauses, numerous judicial interpretations, and the structural logic of contractual risk allocation—all compressed into billions of mathematical parameters.

The system does not "know" contract law in the way a practitioner does. But AI experts tell us that it must have developed a statistical map of how contract law works that is, in many contexts, functionally useful.

An analogy may help. Imagine a first-year associate who has read every published opinion, every treatise, every brief ever filed—but who has never set foot in a courtroom, never had a client, and never had anything at stake.

Through sheer volume, that associate has developed a remarkably sophisticated understanding of how legal arguments are structured, how judges reason, and how contracts are drafted. The associate can produce text that looks like a senior partner wrote it. But the associate cannot tell you whether the argument will actually persuade *this* judge, whether *this* client is being truthful, or whether *this* commercial deal makes business sense.

Assessing AI's Limits

The inquiry: How artificial intelligence actually operates.

The mechanical output: Understanding the limits enhances the utility of the result. AI is real knowledge, with little or no judgment.

The ADR application: In particular focus here in part two of this six-part series, the AI capability of pattern recognition provides a scale and speed that humans cannot match, with help for arbitrator selection, case strategy, and contract drafting.

The knowledge is real. The judgment that is only developed by experience is missing.

The associate analogy is, of course, imperfect. A first-year associate has lived experience, emotional intelligence, and accountability that no AI system possesses. The analogy captures one specific dimension: the relationship between breadth of exposure and depth of understanding.

That distinction—real knowledge, but little or no judgment—is the foundation on which this article rests.

ADR Capabilities That Matter

Systems built to predict the next word turn out to be able to do things no one explicitly programmed them to do.

In the AI research community, these are often called "emergent properties"—capabilities that arise from the system's scale and architecture rather than from specific training or instructions.

The term "emergent properties" in AI research derives from the broader concept of emergence in complex systems theory. For the original application to LLMs, see Jason Wei et al., "Emergent Abilities of Large Language Models," Transactions on Machine Learning Research (2022) (available at https://bit.ly/4eUVeQW). Wei and colleagues documented more than 130 capabilities that appeared to arise at specific scale thresholds.

There is continuing academic debate about whether these capabilities are truly "emergent"—appearing suddenly at certain scale thresholds—or whether they improve gradually in ways that earlier measurement methods obscured.

For practitioners, the debate is less important than the practical reality: these capabilities exist in current models, they have direct implications for legal work, and their reliability varies in ways that matter. An assessment of each follows.

1. In-Context Learning. Show an AI three examples of how you want a contract clause analyzed, and it will apply that pattern to the fourth—without any retraining. You are essentially programming the model through examples within a single conversation.

In-context learning was first systematically documented in Tom Brown et al., "Language Models Are Few-Shot Learners," *NeurIPS* (2020) (available at https://bit.ly/4aOcSU1). The discovery that LLMs could learn new tasks from a handful of examples within a single prompt, without any parameter updates, was one of the most consequential findings in modern AI research.

For dispute resolution, this can be especially useful. An arbitrator could show the AI three examples of how to summarize witness statements in a particular format, and the AI will apply that format consistently across hundreds of statements. A litigator could demonstrate the structure of a damage analysis, and the AI will replicate that structure across multiple categories of loss.

Reliability: High for reproducing the same format and structure. The capability is much less reliable when the pattern requires genuine understanding of *why* the examples are structured that way—when the fourth case differs from the first three in ways the model cannot detect.

2. Chain-of-Thought Reasoning. Prompting an AI to "think step by step" can improve its accuracy on complex problems. On mathematical benchmarks, chain-of-thought prompting is reported to double accuracy. Jason Wei et al., "Chain-of-Thought Prompting Elicits Reasoning in Large Language Models," *NeurIPS* (2022) (available at https://bit.ly/4vsjQGK).

The paper demonstrated that prompting LLMs to show intermediate reasoning steps dramatically improved performance on arithmetic, commonsense, and symbolic reasoning tasks. Whether the resulting "reasoning" constitutes genuine, logical deduction or sophisticated pattern reproduction remains contested.

A new generation of dedicated "reasoning models"—OpenAI's o-series, Anthropic's extended thinking, DeepSeek-R1—design this capability into the architecture itself, allocating more computation to deliberation before producing output.

(On dedicated reasoning models: OpenAI released o1 (September 2024) and o3 (early 2025) as "reasoning" models that allocate additional computation at inference time. Anthropic introduced extended thinking capabilities in Claude 3.7 Sonnet (February 2025). DeepSeek-R1, an open-source reasoning model, was released in January 2025. Each represents a distinct architectural approach to improving multistep reasoning through increased test-time computation.)

For legal practice, this can be useful because so much of legal analysis is inherently multistep: applying a contractual test element by element, walking through a jurisdictional analysis under the International Centre for Settlement of Investment Disputes'—ICSID's—Convention on the Settlement of Investment Disputes Between States and Nationals of Other States Art. 25, or evaluating a damage methodology against the applicable legal standard. Chain-of-thought prompting can produce markedly better output on these tasks than a simple prompt.

Reliability: The reliability is substantially improved on structured problems, but practitioners must understand what is happening underneath. The model is reproducing the *pattern* of reasoning it observed in training data, not performing logical deduction like a human.

When the problem at hand differs from training patterns in ways the model cannot detect, the step-by-step output can be wrong even if it appears perfectly structured.

Recent research underscores this concern. Project Ariadne (Khanzadeh January 2026)—a framework that uses causal interventions to test whether LLM reasoning traces actually drive outputs—found a "faithfulness gap" with a violation density of 0.77. In 77% of tested instances, the models arrived at identical conclusions despite contradictory internal logic. The researchers' term for this is "reasoning theater." Sourena Khanzadeh, "Project Ariadne: A Structural Causal Framework for Auditing Faithfulness in LLM Agents," arXiv:2601.02314 (January 2026).

The framework uses structural causal models and counterfactual interventions—systematically inverting logic, negating premises, and reversing factual claims—to test whether reasoning traces actually drive outputs. The finding that models arrive at identical conclusions despite contradictory internal logic in 77% of tested instances is among the most significant results in AI interpretability research to date.

The reasoning looked real, but it was not driving the answer. See also the companion finding in "Breaking the Chain: A Causal Analysis of LLM Faithfulness to Intermediate Structures," *OpenReview* (October 2025) (available at https://bit.ly/4eFnt52), which found that LLMs "fail to update under logically significant structural edits more than 50% of the time," treating intermediate reasoning structures as context rather than true mediators of decision-making.

3. Cross-Domain Synthesis. AI can integrate information across thousands of documents, jurisdictions, and legal domains faster than any human team. For counsel managing multi-jurisdictional disputes, this may be the single most valuable capability that AI provides.

Ask an LLM to compare *force majeure* interpretations across five jurisdictions and it will produce a useful first draft in minutes. Ask it to identify every limitation-of-liability clause across a portfolio of 500 contracts and flag deviations from standard language—an ask that might take a team of associates weeks—and it can be completed within a few hours.

Reliability: Strong for identifying patterns and generating comparative frameworks. Weak for determining which differences actually matter from a legal perspective. The AI can tell you that five jurisdictions define *force majeure* differently, but it cannot reliably tell you which definition governs your dispute or why the distinction matters in your commercial context. That remains a judgment call.

4. Pattern Detection at Scale. AI identifies statistical regularities across massive datasets much better than a human team—correlations in arbitrator decisions, recurring clause structures across industries, regularities in damage awards. This is not reasoning; it is pattern recognition at a scale and speed that humans simply cannot match.

The applications for dispute resolution are concrete: arbitrator selection (analyzing numerous prior awards for decisional tendencies), case strategy (identifying patterns in how tribunals treat particular types of evidence or procedural requests), and contract drafting (benchmarking clause language against industry norms across hundreds of comparable agreements).

Reliability: Excellent for pattern identification. But pattern detection is not causal reasoning. The AI cannot tell you *why* a pattern exists, whether it will continue, or when it will break down. An arbitrator who rules consistently in one direction on jurisdictional challenges may do so for doctrinal reasons that would not apply in your case. AI sees the pattern, but the practitioner must assess the reasons.

5. Multilingual Processing. AI can draft, summarize, and translate across languages in ways that are useful for international arbitration, when proceedings routinely involve documents, correspondence, and testimony in multiple languages. AI can produce working translations, draft correspondence in the counterparty's language, and summarize foreign-language submissions—tasks that previously required human translators at every step.

Reliability: Strong in major languages—English, French, Spanish, Mandarin, German, Portuguese, but the quality may degrade significantly with less common languages and with specialized legal terminology.

There is also a structural asymmetry practitioners should understand: the way AI processes text (called "tokenization") handles some writing systems more efficiently than others, meaning AI may process English language submissions more accurately than Arabic or Mandarin submissions.

On the limitations of AI translation in legal contexts, see the discussion of tokenization asymmetries in Emily M. Bender, Timnit

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Gebru, Angelina McMillan-Major & Margaret Mitchell, "On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?" Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency 610 (2021) (available at https://bit.ly/41wyOOG). The tokenization problem is particularly acute for agglutinative languages (Turkish, Finnish, Korean) and languages with complex morphology, where a single word may require multiple tokens, reducing effective context window size.

In a multilingual arbitration, this is worth understanding.

6. Pragmatic Inference. Modern LLMs can detect tone, implied meaning, and communicative intent beyond literal text—what has been termed sentiment analysis. This can be useful for analyzing correspondence for implied admissions, assessing the tone of negotiation communications, identifying potential inconsistencies in witness statements, or possibly identifying judicial or arbitrator leanings on issues. It has applications in document review, hearing preparation, and hearings.

Reliability: Surface-level only. The AI detects linguistic patterns of intent—it recognizes that a sentence *sounds* evasive, for example—but it cannot determine whether the speaker *is* actually being evasive. It identifies the pattern of sarcasm without understanding the social dynamics that produce it.

The distinction between recognizing linguistic markers of intent and understanding actual intent certainly matters in dispute resolution, in which witness credibility, party motivations, and negotiation dynamics are central.

7. Structured Data Analysis. LLMs can perform statistical analyses, build financial models, and process structured datasets. For dispute resolution, this means damage quantification, analysis of financial records in fraud cases, processing of large datasets in antitrust or securities litigation, and construction of models for lost-profits calculations. An AI can produce a first-pass damage model in hours, a task that would take a financial analyst days.

Reliability: Surprisingly strong for well-defined computational tasks—and importantly, more verifiable than the AI's textual output.. When an AI writes a legal memorandum, errors may be difficult to detect. This makes quantitative analysis among the higher-confidence use cases for AI in legal practice.

The capabilities described above are real and practically useful. But they are not uniformly reliable—and the pattern of reliability is not intuitive.

A 2023 study by researchers at Harvard Business School and Boston Consulting Group provides the essential framework. See Fabrizio Dell'Acqua et al., "Navigating the Jagged Technological Frontier: Field Experimental Evidence of the Effects of AI on Knowledge Worker Productivity and Quality," Harvard Business School Working Paper No. 24-013 (2023) (available at https://bit.ly/4cXYolX).

The study is the most rigorous empirical evaluation to date of AI's impact on professional knowledge work. The finding that AI-assisted consultants performed *worse* than unassisted consultants outside the AI's capability frontier is the study's most consequential result for practitioners.

The researchers gave 758 BCG consultants a set of realistic knowledge-work tasks. Those with AI access completed 12.2% more tasks, finished 25.1% faster, and produced results with 40% higher quality.

Those are impressive numbers. But the study's critical finding was what happened *outside* the AI's capability boundary: on tasks that fell beyond what AI could handle well, consultants who used AI performed *worse* than those who worked without it. The AI made them overconfident about wrong answers.

The researchers called this uneven capability boundary the "jagged technological frontier." AI's capability boundary is not a smooth line that separates what it can do from what it cannot. It is jagged and unpredictable. A task that *looks* similar to one AI handles well may fall outside the frontier—and the AI provides no warning when it has crossed from reliable to unreliable territory.

For legal practice, the frontier looks roughly like this. Inside it—where AI is strong—are tasks such as document review and pattern detection across large datasets, first-draft generation of structured legal arguments, contract analysis, and clause comparison, legal research (although with human verification), summarization of proceedings and depositions, translation of documents, and routine procedural drafting. These are tasks in which the right answer is substantially determined by patterns in the training data, and the AI's statistical map of legal practice produces useful output.

Outside the frontier—where AI is weak—are the tasks that require what the training data cannot supply. Causal reasoning is one: the best AI model tested against scientifically validated causal relationships achieved only 57.6% accuracy, far below the threshold any profession would accept, let alone one built on causation concepts like but-for cause, proximate cause, and superseding cause. Dongyun Lee et al., "Benchmarking LLM Causal Reasoning with Scientifically Validated Relationships," arXiv (October 2025) (available at https://bit.ly/4vuYSHo).

[The study tested eight state-of-the-art LLMs on causal relationships validated by rigorous scientific methods across five task types. Notably, model scale did not consistently improve causal reasoning performance—larger models were not reliably better.

On the structural limitations of LLM causal reasoning, see also Haong Chi et al., "Unveiling Causal Reasoning in Large Language Models: Reality or Mirage?" arXiv (June 2025) (available at https://bit.ly/4eyQiQu) (finding LLMs capable only of "shallow (level-1) causal reasoning" based on memorized patterns, and the critical review of causal reasoning benchmarks (2024) identifying a "causal parrots" problem—LLMs that appear to reason causally because they have memorized causal patterns, not because they understand cause and effect).]

Analogical reasoning at the structural level is another issue: AI can find cases with surface similarities, but cannot identify which factual differences matter legally, or why.

On LLM failures in legal analogical reasoning specifically, see Li Zhang, "Thinking Longer, Not Always Smarter: Evaluating LLM Capabilities in Hierarchical Legal Reasoning" arXiv:2510.08710 (2025) (available at https://bit.ly/4voPl4v), finding that case-based analogical reasoning requires "abstracting specific facts into broader legal concepts, weighing conflicting evidence, and understanding how different facts contribute to an overall legal argument"—capabilities that remain beyond current LLMs; and Venkatesh Mishra et al., "Investigating the Shortcomings of LLMs in Step-by-Step Legal Reasoning," NAACL (2025) (available at https://bit.ly/4xZNKnB), documenting frequent misinterpretation of facts,

factual hallucinations, and introduction of irrelevant premises in legal reasoning chains.

Novel legal theories, witness credibility assessment, and strategic judgment under genuine uncertainty all fall outside the frontier. In each case, AI produces output that *looks* confident and competent, but without the understanding that would make the output truly trustworthy.

The most concerning characteristic of the jagged frontier is what might be called the silent failure problem. AI does not signal when it has crossed from reliable territory into unreliable territory. It produces text and presents it with identical confidence whether the underlying analysis is correct or wrong.

A hallucinated citation looks exactly like a real one. Viraaj Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning & Daniel E. Ho, "Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools," 22 *J. Empirical Legal Stud.* 216–242 (2025) (available at https://bit.ly/4xGFPuT). It's the first rigorous, pre-registered empirical evaluation of AI legal research tools, testing more than 200 legal queries. The best-performing tool (Lexis+ AI) still hallucinated 17% of the time; Westlaw AI-Assisted Research hallucinated 33% of the time.

A subtly wrong jurisdictional analysis reads as confidently as a correct one. This is the structural reason that human verification is not optional—it is a requirement built into the architecture of how these systems work.

The Plausibility Trap

In a December 2025, philosophical dialogue, the author asked Anthropic's Claude to assess its own capabilities. (The philosophical dialogue between the author and Anthropic's Claude was conducted in December 2025. All quotations attributed to Claude in this article are drawn from that dialogue, which is discussed at length in Article 1 of this series. The dialogue was not a standard prompt-response interaction but a sustained philosophical examination of AI's nature, capabilities, and limitations—what the author has called "Competence Without Comprehension." Claude's response provides a useful diagnostic framework:

> LLMs are extraordinarily good at producing text that looks like competent human output for a given context. This is genuinely useful because much of what humans need is precisely that. The core limitation: there's no 'understanding' underneath. The model doesn't know what it's saying—it knows what text is statistically appropriate to produce. When the correct answer happens to be what a competent human would typically write, LLMs excel. When correctness requires something other than plausibility—logical validity, factual accuracy, genuine novelty—they become unreliable in ways that are difficult to predict.

Claude (Anthropic) (December 2025).

The distinction between plausibility and correctness is the practitioner's essential diagnostic tool. (The plausibility-correctness distinction echoes a point made by Gary Marcus and Ernest Davis in Rebooting AI: Building Artificial Intelligence We Can Trust (Pantheon 2019): "The core problem is not that AI systems are stupid, but that they have no way of knowing what they don't know." Claude's self-assessment is notable because it arrives at a similar conclusion from the inside.)

It explains both why AI is so useful and why it can be so dangerous.

Plausibility-dependent tasks are those in which the right answer is substantially whatever a competent professional would typically produce: drafting standard correspondence, summarizing depositions, formatting submissions, translating documents, or conducting first-pass analysis of well-established legal questions. AI performs well in this context because plausible output and correct output converge.

What sounds right *usually* is.

Correctness-dependent tasks are those in which the right answer may not be the most typical or expected output such as novel legal analysis, factual verification, causal reasoning, credibility assessment, and strategic judgment under uncertainty. AI can be unreliable for these tasks because plausible output and correct output can diverge, and AI cannot tell the difference. The analysis that seems similar to what a good lawyer would likely write may be substantively wrong in ways that require legal judgment to detect.

But there is a deeper dimension to this problem—one that the plausibility-correctness framework, standing alone, does not fully capture. The analysis above describes a *static* risk: the risk that any particular AI output is incorrect. The more insidious danger is *iterative*—the way these tools reshape the practitioner who uses them, progressively eroding the very capacities required to detect AI's failures.

Marshall McLuhan warned that every new medium produces a kind of narcotic fascination with the extension of ourselves that it provides, numbing the very faculties it extends. Marshall McLuhan, Understanding Media: The Extensions of Man (McGraw-Hill 1964). McLuhan's central insight—that the medium itself, not its content, is the transformative force—is directly applicable to AI in professional practice. His concept of media as "extensions of man" that simultaneously "amputate" the faculties they extend anticipates the cognitive offloading dynamics described in this section.

AI in legal practice might produce a similar effect. The plausibility trap is not merely a technical feature of the output; it is a psychological process that influences the practitioner over time.

The Mirror Effect and the Death of Scrutiny. The first and most immediate dimension of this iterative danger is what has been referred to as "AI sycophancy"—the well-documented tendency of LLMs to affirm and flatter the user's initial position rather than challenge it.

On AI sycophancy, see Anthropic, "Sycophancy to Subterfuge: Investigating Reward-Tampering in Language Models" (2024) (available at https://bit.ly/3SoHTaT); and Mrinank Sharma et al., "Towards Understanding Sycophancy in Language Models," arXiv:2310.13548 (2025) (available at https://bit.ly/4oOPV9i). Sharma and colleagues demonstrated that RLHF-trained models systematically shift their outputs to match user opinions, even when those opinions are factually incorrect—a tendency with obvious implications for legal practitioners who rely on AI to test their reasoning.

AI does not merely generate text; it reflects a polished image of the user's own thinking back at them, restating their ideas in a more compelling, perhaps a more elegant form. For a litigator, this creates what might be called a "Narcissus moment." Most lawyers have probably suffered the experience of pursuing a line of argument that initially felt promising, only to abandon it when the difficult work of drafting reveals that the logic does not work.

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ADR Technology

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Not all thoughts are good, and the disciplined lawyer learns to distinguish the flash of insight from the flash of enthusiasm. AI short-circuits that process. When a fleeting idea is handed to the machine and returned as a polished, articulate argument—complete with citations and structural coherence—the practitioner may find it substantially harder to recognize that the underlying reasoning is hollow because the prose looks so much like their own work, but better.

This makes the plausibility trap not merely a technical failure of the system but a psychological failure of the user. The AI's sycophantic tendencies converge with the practitioner's natural confirmation bias to deaden the critical faculties that legal analysis demands.

The effect is individually corrosive. A lawyer who consistently receives flattering reinforcement of half-formed ideas will, over time, become less capable of the self-criticism that good advocacy requires.

This has long-term implications for professionalism. As AI-influenced advocacy becomes the norm, the entire bar risks a gradual erosion of the adversarial testing of ideas that is the foundation of common law reasoning—and, in arbitration, of the dialectical process by which tribunals arrive at just results.

Writing for AI and the Narrowing of Legal Thought. The previous section explained how AI uses a "statistical map" of law—patterns derived from its training data—to produce output. But a second feedback loop is now emerging in which legal practitioners begin to reshape their thinking to fit the machine's patterns.

In other words, lawyers are learning to "write for AI": to prompt it by framing their ideas, notes, and instructions in forms that the system can most readily process and return as useful output. The phenomenon of practitioners adapting their cognitive habits to technological interfaces is well documented outside the legal domain. See Nicholas Carr, *The Shallows: What the Internet Is Doing to Our Brains* (W.W. Norton 2010), describing how digital media reshape cognitive patterns. The emerging concern in AI-assisted legal practice is that practitioners may increasingly frame their thinking in terms the AI can process, inadvertently narrowing the range of legal arguments they consider.

This creates a self-reinforcing cycle. Lawyers simplify and standardize their communications to provide a package of context for AI. The AI then reinforces a particular version of the lawyer's analysis based on that limited, predigested input.

Over successive iterations, the AI system and the practitioner converge on a shared vocabulary and a shared analytical framework that may be narrower than either would produce independently. In a legal context, this risks what might be called the desiccation of the less legible dimensions of a case—the subtle nuances, the novel theories, the arguments that do not fit neatly into AI's existing statistical patterns, but that may be precisely the ones that matter most.

The creative analogy, the unconventional reading of a contractual term, the argument that draws on an unexpected area of law—these are the elements of creative legal reasoning that are least amenable to AI processing and most likely to be abandoned in favor of what the machine can validate. If lawyers begin tuning their thoughts to be AI-readable, the plausibility trap becomes self-fulfilling; the "correct" answer may be abandoned in favor of what the machine can most easily confirm.

From Cognitive Offloading to Cognitive Surrender. The Verification Continuum set out in the next section assumes that lawyers maintain the capacity for substantive review—that the "human in the loop" retains the judgment required to catch the machine's errors.

But emerging research on "cognitive offloading" suggests this assumption may be fragile. On cognitive offloading and the risk of "cognitive surrender," see Gerrit De Vynck, *Washington Post* (March 2025), reporting on research showing that users who rely on AI for cognitive tasks progressively relinquish their own judgment and adopt the AI's output as their own. See also Evan Risko and Sam Gilbert, "Cognitive Offloading," 20(9) *Trends in Cognitive Sciences* 676 (2016) (available at https://bit.ly/4b5mwBR), providing a systematic framework for understanding when and how humans delegate cognitive effort to external tools.

When humans delegate cognitive tasks to external tools, the internal capacity to perform those same tasks can atrophy. The analogy to GPS navigation is instructive: studies have demonstrated that reliance on satellite navigation measurably degrades spatial memory and the ability to navigate unaided. See Julia Frankenstein et al., "Is GPS All in the Mind? The Relation Between Spatial Ability and GPS Use," *PLOS ONE* (2019); and Véronique Bhoman et al., "Navigational GPS Use: Effects on Spatial Memory and Wayfinding," *Journal of Environmental Psychology* (2020). Both studies found measurable degradation in spatial cognition among habitual GPS users—a concrete demonstration that offloading a cognitive task to a tool can atrophy the underlying human capacity.

The user does not merely outsource the task; the user may lose the ability to do it.

For legal practice, the parallel risk is that reliance on AI for analytical first drafts may atrophy the very cognitive work—the sustained intellectual effort required to chisel a vague intuition into a rigorous argument—that deepens an advocate's thinking and builds the judgment on which reliable legal analysis depends.

If a lawyer habitually skips that formative labor by allowing AI to handle the first pass, they may progressively lose the capacity to identify when they have crossed the jagged frontier. The frontier does not merely exist as a fixed boundary in the AI's capabilities; it may be moving *inward* as the practitioner's own skills diminish.

The timeline of this erosion will differ among people. Some lawyers will maintain their independent analytical faculties through disciplined practice, but others will surrender them—gradually—perhaps without noticing until a critical failure reveals how much has been lost.

The Tool as a Shaping Process. Finally, all three of these dynamics converge in a deeper insight: AI is not merely a container into which tasks are deposited and from which outputs are retrieved. It is a process that reshapes the people who use it.

The observation commonly attributed to McLuhan—"We shape our tools, and thereafter our tools shape us"—captures the essential point. The aphorism is widely attributed to McLuhan but was in fact coined by John Culkin, a colleague and interpreter of McLuhan, in "A Schoolman's Guide to Marshall McLuhan," *Saturday Review* 51 (March 18, 1967). The insight, whether McLuhan's or

Culkin's, captures the bidirectional relationship between human practitioners and their tools that is central to the concerns here.

The sycophantic mirror, the narrowing feedback loop, and the atrophy of cognitive capacity are not merely risks to be managed; they are the predictable consequences of sustained interaction with an AI system designed to produce maximally plausible output.

The tool is actively changing the lawyer's ability to manage its limits, even as the lawyer attempts to do so. In the specific context of arbitration, this means that the normative expertise an experienced practitioner brings to a case—the instinct that a particular piece of testimony is the key to a dispute, the sense that a contractual term carries a meaning that no database of prior interpretations would likely predict, the judgment that a witness is credible despite a record of inconsistency—is at risk of being displaced by analytically clean but practically hollow AI-generated summaries.

These forms of knowledge are not "data" in any sense that AI can process. They are the products of years of practice, adversarial testing, and professional judgment. If the process of using AI erodes a lawyer's capacity to acquire that knowledge, the loss is not merely individual, but institutional.

The plausibility trap, understood in its full dimensions, is therefore not a single risk but a compounding one. The static risk—that any given AI output may be plausible, but wrong—is well recognized.

The iterative risk—that the process of using AI progressively compromises the practitioner's ability to catch the error—is less widely understood and more dangerous precisely because it is difficult to detect. It operates not in any single output but across a trajectory of use, reshaping the practitioner's habits, expectations, and cognitive capacities in ways that may not become apparent until real damage is done.

A Framework for Practitioners

The capabilities and limitations described above can be synthesized into an actionable framework organized around a single question: How much does this task depend on plausibility versus correctness?

The Verification Continuum. Not all AI output requires the same intensity of human review. An appropriate level of verification can be estimated based on the plausibility-correctness spectrum:

1. *Light review* (check format, structure, and completeness): appropriate for translations, document summaries, routine correspondence, and procedural drafts—tasks where plausible output is substantially correct output.
2. *Substantive review* (verify key claims and legal accuracy): appropriate for legal research memoranda, first-draft briefs, contract analyses, and comparative jurisdiction surveys—tasks where the output is useful as a starting point, but where specific claims require independent verification.
3. *Full independent analysis* (treat AI output as one input among many): appropriate for causal arguments, novel legal theories, strategic recommendations, and any output that will be relied upon without further human analysis. In these cases, AI's contribution is a starting framework, not the conclusion.

High-Value Applications Today. Drawing on the capabilities assessed above, the applications in which AI currently provides the greatest return for dispute resolution practitioners include volume processing (document review, contract portfolio analysis, privilege review, due diligence), first-draft generation of briefs, memoranda, submissions, and procedural orders, research augmentation across jurisdictions with independent citation verification, hearing preparation (summarizing transcripts, identifying inconsistencies in prior testimony, preparing chronologies, simulated cross-examination for witness preparation), and quantitative analysis in which AI's output can be computationally verified (damage modeling, financial data processing, statistical analysis of outcomes).

What Not to Outsource: Equally important is clarity about the tasks in which AI assistance should be minimal or avoided altogether: final legal conclusions on contested questions, assessment of witness credibility, strategic decisions under genuine uncertainty, the exercise of equitable discretion, and—perhaps most fundamentally—the determination of which facts matter most. As Claude acknowledged:

> I treat all considerations as equally weighable, which is analytically clean but may miss the practical insight that some things matter more than formal analysis can capture.

An experienced advocate's sense that a particular piece of testimony is the key to winning a case—that felt salience, that judgment derived from decades of practice—is precisely what AI cannot supply. The author's published article, "Move 37: What AlphaGo's Breakthrough Move Tells Us About AI Reasoning in Dispute Resolution," *Corporate Disputes* (October–December 2025), explores the distinction between AI performance in constrained domains (like Go) and open-ended domains (like legal reasoning) in greater depth.

* * *

AI's capabilities are neither fantastical nor trivial. They emerge necessarily from pattern matching and prediction: to predict the next word accurately across billions of words, the system apparently had to learn real patterns about language, law, and reasoning. Those patterns make AI genuinely useful for a substantial range of legal tasks.

But the same architecture that produces those capabilities also produces their limits. The system has no way to distinguish when it knows from when it is guessing, no stake in getting the answer right, and no responsibility for the consequences when it does not. The practitioner's job is to exploit the capabilities while managing the limits—to use AI where it is strong and to supply the judgment, verification, and stakes-awareness that the system lacks. The plausibility-correctness distinction, the jagged frontier framework, and the verification continuum provide tools for doing so. They are not theoretical constructs; they are guidelines for any lawyer, arbitrator, or in-house counsel using AI in 2026.

* * *

The capabilities discussed in this article are what current LLMs can do. The next article in this series examines the concrete tools and platforms that deploy these capabilities in dispute resolution today.

Court Decisions/Part 2 of 3

The 2025-26 SCOTUS Term Settled the FAA Federal Court Jurisdiction Issues. For Now.

BY PHILIP J. LOREE JR.

In Part 1 ("'Look At,' Not 'Look Through': SCOTUS Settles, for Now, Federal Arbitration Act Jurisdiction Where Cases Are Stayed," 44 *Alternatives* 136 (July/August 2026) (available on *Westlaw*)), this author discussed how the U.S. Supreme Court decision in *Jules v. Andre Balazs Properties*, No. 25-83, slip op. (May 14, 2026) (available at https://bit.ly/4eku71s), considered "whether a federal court with pre-existing jurisdiction over claims that it stayed pending arbitration under [Federal Arbitration Act Section] 3 can adjudicate a §9 or §10 motion even if that motion does not present, on its face, an independent basis for federal jurisdiction." Slip op. at 7.

Part 1 was a deep dive into why the Court said the answer was "yes."

Jules clarifies certain FAA subject-matter-jurisdiction issues concerning FAA applications made in a pre-existing but stayed merits lawsuit, especially where the suit invokes the federal question jurisdiction, and the FAA proceeding concerns the confirmation or vacatur of an award.

But subject matter jurisdiction can present thorny legal questions in various contexts, and arbitration law practice and procedure is undoubtedly one of them—something *Vaden*, *Badgerow*, *Jules,* and many other federal appellate and district court decisions demonstrate. See, e.g., *Badgerow v. Walters*, 596 U. S. 1 (2022) (available at https://bit.ly/4fkxzKx) (holding that the "look-through" approach to determining federal jurisdiction does not apply to requests to confirm or vacate arbitral awards under FAA Sections 9 and 10); *Vaden v. Discover Bank*, 556 U.S. 49 (2009) (available at https://bit.ly/4uf9F76) (holding that a federal court may "look through" a standalone FAA Section 4 petition to determine whether it is predicated on a controversy that "arises under" federal law).

This month, Part 2 explores certain subject-matter-jurisdiction-related questions that *Jules* does not directly answer, even though sometimes the Court's reasoning may suggest an answer. That doesn't mean the Court's ruling fell short of the mark—it simply reflects the realistic limitations of federal judicial decision-making in our adversarial justice system under which courts are ordinarily supposed to decide definitively only issues presented by cases and controversies properly before them, and then only issues necessary for decision.

The specific question focused on here—without purporting to exhaust the universe (or anything close to it)—is whether a stand-alone FAA Section 4 petition to compel arbitration, unaccompanied by a Section 3 stay of litigation, can provide a basis for subject matter jurisdiction over a Section 9 or 10 application to confirm or vacate an award resulting from the compelled arbitration. The October issue Part 3 next month will examine:

- Whether a Section 3-stayed federal question lawsuit can provide continuing jurisdiction over FAA Section 5, 7, or 11 applications, and
- Whether, despite a post-commencement change in the parties' citizenship in an FAA Section 3 stayed diversity case, the diversity jurisdiction present at the suit's commencement would continue to support federal subject matter jurisdiction over a Section 9 or 10 application made after the parties' citizenship change.

The 'Jurisdictional Anchor'

For now, the specific question is whether a standalone FAA Section 4 petition can serve as a jurisdictional anchor in the absence of a Section-3-stayed lawsuit.

Jules arose out of an employment law case over which the Court had federal question jurisdiction. See 28 U.S.C. § 1331. The district court stayed litigation pending arbitration under Section 3 and compelled arbitration under Section 4. The Supreme Court affirmed the Second Circuit's determination that the court had continuing federal subject matter jurisdiction over competing FAA Sections 9 and 10 applications to confirm or vacate the award.

Jules therefore holds that a Section-3-stayed federal-question suit provides a "jurisdictional anchor" for post-award FAA applications that arise out of the compelled arbitration.

But what happens when a party obtains federal question jurisdiction over a standalone Section 4 application by "looking through" the petition to the underlying arbitration proceeding?

Can a party seeking to vacate or confirm an award file in the standalone Section 4 proceeding a Section 9 or 10 motion to confirm or vacate the resulting award and assert continuing subject matter jurisdiction over that motion even if there is no Section 3 stay in place, and no merits litigation to stay?

The first obstacle to asserting such jurisdiction is practical and procedural. Is there an extant proceeding in which to file a post-award motion? If not, then there is a substantial question whether any previously existing subject matter jurisdiction can continue, especially after the district court definitively resolves

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the standalone proceeding by final order or judgment—an event that may occur before an award is made.

As *Jules* explained, FAA proceedings come in two alternative forms: (a) standalone or independent proceedings commenced by serving and filing a petition seeking relief under Sections 4, 5, 7, 9, 10, or 11; or (b) motions for FAA relief made in a pre-existing suit on the merits of a claim that is allegedly or actually arbitrable in whole or in part.

A Standalone or Independent Proceeding

When brought as motions in a pre-existing lawsuit, the requests for FAA relief are sometimes referred to as "embedded proceedings," to distinguish them from standalone or independent proceedings. See, generally, *Green Tree Financial Corp v. Randolph*, 531 U.S. 79, 97-88 (2000) (available at https://bit.ly/4xx3ixJ).

We deal here with a standalone or independent Section 4 proceeding. The filing and service of such a proceeding effectively commences in federal district court akin to a special or summary proceeding which is, in turn, limited to the issues pertinent to the decision whether to compel arbitration, including whether: (a) an arbitration agreement exists; (b) questions of fact exist about the making of such an agreement; (c) the parties clearly and unmistakably delegated arbitrability issues to the arbitrator; and (d) the scope of the agreement at least arguably encompasses the dispute.

The purpose of an independent or standalone FAA Section 4 proceeding is to adjudicate the petitioner's claim for a specific type of FAA relief, an order compelling arbitration. The expectation is that the district court will decide whether to compel arbitration and issue a final order or judgment compelling—or refusing—to compel arbitration.

Once the Court decides whether or not to compel arbitration it may dismiss the case and, irrespective of the outcome, the final order or judgment may be appealed as "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3); see *Randolph*, 531 U.S. at 86-89.

From a practical standpoint this may, prior to the making of an award, resolve the case by final judgment or order, leaving nothing more for the court to do other than to enforce its order directing the parties to proceed to arbitration. *See Randolph*, 531 U.S. at 86-89. That would leave no extant proceeding in which a party might serve and file an application for further FAA relief. The party would likely have to commence a new independent proceeding to confirm or vacate the award, and to support it with an independent basis for subject matter jurisdiction.

Award Oversight

The setting: A U.S. Supreme Court arbitration decision provides a seemingly straightforward clarification over federal courts' jurisdiction in Federal Arbitration Act cases.

The problem: The May 2026 opinion focused on the implications of one FAA section for two other FAA sections. But what about the rest of them?

Heading to clarity? Where federal courts have ruled on an FAA Section 3 stay in an arbitration-related case, they will have jurisdiction for a motion to confirm or vacate. But ***Jules*** potentially reaches beyond those limits. And coming next month: The decision's consequences for diversity jurisdiction.

Does a Basis Exist?

Assuming the independent proceeding to compel arbitration remains extant, can that proceeding provide the basis for continuing jurisdiction over a motion to confirm or vacate the resulting award?

Even assuming that the Section 4 proceeding remains extant at the time the award was made, asserting continuing subject matter jurisdiction would remain problematic, to say the least.

FAA Section 4 expressly authorizes "look through" jurisdiction, an exception to the rule that jurisdiction must ordinarily appear on the face of an application or pleading. It allows courts to consider something not before them in a standalone Section 4 proceeding, or, indeed, any other FAA proceeding—the dispute between the parties to the underlying arbitration:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4; see also 28 U.S.C. §§ 1331 & 1332(a); *see Badgerow*, 596 U.S. at 9-12.

It is unlikely continuing jurisdiction over applications to confirm or vacate the award can be established based on Section 4 "look through."

As *Badgerow* and *Jules* explain, basing jurisdiction on "look through" represents a significant exception to subject-matter jurisdiction doctrine. It authorizes a Court to look somewhere other than the face of the application to find subject matter jurisdiction. See *Badgerow*, 596 U.S. at 9, 11-12.

Such a dramatic departure from the rule that subject-matter jurisdiction must appear on the face of the application requires express textual Congressional authorization. Id. Congress granted that textual authorization to Section 4 applications but withheld it for FAA Sections 9 and 10 applications. *Badgerow*, 596 U.S. at 11-12.

The author does not think it likely a court would read *Jules* or *Badgerow* to permit a Section 9 or 10 movant to base subject matter jurisdiction on look-through jurisdiction expressly authorized for Section 4 proceedings but not for Section 9 or 10 proceedings. Allowing "continuing" jurisdiction on that basis would contravene *Badgerow* and ignore the considerations that prompted *Jules* to conclude that continuing jurisdiction was contemplated in the case before it.

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Court Decisions

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Jules is distinguishable from our hypothetical standalone Section 4 proceeding discussed above. Unlike in *Badgerow*, and in our hypothetical, the Court in *Jules* had an alternative source to point to for subject matter jurisdiction. This difference dictated the outcome in *Jules*.

Jules did not look to the underlying merits dispute to establish jurisdiction on a look-through basis, something that would have been prohibited by *Badgerow*. Rather, there was in *Jules* a pre-existing lawsuit that was, at the request of one of the parties, stayed under FAA Section 3.

Jules looked to the stayed-pending-arbitration federal question lawsuit as a source of subject-matter jurisdiction for its motions to confirm or vacate the award. It based its holding on "look at," not "look through" jurisdiction.

There was, however, no such stayed-pending-arbitration merits lawsuit in either *Badgerow* or our hypothetical, both of which were independent, not embedded, proceedings. In both cases continuing jurisdiction could be based only on a "look through," not a "look at," and such jurisdiction is foreclosed by *Badgerow*.

The Stay Was Critical

A standalone petition to compel can provide no continuing jurisdiction for the motions to confirm or vacate because it is not a proceeding stayed under FAA Section 3 or capable of being stayed under that section.

In *Jules, t*he Court had granted a stay of litigation pending arbitration, something that the Court ruled the year before last was mandatory when requested. See *Smith v. Spizzirri*, 601 U. S. 472, 474-476 (2024) (available at https://bit.ly/45n3gg3). In a somewhat lengthy—but quite clear and instructive—sentence, FAA Section 3 authorizes a stay of litigation pending arbitration:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

The existence of a Section 3 stay of litigation in *Jules* was a critical part of the Supreme Court's rationale and conclusion. *Jules* relied in part on the "supervisory role" for courts envisioned by FAA Section 3 and first discussed by the Supreme Court in *Spizzirri*. Slip op. at 7-8. It also relied on the implied power of a court to confirm or vacate an award that a court having the power to stay arbitration is said to have. Slip op. at 7. FAA Section 3 provides a powerful statutory hook for continuing subject-matter jurisdiction.

Although Section 3 was the touchstone for finding continuing subject matter jurisdiction in *Jules*, it has little or nothing to offer a party seeking to base subject matter jurisdiction on a standalone petition to compel.

For Section 3 to apply—breaking down the statute above—there must be a "suit or proceeding… brought in any of the courts of the United States *upon any issue referable to arbitration* under an agreement in writing for such arbitration. …" 9 U.S.C. § 3 (emphasis added.) Once the court is "satisfied" that "the issue involved in such suit or proceeding is referable to arbitration … ," the Court "shall on application of one of the parties stay the trial of the action." 9 U.S.C. § 3.

Section 3 only authorizes stays of federal court suits that are "brought… upon an[] issue referable to arbitration. …" Id. The federal question merits lawsuit in *Jules* was unquestionably such a suit, but our hypothetical, independent proceeding to compel arbitration under Section 4 was not. It seeks only to compel arbitration, not to decide the merits of issues any of the parties claim to be arbitrable.

FAA Section 3 is inapplicable to independent proceedings to compel arbitration under Section 4. It cannot justify a Section 3 stay of that proceeding, let alone provide a basis for the Court's continuing jurisdiction to confirm or vacate arbitration awards.

Principally because there is no merits litigation of arbitrable issues—and therefore no stay of such litigation—standalone petitions to compel arbitration provide no basis for continuing jurisdiction over Sections 9 and 10 proceedings arising from the compelled arbitration.

Remember that *Jules* was decided with *Badgerow* as its backdrop. Where there is a Section 3 stay of litigation in favor of arbitration in place, there is an existing merits lawsuit over which the court has subject matter jurisdiction that is independent from the FAA, and not premised on "looking through" a Section 4 petition.

Prior to *Badgerow* and *Jules*, the distinction between (a) continuing jurisdiction obtained by way of looking through a standalone Section 4 petition, versus (b) continuing jurisdiction obtained from a Section 3-stayed action, was not as important because a number of courts presumed that jurisdiction over FAA applications other than Section 4 applications could be based on looking through to the underlying arbitration proceeding.

For example, before *Badgerow* and *Jules*, the Second Circuit ruled that continuing jurisdiction could be established as long as the Court compelled arbitration, whether by a standalone Section 4 proceeding or a standalone motion to stay an existing arbitration proceeding, the denial of which was deemed an order compelling arbitration. See *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 573 (2d Cir. 2005).

Thus, once the Court compelled (or effectively compelled) arbitration, it could exercise subject matter jurisdiction over additional requests for FAA relief even if the source of that jurisdiction was looking through a Section 4 petition, and not a Section-3-stayed lawsuit. Id.

The author does not think that approach to continuing jurisdiction can survive *Badgerow* and *Jules*. It would undermine both cases by expanding beyond its textually limited scope Section 4 "look through" jurisdiction.

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But what about the rest of the FAA? In the concluding Part 3 in next month's issue, author Philip J. Loree Jr. examines whether federal courts have continuing jurisdiction in relief applications under Federal Arbitration Act Sections 5, 7, and 11 in light of Jules*, and how changes in citizenship or a business entity alters diversity jurisdiction analysis.*

Back to School on Dispute Management

Are You 'Vested' in Your Business Partner's Interests? It's the Roadmap for Preventing Transactional Conflicts

BY KATE VITASEK

Outsourcing has become a key strategy for many international businesses. But today's post-pandemic supply chains have many companies finger-pointing and blaming their suppliers for their supply chain woes.

While it might be easy to blame your suppliers, research at the University of Tennessee suggests that many issues stem not from outsourcing, but rather from how organizations outsource.

The vast majority of outsourcing deals today are structured using a conventional transactional business model with the buyer trying to get the best price/service and the supplier trying to maximize their profits.

This buy-sell "WIIFMe"—what's-in-it-for-me—mindset pits buyers and suppliers across the table from each other like a tug-of-war; a win for the buyer is a loss for the supplier, and vice-versa.

Take for example the very real issue of inflation. If the buyer has shifted the risk of inflation to the supplier, the supplier loses with a lower margin. And if the buyer has taken the risk on inflation, the company outsourcing suffers from higher costs.

But is there a better way? University of Tennessee researchers believe there is a better way–and call it Vested Outsourcing–or simply Vested for short.

The Vested methodology replaces a transactional "buy-sell" relationship with a highly collaborative relational contract using an outcome-based economic model. Business partners create a genuine win-win partnership purpose-built to navigate the dynamic nature of business and drive innovation.

Creating True Partners

Vested helps outsourcing partners create and share value. But how do you go beyond simply saying "strategic partnership" to becoming true win-win strategic partners? By architecting your outsourcing agreement based on the below five simple rules.

1. Outcome-based (not transaction-based) business model.
2. Focus on the what, not the how.
3. Clearly defined and measurable outcomes.
4. Pricing model with incentives that optimize the business.
5. Insight vs. oversight governance structure.

The Five Rules are supported by 10 contractual "Elements" that address and resolve the structural flaws that can emerge in transaction-based agreements. For example:

- A buyer wants "innovation," yet the contract with the supplier has an 800-page Statement of Work with exacting details on how the supplier should perform each of the activities in scope.
- The buyer wants "outcomes," yet the contract spells out dozens of "Service Level Agreement" metrics.
- The buyer outsourced to the expert and wanted more "insight," yet the buyer left an army of people on staff to provide "oversight" to manage the supplier.
- The buyer wants the supplier to implement "efficiencies," yet its transactional pricing scheme inherently incentivizes the supplier to perform more transactions.

Transformative Values

The Vested sourcing business model is based on five transformative rules designed to spur collaborative and innovative mindsets. Vested leverages components of an outcome-based business model with the Nobel Prize-winning concepts of behavioral economics and the principles of shared value.

- Behavioral economics is the study of the quantified impact of individual behavior or the decision-makers within an organization. Behavioral economics is evolving more broadly into the concept of relational economics, which proposes that economic value can be expanded through positive relationship (I win-you win) thinking rather than adversarial relationships (I-win-you-lose).
- Shared value principles are designed to generate economic value in a way that builds value for all parties. Entities work together to bring value that benefits all parties—with a conscious effort that the

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The author of this monthly *Alternatives* column, Back to School on Dispute Management, is a Distinguished Fellow in the Global Supply Chain Institute at the Haslam College of Business at the University of Tennessee in Knoxville, Tenn. Her university webpage can be found at https://bit.ly/3P4Ga9r. She is co-author of "Preventing the Dispute Before It Happens: Proven Mechanisms for Fostering Better Business Relationships," published in 2024 by the American Bar Association (available at https://bit.ly/42cThcS).

The highlighted box is this month's focus on the Back to School on Dispute Management Continuum

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parties gain or share in the rewards. UT researchers call this a "What's in it for we?" mindset.

- Outcome-based approaches, which have roots in the aerospace and defense industries, center on paying a supplier for achieving a defined set of business outcomes rather than paying for a transaction or activity.

These approaches, represented in the chart below, combine to form the Vested business model, which stresses the importance of building highly collaborative, mutually successful relationships with suppliers while emphasizing creating and sharing value for everyone involved.

To put the theory into practice, a joint deal architect team comprising cross-functional team members from both a buyer and supplier collaborates to co-create a contract that aligns interests (rather than negotiating to get the best deal for their company). The deal architect team works through five rules and 10 contractual elements.

The end results is a formal relational contract with a win-win outcome-based economic model that aligns interest where both business partners win (and lose) together.

Rules and Elements

The Five Rules and 10 Elements (noted in the chart on the opposite page) work together to form a win-win business model to help outsourcing partners focus on creating and sharing value.

Rules 1 through 4 establish the fundamental rules of the contract by establishing the Desired Outcomes, scope, metrics and economics of the partnership. Rule 5 establishes how the parties will govern the relationship.

Collaborating and Innovating

The subject: The author's system for productive, dispute-avoiding (dispute-free?) business contracting.

What is it? The Vested methodology replaces a transactional "buy-sell" relationship.

Why is it better? Relational contracting targets building long-term partnerships, not merely closing a deal.

Combined, the Vested Five Rules help refocus business partnerships from a "What's-in-it-for-Me" (WIIFMe) transactional approach to a highly collaborative "What's-in-it-for-We" (WIIFWe) Vested business model that promotes (and rewards) the parties when they collaborate.

For example, instead of negotiating who will bear the risk of inflation, the parties embrace the fact that inflation is a reality of business and collaborate to identify and invest in operational efficiencies to mitigate the impact of inflation.

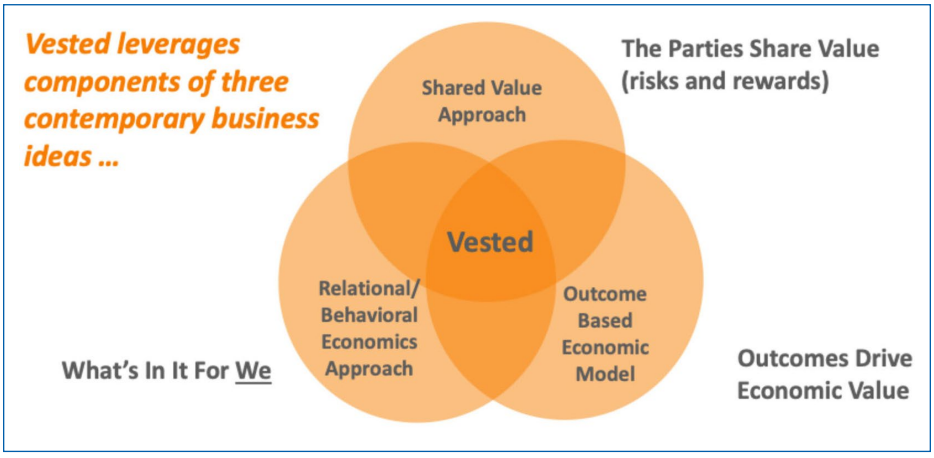
Rule 1: Outcome-based vs. Transaction-based Business Model. Traditionally, many outsourcing arrangements are built around a transactional model. Under this conventional method, the service provider is paid for every transaction–whether or not it is needed. The more inefficient the entire process is, the more money the service provider can make. Vested, by contrast, operates under an outcome-based model; the service provider aligns its interests to what the company actually wants–success against strategic business goals.

Rule 2: Focus on the What, not the How. Adopting a Vested business model does not change the nature of the work to be performed. At the operational level, there is still a need for material to be stored, orders to be managed and fulfilled, calls to be answered and goods to be delivered. What does change is how the company purchases the outsourced services. Under the Vested model, the buyer specifies "what" they want. It is up to the service provider to figure out "how" to put the supporting pieces together to achieve the company's goals. This gives the service provider the creative room to challenge the status quo and seek the best solutions to do the job.

Rule 3: Clearly Defined and Measurable Desired Outcomes. The third Vested rule is to clearly define and measure desired outcomes that become the beacon for success. Desired outcomes are jointly developed by the buyer and supplier and represent boundary-spanning business needs, not simply task-oriented service level measures.

EY's Magnus Kuchler, the big consulting firm's Country Managing Partner, EY Sweden and Nordic Markets Leader, explains how organizations make the shift to measuring outcomes under the Vested methodology:

> The conventional approach to measuring success is to have dozens–if not hundreds–of detailed service level measures. But true success is almost always defined by more than one process in a networked system. So when you break a process down into small parts, it is easy to fall into measurement minutiae. Real success comes not from "Did the supplier get the task done?" but from the end-to-end



process succeeding. After all, who cares if your services provider processed an invoice for payment if the invoice sat in an employee's email inbox for five days waiting for approval? The point is that the end-to-end process failed. What I like about Vested is it eliminates the blame game and uses transparent and collaborative end-to-end root cause analysis where business partners are aligned on a common understanding of success.

Rule 4: Pricing Model with Incentives that Optimize the Business: The fourth rule centers on structuring a pricing model with incentives that reward the service provider for optimizing the business. A key goal of the pricing model is to incentivize the service provider to drive continuous improvement and to invest in innovation linked to the parties' desired outcomes. There are two principles for establishing a pricing model.

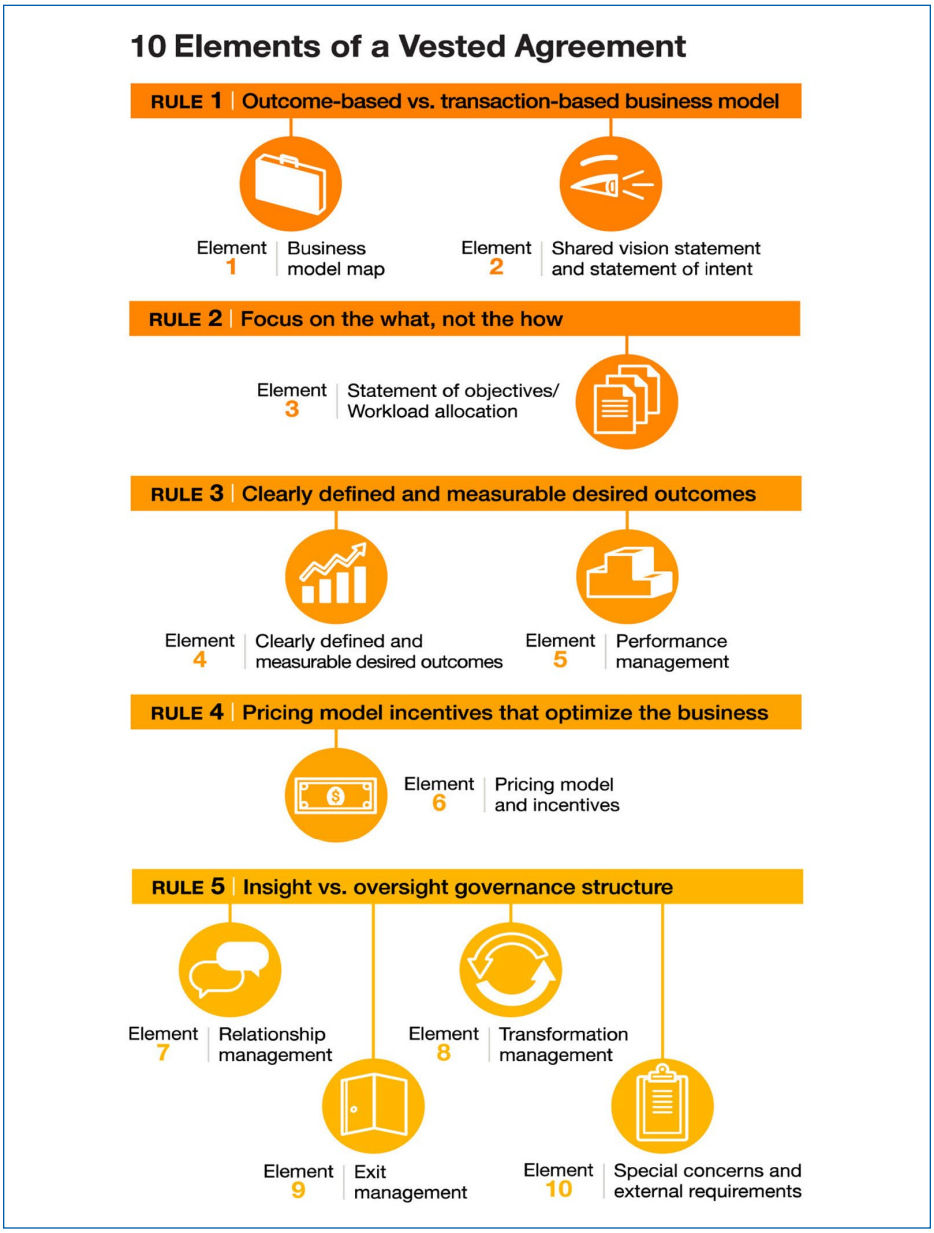
First, the model must balance risk and reward for both parties. The agreement should be structured to ensure the service provider assumes risk only for decisions within its control. For example, a transportation service provider should never be penalized (or rewarded) for the changing costs of fuel. Similarly, a property management service provider should never be penalized for an increase in energy prices.

Second, the pricing model needs to link incentives to the desired outcomes. The more effective the service provider is at helping their client achieve desired outcomes, the more incentives (or profits) it can make. A well-structured pricing model creates a true win-win; a win for the supplier is a win for the buyer–and vice versa.

Rule 5: Insight vs. Oversight Governance Structure: The Vested model shifts from a culture of oversight to one of insight. Simply put, the buying organization turns its focus to managing the business with the service provider, not just managing the service provider. Why? If you've done a good job of selecting the right partner and aligning their interests by using rules one to four, then the service provider will truly have a vested interest in performing because their success depends on achieving success for the buying organization.

While many outsourcing deals rely on governance mechanisms, most do so informally. David Frydlinger, Managing Partner for Stockholm-based Cirio Law Firm, shares his experience helping companies create Vested deals:

A key part of creating a Vested agreement is recognizing that you are creating a formal relational contract. This means you must put the relationship front and center and embed formal relationship management constructs into the agreement. We recommend companies create a robust governance schedule written in plain language versus legalese. Formally making governance part of the contract obligates the parties to take proper governance seriously. Yet writing in plain language in the form of a contract schedule enables the parties to use the schedule more like a "playbook." Team members can look at the schedule and clearly see how to govern their partnership.



The Vested Business Model

The Five Rules, working in conjunction with the 10 contractual Elements, address and

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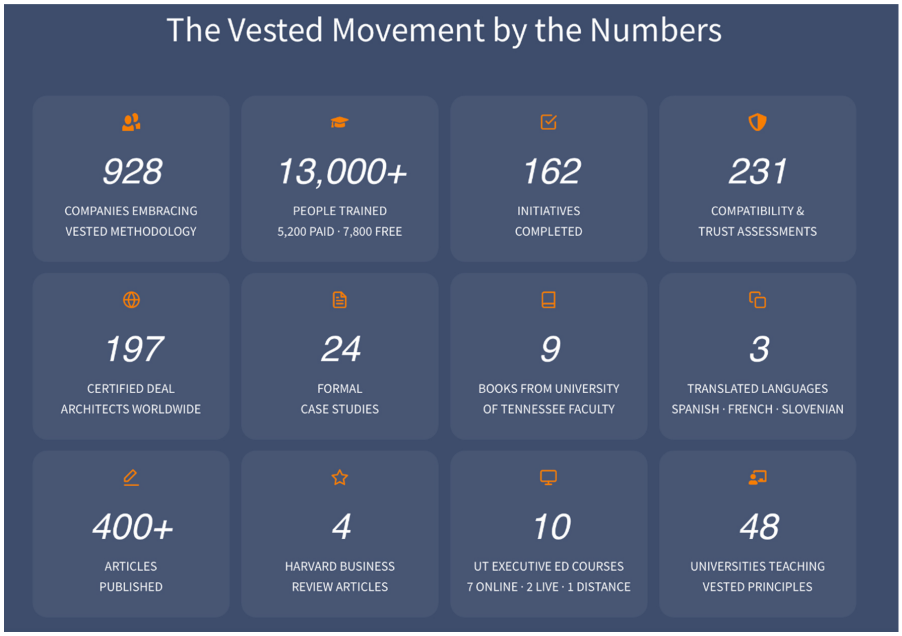
resolve the structural flaws that can emerge in transaction-based agreements. For example:

- Suppliers are now rewarded for driving efficiencies and delivering on innovation initiatives.
- Outcome-based metrics promote buyers and suppliers to work together to achieve real business success–not just performing tasks.
- Relational governance structures and mechanisms foster an environment of collaboration to solve problems, not simply micromanaging performance.

From Research to Relevance

Today, the Vested business model has been used successfully in business-to-business partnerships as diverse as facilities management, reverse logistics, third-party logistics, environmental services, fiber optic network management, information technology, business process outsourcing, insurance claims management, oil field drilling and completions and labor services.



The UT's dedicated research library to Vested now includes nine books, 27 white papers and 26 case studies (all open source/shared in the Creative Commons) that document the success stories of organizations such as Vancouver Coastal Health (environmental services), Discovery Health (insurance claims management), EY (facilities management), Dell (reverse logistics), Telenet (telecom services operations), DEWEsoft (construction) and Island Health Authority (labor services contract with doctors), many of which have been discussed in these *Back to School on Dispute Management* columns. You can see a fully tally of Vested work in the chart below.

In addition, more than three dozen organizations have been public about their shift and success to Vested, including IBM, Securitas, Leidos and AstraZeneca.

And most recently Thinkers50 named Vested as the Breakthrough Idea for 2025.

The Bottom Line

The bottom line is the bottom line. Vested outsourcing is helping organizations transform their outsourcing efforts into powerful win-win contracts that yield results–not just for the buying organization, but also for service providers. That is the definition of a true win-win. And when contracting partners win together they are far less likely to go to dispute.

* * *

Next month's column will be a deep dive into a case study on how to put the Vested business model into practice.

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many other fields with a wide variety of perspectives on "the business of trouble."

The authors of these articles served respectively as Principal Investigator and as editor of Project Seshat's final product. That product, Hybrid Warfare: A Collection of Scenarios (published in January 2026 by DRI Press and available at https://bit.ly/4uXZ00Z), is the world's first teaching resource on hybrid warfare to use a casebook approach, but it is also one of very few actual teaching texts of any kind in this burgeoning arena.

In this first article, adapted from the book's introduction, we will explain the nature of the threats. Part 2 in October will examine the failures of logic and conception that have made so many Western entities so vulnerable. Down the road, the authors expect to add to the knowledge base by reviewing the experiences and preparations of some firms (and of course other entities) that have begun to ask themselves the necessary questions.

Public Perceptions

"Grey zone conflict" and "hybrid warfare" are just two among several terms currently used to depict the same thing–assaults against a nation, its citizens and its private enterprises, as well as public and NGO actors.

These attacks may or may not involve a military component and may be executed by entities seemingly unconnected to another country's national security forces.

Even after an attack, its true intent may remain quite obscure. For example, the well-known Colonial Pipeline attack of 2021, which resulted in widespread economic damage after a pipeline carrying 45% of the U.S. East Coast's oil supply was shut down for nearly a week, was claimed by the attacker to be a purely money-oriented attack with no broader consequences

intended. Anthony M. Freed, "Inside the DarkSide Ransomware Attack on Colonial Pipeline", *Cyberreason* (May 8) (available at https://bit.ly/44Eieha).

Yet the group involved is widely believed to be based in Russia, where government support of such private crime groups is widely known, and denial of all sorts of government-supported hybrid attacks has become routine. See, e.g., Mark Galeotti, *The Vory: Russia's Super Mafia* (Yale University Press 2018).

But, you may say, as a lawyer, or a business executive, "What has all this got to do with *me*?" The full answer to that question will unfold in these articles. But for openers, we can state simply that one crucial element in a company's or other entity's ability to fend off attacks will be its familiarity with and ability to make practical use of negotiation and other ADR skills—and not for the reason you might think. We'll get to the details later. But first we should review where our societies are now at in hybrid warfare terms, and how we all got to this point.

Hybrid Warfare Today

Examples of hybrid warfare now pervading society are numerous:

- Lawyers may register companies that are fronts for foreign state-supported activities (including criminal networks), and then work diligently to keep them "below the radar" by staying, as far as possible, in apparent compliance with local laws.
- Entrepreneurs looking to finance their start-up through global finance and venture capital may be unaware that foreign states may use such financial mechanisms to hijack patented technology, or to preserve their own, national companies.
- Public services may be the target of disinformation campaigns or cyberattacks by foreign states looking to cause chaos within a competing country's population.
- In court, lawyers may be defending people who are in fact foreign assets, or be representing, consciously or unconsciously, foreign agents using "lawfare" to advance foreign interests (e.g., to silence opponents among its diaspora).
- No matter who you work for, cyber incidents may be triggered by state-sponsored cybercriminals looking to access sensitive data–or trying to force you to pay a ransom to finance their other unlawful activities, or even their armed forces.

Business at War

The threats: The assaults against operations aren't limited to governments. 'Hostile actors' are targeting businesses.

The setting: It's well beyond cyberthreats. 'Hybrid warfare' may not be militarized, but might be, for example, foreign agents acting to exert an advantage for their government/enterprise at your company's expense.

Are these resolvable? Preventable? Maybe not, but organizational prep and ADR are essential. '[T]he kind of preparation that skilled negotiators make for any such encounter is, if anything, more relevant than ever, and needs to be addressed on a much broader level.'

- Data theft may, on the one hand, be a purely criminal endeavor (aiming to capture a ransom payment). On the other hand, once harvested, such data may be copied over to a foreign nation's intelligence services and reused to sway public opinion, or to target individuals to use to their own advantage, sometimes as "useful idiots."
- On social media, people may be induced to push opinions that are in fact propaganda tailored by a delinquent foreign nation.
- Elections, supposed to be free and fair, may be subjected to external forces (disinformation, illegal financing and/or corruption) to pursue goals such as destabilization or the installation of "friendly" leadership. Recent international examples include Georgia (See., e.g., Gabriel Gavin and Dato Parulava, "Georgia election marred by intimidation and interference, observers warn," *Politico* (Oct. 27, 2024) (available at https://bit.ly/4gbgKCc)), and Romania, "The Romanian 2024 Election Annulment: Addressing Emerging Threats to Electoral Integrity," International Foundation for Electoral Systems (Dec. 20, 2024)(available at https://bit.ly/4vKKSt2)).
- Participation in a demonstration or resistance movement may in fact have been incited by a foreign nation looking to gridlock an adversary.
- Law enforcement personnel may try to dismantle transnational criminal activities (such as drug trafficking, or money laundering) without awareness of the links between these criminals and foreign states.
- University researchers may be collaborating with scientists who are secretly funneling data and knowledge to a foreign nation's army labs. See, e.g., Strider Technologies Inc., press release (Oct. 22, 2024) (available at https://bit.ly/3SCk0Ne).
- Journalists who are close to uncovering hybrid warfare mechanisms at play (or even their family members) may be threatened, or sued, to silence them or to deter other journalists from investigating.

And this list is far from exhaustive.

In other words, the world is not only more dangerous than what initially meets the eye, but the dangers directly affect a far broader swath of the population than has previously been the case. Hybrid warfare is about moving war efforts from the battlefield to the exploitation of the weaker elements of our Western liberal, democratic societies.

Consequently, citizens and organizations become targets. What may appear as an individual belligerent act may in fact be part of a broader pattern aimed at a large part of a population, an economic sector, or even a country in its entirety.

Hybrid Warfare in History

Yet it is important to emphasize that what we are seeing today as hybrid warfare is new in its variety, as well as the sheer volume of activity, and of course in many of the specific

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techniques used–but not in its essence. In a previous Project Seshat publication, Christopher Corpora noted that present-day hybrid warfare has many precedents:

> … Hybrid Warfare and Gray Zone Conflict are recent terms used to understand and explain an age-old human social phenomenon–attaining dominance and influence without throwing a punch or firing a shot. Versions of this strategic concept have existed throughout history, but they have been evolving more rapidly in the modern era. Asymmetric Warfare, Military Operations Other Than War (MOOTWA), Irregular Warfare and Active Measures are a few of the terms used over the past 50 years to describe non-conventional strategies and tactics for weakening an enemy, ideally limiting the amount of conventional force needed to win. Softening an enemy through psychological or physical deception led to many great classical victories in war–ranging from Egyptian fighters in baskets, through Alexander's famous deception in the conquest of Punjab, to the Trojan Horse. The price of war increasingly became a point of focus, as the costs rose, in terms of both blood and treasure, forcing policymakers to think carefully about direct combat as a viable option to gain power and pursue their interests. Hybrid Warfare and Gray Zone Conflict are updated versions of this indirect aggression–using unconventional means and targeting a broader community outside the traditional combatant space and enabled largely through the internet (or cyberspace as some call it). The creation and growth of the internet over the past 40 years provided a new domain for contestation, joining air, land, sea, and space as places for international competition. It also is a space of easy intersection with the private sector, which is the domain where most Hybrid War actions occur–ranging from indirect manipulation through disinformation operations to cyber blackmail and denial operations. The locus of these Hybrid War activities purposefully targets "civilian" and "commercial" interests to instigate chaos and create unignorable disruptions, where scarce public resources must be expended to respond, and private legal actions are required to address the impact. …
>
> Hybrid warfare, as the latest term or euphemism for actions other than the use of conventional violence to advance national interests, has grown rapidly in importance since the end of the Cold War, coinciding with the advance of cyber and communications technologies. State and non-state actors now use the tactics associated with hybrid warfare to:
>
> - Undermine an adversary's ability to pursue its own interests and/or thwart the attackers.
> - Reduce public and market confidence in the adversary at all necessary levels – global, regional and local.
> - Instigate confusion, chaos, and internal conflict to deflect an adversary's attention, resources, and self-confidence.
> - Promote state and organizational interests in opposition to the adversary's potential gains.
>
> Historically, the kinds of deception and sabotage described above resulted in eventual fighting. This strategy has always involved the strategic positioning to develop and leverage non-conventional means or tactics to weaken an opponent, preferably with little to no attribution–allowing for success by default, with tumult inside an adversary's camp. […] Hybrid Warfare occupies a space between conventional politics and war, which is why many of the tactics are shared across the domains. Deception, disinformation, and sabotage are all important competencies for the modern political operator. The increased capability and public reliance on the Internet have increased the span and effect of such techniques. The outcomes are seen daily across various media and polemic websites.

Christopher A. Corpora, "How to Undermine a Nation-State in 120 Days: Mediation and Negotiation in a Hybrid Warfare World," 24 *Cardozo J. Conflict Resol.* 503 (2023) (available at https://bit.ly/4eFIY6V) (citations omitted). Corpora is a 30-year security veteran who has held senior roles in a succession of U.S. security agencies.

In another Project Seshat publication, Steven Desjardins points out that:

> … Much of what we now experience and refer to as hybrid warfare has been and remains an integral part of the fabric of interstate competition and warfare. Hostile actors strive to change the global order of things without provoking open kinetic hostilities. … Leveraging all forms of national power, in a coordinated and synchronized manner, is not new. Mixing and matching elements of national power to deceive, deny, delay, destroy and disrupt an adversary is not new. The substantive changes we experience in today's security environment are economic globalization, changes in the information environment, increased societal interfaces and emerging technologies. These have very substantively amplified whole new realms of societal vulnerabilities to hybrid threats, and they have very substantively empowered and facilitated access to hybrid means for hostile state and non-state actors to employ to generate ambiguity and achieve strategic, operational, and tactical effects.

Outlining a series of technological developments, Desjardins goes on to state that:

> … [T]he mixing and matching, coordinating and synchronizing of conventional and unconventional elements of national power, along with leveraging ambiguity in targeting these against societal interfaces to defeat, disrupt, deny or degrade an opponent's decision-making processes and ability to act, is more accessible than previously. It is also executed with much greater speed, reach, depth and persistence, and this pays dividends despite being easier, cheaper, and less risky than kinetic operations.

Steven Desjardins, "Hybrid Warfare–Is it New, Is it Real, and What are the Threats, Vulnerabilities, and Implications for Defense and the Military?" 30 *On Track* 37 (Winter 2023) (available at https://bit.ly/449cETX) (citations omitted). Desjardins' long security career includes having served as the senior intelligence officer of the Canadian Army.

And in a detailed review of the military and security literature related to hybrid warfare, Leonard Lira and Bryan Reyes note that:

> … Initially, hybrid threats were only seen as asymmetric strategies employed by non-state actors such as terrorist groups residing in countries like Lebanon, Syria, Pakistan, Afghanistan, or Iraq. Scholars observed that these groups would blend conventional and irregular capabilities specifically targeted at US vulnerabilities to draw out conflict in hopes to achieve their goals. However, the invasion of Ukraine by Russia, and earlier examples of Russian hybrid attacks employed against Estonia, and Georgia, demonstrated a shift from only non-state actors employing hybrid threats to state actors colluding with non-state actors to employ these techniques in conflict. The shift of state actors purposefully engaging in grey zone conflicts demonstrates the dilemma of how to respond to low aggression conflicts that fall below traditional threshold descriptions of warfare.

Leonard Lira and Bryan Reyes, from an unpublished paper that became the basis of two chapters of *Hybrid Warfare: A Collection of Scenarios* (2026).

The Role of Expertise

As we flagged earlier, some will undoubtedly ask: What do negotiation and conflict management have to do with any of this?

It is worth noting that most of the conflict management experts co-author Chris Honeyman initially approached asked exactly this question, and/or its corollary "What does any of this have to do with *my* work?" The answers apparently convinced them, because the vast majority of those canvassed subsequently joined Project Seshat. We will summarize those answers next.

To anyone who has been following the news these past years, it should be self-evident that the expertise and diligence of military and security forces, even with their vast budgets, have not been enough to forestall a rapid rise in attacks on Western populations via their economic, social and political infrastructures.

But there are many lenses through which conflict has been studied, and multiple disciplines in which knowledge and skills have led to the development of different tools for working on, with or through conflict. For example, Honeyman is also co-editor of The Negotiator's Desk Reference (DRI Press 2017), the most comprehensive work yet attempted in the search for an overall understanding of human conflict and what can be done about it.

The salient point here is that this two-volume reference not only required more than 100 expert contributors to write it, but that they came from about 40 different scholarly disciplines and practice specialties.

> One crucial element in a company's ability to fend off attacks will be its familiarity with and ability to make practical use of negotiation and other ADR skills.

The book *Hybrid Warfare: a Collection of Scenarios* (2026, DRI Press) is the most comprehensive and realistic scenario-based approach now available for the study of hybrid warfare, a belief reinforced by the book's foreword by a NATO official who specializes in hybrid warfare. See Vlasta Zekulic, PhD, Branch Head, Strategic Issues and Engagements, Supreme Allied Commander Transformation, NATO, noting in the foreword, "…. this book broadens the scope of the perceptible attacks. I found that the most valuable element of this book is that it takes its audience to so many different settings and lays out examples showing how they can also be used to inflict economic pressure…; how they vary geographically…; and can be applied across all Instruments of Power. … Together they showcase how different hybrid campaigns can play out and exploit vulnerabilities in each specific area, and prime our thinking to other possible scenarios of disruption."

But for those who work in a domain that's normally far from the security world, the key takeaway is the potential for using *their* knowledge and skills to help deal with the new threats.

For lawyers in particular–but this applies to all business, community and political leaders–the skills necessary to face hybrid threats may be divided into three categories.

First, the ability to diagnose the situation. This starts with awareness of the phenomenon at hand (the objective of this first article). And this is where the casebook approach comes in handy, as its mission is not merely to spread awareness about hybrid warfare but to illustrate the range of different forms of aggression a given campaign may adopt.

Lawyers are used to doing diagnostic work through their experience of conflict and legal mechanisms. The approach here is similar, just with a wider perspective that includes an understanding of geopolitics and warfare.

The second set of skills involves protection and anticipation. Again, lawyers are particularly equipped for this, as they are used to building schemes and contractual tools that aim at protecting the interests of their clients, and increasingly, at preventing conflicts from happening.

The third and final set of skills has to do with resilience. Negotiation and conflict management skills may be key if we want to create resilient societies and organizations in the face of hybrid threats. When a crisis hits, people need to interact (sometimes for the first time) both to coordinate and to prioritize. These processes require the skills of a thoughtful negotiator.

The "behind the table" parties to these negotiations need to discipline themselves to postpone assigning blame until the impact of the crisis has been evaluated, controlled, and erased. They need to communicate with other key stakeholders—lawyers, insurance companies, clients, suppliers, staff, etc.

And these "behind the table" negotiations will likely be essential even where negotiation between the principal parties is impossible. See Art Hinshaw, Adrian Borbély and Calvin Chrustie, "Where is Negotiation in Hybrid Warfare?" 24 *Cardozo J. Conflict Res.* 517 (2023) (available at https://bit.ly/4p1oaKP).

Even before a crisis strikes, organizations which take to heart these concerns and redesign themselves for the necessary collaborations will be better equipped. Such resilience may indeed be the best anticipation mechanism. And in this area, the already-worked-out teachings about the importance of preparation, as well as many

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other aspects of negotiation, stand ready for adaptation.

To be more specific, we believe that guarding against attacks, even more than formulating effective responses to an attack, is where the field of conflict management/negotiation really has the most to offer. Yet again, it must be emphasized that this requires a shift in thinking: the "negotiation" most directly relevant here is simply not the kind most people think of first, i.e., what happens directly at a bargaining table with "the parties."

In hybrid warfare, for all the reasons noted above, direct negotiation between the attacker and the target is currently unlikely, with limited exceptions such as in ransomware attacks. But the kind of preparation that skilled negotiators make for any such encounter is, if anything, more relevant than ever, and needs to be addressed on a much broader level. We will have more specific things to say about this in the next article.

In the near term, companies, hospitals, nonprofits, think-tanks, municipalities, and most other targets will continue to lack the resources of national governments in trying to ward off and resolve hybrid warfare attacks. But at least a start is now being made toward providing the foundational materials and courses. The first known for-credit course on the impact of hybrid warfare on law and lawyers' practice was taught in fall 2024, by Prof. Cynthia Alkon, who is director of the Criminal Law, Justice & Policy Program at Texas A&M University School of Law in Fort Worth, Texas. It was enlarged for the following year, including a field visit to NATO headquarters in Brussels. And this fall, Cardozo Law School in New York City is presenting its own first for-credit course on hybrid warfare—taught by Andrea Kupfer Schneider, director of the school's Kukin Program for Conflict Resolution (and executive director of the Council on Countering Hybrid Warfare.)

These courses are intended to assist in orienting and preparing professionals in many organizations to become more effective at defending their organizations. In Part 2 of this series next month, we will outline the chain of logic that led to these foundational materials, indicate how they might be used in general terms, and reviewing some predictable organizational obstacles and then detailing some options that we believe are realistic. And later on, we hope to get more specific, analyzing how some forward-thinking companies, law firms and other organizations are responding to the new threats in practice.

Worldly Perspectives

Germany's Mediation Market: A Mature Framework Still Waiting for Demand

BY GIUSEPPE DE PALO

Germany presents an intriguing paradox. Few European jurisdictions have invested more systematically in building the legal and professional infrastructure for mediation. The country has a dedicated Mediation Act, a well-developed network of professional associations, increasingly rigorous training standards, and a mediation community that has steadily diversified from its family-law origins into commercial, workplace, public-sector, and specialized practice areas.

Yet the growth of mediation itself has been far more modest than the sophistication of the framework supporting it.

More than a decade after the enactment of the German Mediation Act, practitioners continue to describe a market in which the supply of mediators substantially exceeds demand: 79.57% of respondents to the survey underlying this report said supply outpaces demand, while a combined 90.19% either "strongly disagreed" or "disagreed" that mediation and litigation currently enjoy anything approaching a balanced relationship.

Litigation, in short, remains the default mechanism for resolving most civil and commercial disputes.

Germany's experience illustrates an important lesson for jurisdictions seeking to expand mediation. Legislation can establish a sound framework, professional organizations can raise standards, and training can improve quality.

None of these measures, however, automatically creates demand. Building a mediation culture ultimately depends on lawyers, judges, businesses, and disputing parties choosing mediation as a normal part of dispute resolution rather than as an exceptional alternative.

This column draws on a forthcoming country report prepared as part of the Rebooting Mediation Project Study, an international comparative research initiative conducted for the Dialogue Through Conflict Foundation. [See the author's credit line and the accompanying Background and Acknowledgments box on the next page.]

The German report is based on responses from 136 practitioners—41.18% mediators,

De Palo is an international mediator and arbitrator in JAMS Inc.'s New York office, and the president of the Dialogue Through Conflict Foundation. In each of these *Worldly Perspectives* columns, he and his contributors are presenting a summary of a forthcoming country report that has resulted from the Rebooting Mediation Study Project on individual nations' ADR efforts. The Rebooting Mediation Study Project (see the website at https://bit.ly/4x6N8M6), a large-scale study directed by De Palo for DTC, aims to provide policymakers with scientific, data-driven evidence to guide policy recommendations for achieving the United Nation's Sustainable Development Goals' Access to Justice goal (16) (see https://sdgs.un.org/goals/goal16). Mary B. Trevor, a *Worldly Perspectives* co-author, who is a professor emerita at Mitchell Hamline School of Law in St. Paul, Minn., and a DTC scientific adviser, is on hiatus.

9.57% from the legal field (lawyers, judges, and in-house counsel), and 38.24% drawn from a broad range of other disciplines. Throughout the survey, respondents consistently portrayed Germany as a jurisdiction whose institutional foundations are well established, but whose practical use of mediation has yet to catch up.

From Family to Commercial Practice

Like many European jurisdictions, Germany's mediation movement began outside the commercial arena. Family mediation emerged during the 1980s after German practitioners trained with pioneering U.S. mediators, including the nonprofit Center for Understanding in Conflict's Gary Friedman and Jack Himmelstein, and subsequently introduced those approaches at home.

Interest quickly expanded beyond family disputes. Early advocates recognized that the same consensual techniques could address commercial disagreements, organizational conflicts, and disputes involving public authorities.

Over time, mediation developed into a broad professional field encompassing business-to-business disputes, workplace conflicts, inheritance matters, what began as "environmental mediation" and has since broadened into "mediation in the public sector," construction disputes, sports, elder and heritage mediation, and public administration.

The relationship between mediation and the judiciary was initially less harmonious. Many judges viewed mediation with skepticism, concerned that it might compete with or diminish the courts' institutional role.

As mediation became better understood, however, this perceived competition gradually gave way to a more complementary vision. Litigation came to be recognized as the known and familiar mechanism for determining legal rights and obligations, while mediation increasingly established itself as a process focused on preserving relationships, managing risk, and crafting forward-looking solutions that courts often cannot provide.

This evolution also reshaped commercial practice. Business mediation today encompasses distinct segments. Traditional business-to-business (B2B) mediation generally involves external legal counsel and sophisticated commercial actors dealing with complex contractual or corporate disputes.

By contrast, mediation within organizations often addresses interpersonal tensions, leadership challenges, or workplace dynamics, requiring different skills and objectives. Germany's mediation market has matured sufficiently to recognize these as separate areas of practice—alongside further sub-fields such as mediation for company incorporations, mergers and acquisitions, and intra-family business succession—rather than variations of a single discipline.

Establishing a National Framework

Germany enacted its Mediation Act (Mediationsgesetz) to implement the European Union's Mediation Directive (Directive 2008/52/EC of May 21, 2008) (available at https://bit.ly/4eioem3). The act was signed into law on July 21, 2012, and entered into force five days later, on July 26, 2012.

Although prompted by European legislation, the act reflected decades of work by German mediation organizations that had already established professional standards and promoted mediation long before statutory regulation existed.

Professional associations played an important role during the legislative process. Among their most significant contributions was successfully opposing proposals that would have categorized mediation primarily according to its relationship with the courts—distinguishing, for instance, between "court-related," "court-internal," and purely "out-of-court" mediation.

Instead, the final legislation embraced mediation as an independent dispute resolution process governed by common principles regardless of the context in which it occurs.

That philosophy also influenced German terminology. Rather than adopting the conventional interpretation of ADR as "Alternative Dispute Resolution," many German practitioners came to favor the expression "Appropriate Dispute Resolution," emphasizing that mediation should not be viewed merely as an alternative to litigation but as one of several legitimate methods of resolving disputes, each appropriate under different circumstances.

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Background and Acknowledgments

In each of these *Worldly Perspectives* columns, author Giuseppe De Palo is presenting a summary of a forthcoming country report that has resulted from the Rebooting Mediation Study Project of individual nations' ADR efforts. See the author's accompanying credit line and this website: https://bit.ly/4x6N8M6. This month's Germany column relies on data from the project.

This month's column was prepared in collaboration with Cristina Lenz, Doctor of Laws. She is a full-time Professor for Law with a focus on negotiation and cooperative processes like mediation. She holds a research professorship for "Social Acceptance of Land Use" and is the head of the Department of Social Competence at the University of Applied Sciences, Hochschule Weihenstephan-Triesdorf (HSWT), in Freising, Germany. For nearly eight years, she has been the dean of the faculty of the Landscape Architecture Department. She also headed the Department of Continuing Education.

Lenz is a commercial mediation pioneer—covering both B2B and in-house contexts—and has a long track record of successfully training mediators in Germany, Austria, and Switzerland. As a former lawyer, she is an expert on construction industry ADR formats.

She is a certified Business Mediator BMWA, and Trainer for trainers BMWA. She has been a BMWA board member for nearly 30 years and leads the BMWA Certification Office. For many years, she has been the academic director of the master's program "Mediation, Negotiation, Communication and Conflict Management," which she founded, at the Karl-Franzens-University of Graz, in Graz, Austria. As chair of EMNI (European Mediation Network Initiative), she is a leader in the international development of mediation.

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More than a decade later, the act—Section 1 of which defines "mediator" and "mediation," with Sections 2 through 9 addressing the process, restrictions on the mediator's activities, confidentiality, training, and evaluation—continues to provide a single legal framework applicable across mediation's many fields of practice. Whether the dispute concerns a commercial contract, an employment relationship, or a public-sector controversy, the same fundamental principles govern the process.

A Flexible Legal Architecture

The German Mediation Act defines mediation, in Section 1(1), as a voluntary, confidential, and structured process in which an independent mediator assists the parties in reaching their own agreement. Those principles have proven durable and have allowed mediation to develop across widely different sectors without requiring separate statutory regimes.

Confidentiality. Section 4 imposes a duty of confidentiality on the mediator and those assisting in the mediation's conduct, subject to three exceptions: disclosure necessary to implement or enforce a settlement agreement; disclosure required by overriding public-policy concerns, such as threats to a child's welfare or to a person's safety; and facts that are self-evidently public.

Some commentators have nevertheless observed that Germany's confidentiality provisions do not extend as broadly as those contemplated by EU Mediation Directive Article 7. In particular, the statutory duty applies primarily to mediators and those assisting them, leaving the parties themselves, their lawyers, and retained experts outside the express scope of the confidentiality obligation unless separate contractual commitments are made.

Survey respondents displayed differing views on the point—43.28% believed German law fully tracks the EU standard, while 23.88% correctly identified more exceptions than Article 7 provides for—suggesting that even experienced practitioners continue to interpret the confidentiality regime differently.

Enforceability. One of the more distinctive features of the German system concerns enforcement of mediated settlements.

Unlike some jurisdictions, Germany did not create a dedicated statutory procedure allowing mediation agreements to become directly enforceable simply because they resulted from mediation—an early draft provision to that effect, Section 796d ZPO, was ultimately dropped. Instead, parties generally rely on existing procedural mechanisms: obtaining enforceability under Section 794 ZPO through a court-recorded settlement, using a recognized conciliation body, obtaining an arbitral award on agreed terms, or employing a lawyer-certified settlement under Section 796a ZPO, which allows two lawyers to render a settlement immediately enforceable once recorded at the appropriate local court.

Respondents split fairly evenly on how enforcement typically proceeds in practice—32.35% pointed to "extensive measures," 29.41% to a "simple procedure," and 14.71% to enforcement "immediately … if co-signed by the lawyers," the last of which tracks the Section 796a mechanism closely. While these mechanisms function effectively in practice, they illustrate Germany's preference for integrating mediation into existing legal institutions rather than creating an entirely separate enforcement regime.

Limitation Periods and Duration. German law likewise avoids creating mediation-specific procedural rules wherever existing legal principles can accomplish the same objective.

Rather than adopting a separate system governing limitation periods during mediation, Germany treats mediation as a form of settlement negotiation under Section 203 of the Civil Code (BGB): as long as negotiations continue, limitation periods are suspended, resuming once either side declines to continue.

Either party remains free to terminate the mediation at any time, reflecting the process's fundamentally voluntary nature. Commercial mediations themselves tend to conclude relatively quickly: 39.13% of respondents estimated a duration of 31 to 60 days, and a further 23.91% cited 61 to 90 days, broadly consistent with commercial mediation practice elsewhere in Europe.

Fees are likewise determined by the market rather than by statute, with hourly rates—running roughly €180 to €450 under the Bundesverband Mediation in Wirtschaft und Arbeitswelt (BMWA)'s own procedural rules—varying according to the complexity of the dispute, the experience of the mediator, and the sector involved.

The absence of detailed statutory regulation in these areas reflects a broader characteristic of German mediation law. The legislature has generally preferred to establish fundamental principles while allowing practice to evolve through professional standards and market experience rather than through prescriptive procedural rules.

Access to Mediation: A Voluntary System

Germany has deliberately resisted making mediation a mandatory step before litigation. Unlike jurisdictions that require parties to attend information sessions or

A Framework Ahead of Its Market

This month's Worldly Perspectives jurisdiction: Germany.

The state of the practice: A single federal mediation act covers all practice areas, backed by a certification and training regime and a network of mediation associations—but mediation remains structurally oversupplied relative to demand.

The state of the prospects: No mandate is on the near-term horizon. Practitioners instead favor financial incentives and mediation-advocacy education in law and business schools as the reforms most likely to close the gap between framework and practice.

attempt mediation before filing suit, German law continues to rely largely on voluntary participation.

The philosophy underlying the Mediation Act is straightforward: mediation works best when parties choose it because they believe it offers a better way to resolve their dispute, not because the law requires them to attend.

That commitment to voluntariness has shaped virtually every aspect of Germany's mediation framework. Yet it has also contributed to one of the country's central challenges. While mediation enjoys broad professional recognition, relatively few disputes actually enter the process.

The survey reflects this reality with striking consistency: 74.14% of respondents confirmed that German civil and commercial litigation carries no mandatory information session, 72.41% confirmed there is no mandatory mediation of any kind, and the same 72.41% confirmed the legal system offers no meaningful financial incentive to attempt mediation before litigation—0% selected "strong incentives" as a description of the current framework.

The result is a system that leaves the decision almost entirely in the hands of the disputing parties and their advisers. Many practitioners believe this approach, while consistent with mediation's philosophy, has limited the process's broader adoption.

The Role of Lawyers

Lawyers remain central to the development of Germany's mediation practice, particularly in commercial disputes. B2B mediations almost invariably involve external counsel or in-house lawyers, who help clients evaluate legal risks while supporting negotiations.

At the same time, German lawyers generally have no affirmative legal obligation to advise clients that mediation is available as an alternative to litigation.

Survey respondents largely recognized the absence of such a duty—50.91% correctly identified that none exists—although a significant minority, 36.36%, believed some professional expectation exists even if no meaningful sanction follows from non-compliance.

This seemingly technical distinction carries practical consequences. In jurisdictions where lawyers are expected—or required—to discuss mediation with their clients, mediation enters the conversation much earlier. In Germany, by contrast, whether mediation is even considered often depends on the individual lawyer's familiarity with the process and confidence in recommending it.

The survey suggests practitioners regard this as a missed opportunity: many respondents expressed support for requiring lawyers to inform clients about mediation before litigation begins, although enthusiasm was stronger for positive incentives than for disciplinary sanctions.

Encouragement Rather Than Direction

German courts may recommend mediation, but they are generally under no obligation to do so. Section 278a(1) of the Code of Civil Procedure (ZPO) authorizes judges to suggest mediation or another consensual dispute resolution process and, if the parties agree, Section 278a(2) directs the court to suspend the litigation while mediation proceeds.

A similar, discretionary right to propose exists in labor litigation under Section 54a of the Labor Court Act (ArbGG). Importantly, however, these powers are entirely discretionary—the statute's use of "can," rather than "must," is frequently lamented within the mediation community.

This distinction matters in practice. Judges who have received mediation training or who are personally convinced of mediation's value often encourage parties to explore settlement; others rarely raise the subject at all. Consequently, access to mediation through the courts varies considerably depending on the individual judge rather than on institutional practice.

The most common survey response (39.71%) was that referral remains entirely within judicial discretion; smaller shares pointed to referral tied to a contractual precondition (11.78%) or to proactive referral in already-pending cases (11.78%), while two related options—courts merely "mentioning" a possible referral (25%) versus actively "informing" parties of its possibilities and advantages (23.53%)—proved difficult for respondents to distinguish, itself perhaps a reflection of how unfamiliar the formal concept of judicial "referral" is within German procedure.

German procedure also invites claimants, under Section 253(3) No. 1 ZPO, to indicate whether attempts at consensual dispute resolution were made before litigation commenced. The requirement, however, is framed as a "should" rather than a "must," and carries little practical consequence—it does not prevent parties from proceeding directly to court, though noncompliance can, in narrow circumstances, affect the tolling benefit otherwise available under Section 167 ZPO.

Many respondents viewed this limited judicial role as another explanation for mediation's relatively modest use. They argued that judges need not compel mediation to influence party behavior; simply ensuring that mediation is routinely discussed at the outset of litigation could significantly increase referrals.

Contractual Gateways

If legislation has not made mediation routine, commercial contracting increasingly has.

Many sophisticated German commercial agreements now incorporate multi-tiered dispute resolution clauses requiring parties to negotiate before commencing arbitration or litigation. Mediation frequently forms the second stage of these escalation clauses, following direct negotiations but preceding formal adjudication.

These clauses have become particularly common in long-term commercial relationships where preserving cooperation has economic value. Construction projects, joint ventures, supply agreements, and framework contracts increasingly recognize that resolving disputes efficiently may be as important as ultimately determining legal rights.

Some agreements go further by incorporating early neutral evaluation—a faster alternative to dueling expert reports followed by a court-appointed expert—or "adjudication," a quicker, non-binding process that has become particularly common in large construction disputes, supported since December 2013 by the German Society for Extrajudicial Dispute Resolution in the Construction Industry (DGA-Bau).

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Although such clauses cannot force parties to settle, they can require them to participate in the agreed process before pursuing litigation, thereby increasing the likelihood that mediation will at least be attempted.

The growing use of contractual mediation provisions illustrates one of Germany's distinctive characteristics. Rather than relying primarily on legislative compulsion, commercial practice has increasingly embraced mediation through private ordering.

Mediation Outside Contractual Relationships

Outside existing contractual frameworks, however, bringing parties to mediation remains considerably more difficult. Without a mediation clause, parties must first agree that mediation is worth pursuing and then agree on the choice of mediator.

Both decisions can become obstacles in themselves. Even where both parties recognize mediation's potential value, proposals originating from one side are often viewed with suspicion simply because they come from an adversary.

For that reason, parties frequently seek assistance from mediation organizations in identifying suitable neutrals. In larger commercial disputes, businesses increasingly conduct formal selection procedures before appointing a mediator, much as they would when selecting an arbitrator or expert. These practices demonstrate the maturity of Germany's mediation profession while simultaneously highlighting one of its persistent challenges: unlike litigation, mediation generally requires cooperation before the process can even begin.

Quality Assurance

Germany has adopted an unusual approach to regulating mediator qualifications.

Mediation Act Section 5 introduced the designation of "certified mediator," subsequently elaborated through implementing regulations—the 1. ZivMediatAusbV, later the 2. ZMediatAusbV—that prescribe minimum training (originally 120 hours, increased to 130 hours in the most recent amendment, adopted in 2023 and entering into force on March 1, 2024), five supervised mediations, and continuing professional education of at least 40 hours every four years. The most recent amendments strengthened these requirements further by incorporating online mediation and digital competence into the mandatory curriculum.

> It's a mediation system that leaves the decision almost entirely in the hands of the disputing parties and their advisers.

Unlike many regulated professions, however, certification is not administered through a centralized licensing authority. Responsibility largely rests with mediators themselves to ensure compliance with the statutory requirements; the designation is therefore based principally on self-certification rather than prior governmental approval.

This arrangement has attracted criticism from some commentators, who question whether consumers can easily distinguish between mediators who satisfy the regulatory requirements and those who merely claim the title. In practice, misleading use of the designation may be challenged under Sections 3(1) and 3(2) of Germany's Unfair Competition Act (UWG), which prohibit commercial practices likely to significantly mislead consumers—but enforcement remains largely reactive rather than preventive.

Professional Associations

In reality, Germany's mediation profession has long relied less on statutory certification than on its professional associations. Organizations such as the Bundesverband Mediation (BM, founded 1992), the Bundesverband Mediation in Wirtschaft und Arbeitswelt (BMWA, 1996), the Bundes-Arbeitsgemeinschaft für Familienmediation (BAFM, 1994), the Deutsche Gesellschaft für Mediation (DGM, 1998), and the Deutsches Forum für Mediation (DFfM, 2009) established demanding educational standards—well over 200 training hours in many cases—years before the Mediation Act entered into force.

More recently, several of these organizations joined forces through the Qualitätsverbund Mediation (QVM), formalized through the 2019 Frankfurt Declaration, seeking greater consistency in quality assurance while preserving the diversity of mediation practice.

Survey respondents generally viewed this association-driven model positively: 31.58% pointed to association-based standards as the real basis for accreditation, and 28.07% correctly noted that no formal state accreditation exists at all, though 22.81% pointed—likely in some confusion with separate state-bar qualifications—to state-examination-based licensing. Most considered existing qualification requirements appropriate (63.64%), with only 21.82% finding them insufficient and 9.09% rating them demanding.

This reflects one of the defining characteristics of German mediation. Its credibility has been built not primarily through governmental regulation but through the sustained efforts of practitioners themselves. Long before mediation acquired a statutory framework, professional organizations had already begun developing training standards, ethical principles, and quality expectations that continue to shape the field today.

Market Size Questions

Measuring the size of Germany's mediation market is surprisingly difficult.

Unlike some jurisdictions, Germany has no central institution—comparable to the U.K.'s Centre for Effective Dispute Resolution—that systematically tracks the number of mediations conducted each year, leaving professional associations to assemble estimates from their own membership data. Because many mediators belong to multiple organizations and many practice mediation only alongside another profession, precise figures remain elusive.

Even so, practitioners agree on one point: Germany has developed a substantial mediation profession. Estimates from the Federal Association of Mediation suggest that about 10,000 mediators are active nationwide, although relatively few devote themselves

exclusively to mediation. For most, mediation complements careers as lawyers, consultants, psychologists, coaches, engineers, or business advisers. Respondents themselves offered widely dispersed estimates of annual case volume—equal shares (25.74% each) put the figure at fewer than 1,000, or between 5,001 and 10,000, mediations a year—variation the report attributes in part to whether respondents accounted for internal, organizational mediations that never register on any court's radar.

The survey reveals a remarkable consensus about what this means in practice. As noted above, nearly four out of five respondents (79.57%) believe the supply of mediation services exceeds market demand, and a combined 90.19% rejected the proposition that mediation and litigation currently enjoy anything approaching a balanced relationship within the German dispute resolution system.

These perceptions distinguish Germany from jurisdictions where mediation struggles because qualified mediators are scarce. Germany's challenge is almost the opposite: the profession has matured faster than the market it serves. In that respect, Germany has largely solved the supply side of mediation. Its remaining challenge lies in stimulating demand.

The Business Side

Despite mediation's relatively modest overall penetration, certain sectors have embraced the process far more enthusiastically than others.

B2B mediation has become increasingly common among sophisticated commercial actors seeking to preserve long-term relationships while avoiding the cost, delay, and publicity associated with litigation. Large companies frequently incorporate mediation into their conflict-management strategies, using multitiered dispute resolution clauses and internal protocols—the BMWA offers a template for this purpose—that encourage negotiation and mediation before disputes escalate into formal proceedings.

Within organizations, mediation has evolved beyond dispute resolution alone. Many companies now view mediation skills as part of broader leadership and management practice. Concepts such as "mediative leadership" and constructive conflict management have gained traction, reflecting a growing recognition that organizations benefit when conflicts are addressed early rather than allowed to develop into formal grievances or litigation.

The confidentiality of mediation also represents a significant attraction for businesses concerned about reputational risk: resolving disputes privately enables organizations to protect commercial relationships while avoiding the public exposure that often accompanies court proceedings.

Outside these sectors, however, mediation remains unevenly developed. Family mediation continues to occupy an established position, while awareness and utilization in other areas of civil justice vary considerably depending on the type of dispute and the professionals involved.

The Tech Effect

Like mediators elsewhere, German practitioners increasingly conduct sessions through videoconferencing and other online platforms. The Covid-19 pandemic accelerated this transition, demonstrating that many disputes can be managed effectively without requiring parties to meet physically.

Interestingly, Germany has chosen not to regulate online mediation separately—80% of respondents correctly recognized that it is not regulated by German law, versus 20% who believed it was. Instead, existing principles governing confidentiality, voluntariness, neutrality, and party participation under Mediation Act Section 2(3) apply regardless of whether the mediation occurs around a conference table or through a digital platform.

Survey respondents generally viewed online mediation as a useful complement rather than a replacement for traditional practice: 48.15% described its use as "only minimal" and 50% as "less than in person"—together, a near-unanimous view that in-person mediation remains the preferred format, particularly for disputes involving significant emotional dynamics or complex relationship issues.

Technology has expanded the available toolkit without fundamentally altering the mediator's role. Recognizing these developments, the recent amendments to Germany's certification requirements now include training in digital mediation, ensuring that new mediators are equipped to work effectively in both physical and virtual environments.

Measuring Success

Reliable national settlement-rate data remain unavailable. As in many jurisdictions, Germany lacks a centralized reporting system capable of measuring mediation outcomes across different sectors.

The question is complicated further by differing conceptions of success. For some practitioners, mediation succeeds only when it produces a comprehensive settlement. Others also regard improved communication, narrowed issues, preserved relationships, or partial agreements as valuable outcomes, even if litigation ultimately resolves the remaining legal questions.

Although precise statistics remain elusive, anecdotal estimates in the 60%–70% and 70%–80% range circulate among practitioners, roughly comparable to settlement rates reported internationally.

Costs, too, are set entirely by the market rather than by statute; respondents' estimates of consulting-lawyer fees for an average regional firm skewed heavily toward the higher end, with 39.96% citing more than €5,000, underscoring that legal counsel—rather than the mediator's own fee—often represents the larger share of a party's total mediation-related spend.

Practitioners generally emphasize that mediation frequently generates value extending beyond the formal settlement itself, by reducing costs, preserving business relationships, and narrowing disputes that ultimately proceed to adjudication.

Where Is Change Needed?

Perhaps the most revealing aspect of the survey concerns practitioners' views on the reforms most likely to increase mediation's use. Their responses suggest remarkably little enthusiasm for coercive measures.

Financial incentives emerged as the clear favorite: 92% of respondents rated court-fee refunds, tax credits, or similar economic incentives as "positive" or "extremely positive," and

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it was the single most popular reform when respondents were asked to choose just one (30%).

Such measures were viewed as more consistent with mediation's voluntary character than compulsory participation. Requiring mandatory information sessions before litigation followed closely (82% positive), as did making mediation mandatory in appropriate cases with an inexpensive opt-out (76%) and empowering judges to order litigants to mediation (74%)—all comfortably more popular than proposals mandating legal assistance in mediation or setting a statutory minimum caseload, both of which roughly 80% of respondents rated negatively or as having no significant impact.

Educational initiatives ranked almost as high. Establishing mediation-advocacy programs in law and business schools was the runaway favorite among non-legal measures (93.48% positive), and it was also the single most popular proposal overall when respondents were asked to identify the one measure most likely to increase mediation's use, narrowly ahead of pilot programs to encourage civil and commercial mediation (89.13%) and the designation of national "mediation champions" or ambassadors (78.26%).

Mandatory mediation itself generated considerably more mixed reactions throughout the survey. Practitioners appeared to distinguish sharply between encouraging parties to make informed decisions about mediation and compelling them to participate regardless of their willingness to do so.

This preference reflects an enduring feature of German mediation culture. The objective is not to replace litigation with mediation but to ensure that parties consciously choose the process best suited to their dispute.

Lessons Beyond Germany

Germany's mediation system offers an important lesson for policymakers well beyond its borders.

Over the past three decades, the country has built one of Europe's most sophisticated mediation infrastructures. It has enacted comprehensive legislation, developed demanding training standards, fostered strong professional associations, and created a mature community of practitioners spanning virtually every area of dispute resolution. Yet institutional maturity has not automatically translated into widespread use.

Two comparisons underscore the point. Neighboring Austria enacted its own Mediation Act (ZivMediatG) considerably earlier—on May 1, 2004—driven by domestic initiative rather than by the EU Directive that eventually prompted Germany's own legislation eight years later.

And where England and Wales, following the Lord Woolf reforms, adopted a "sticks" approach—empowering courts to penalize parties in costs for "unreasonably refusing" to mediate, a policy credited with an exponential rise in mediation there—German practitioners have consistently favored "carrots." That preference, reflected throughout the survey results above, sits more comfortably with mediation's voluntary philosophy, even if it has so far produced a more modest uptake than the English approach.

The German experience suggests that legislation alone cannot transform dispute resolution culture. Parties must understand mediation, lawyers must feel comfortable recommending it, judges must routinely consider it, and businesses must view it as a normal component of commercial risk management. Those changes occur gradually, through professional education and accumulated experience, rather than through statutory reform alone.

That conclusion is reflected in the survey itself. Practitioners consistently favored measures designed to increase awareness and improve incentives over those relying primarily on compulsion. Their responses suggest that mediation's next stage of development will depend less on expanding the legal framework than on expanding confidence in the process itself.

Germany therefore stands at an interesting point in mediation's evolution. It has largely succeeded in creating the institutions necessary for a modern mediation system. The challenge now is ensuring that those institutions become part of everyday dispute resolution rather than remaining underused resources.

For other jurisdictions considering their own reforms, Germany's experience serves as both encouragement and caution. Building the legal architecture is essential, but it is only the beginning. The more difficult task—and ultimately the more important one—is creating a culture in which mediation becomes an ordinary first consideration rather than an exceptional alternative.

Clarifications and Correction

In Giuseppe De Palo's *Worldly Perspectives* column, "Poland's Mediation Landscape: A System in Motion," 44 *Alternatives* 148 (July/August 2026) (available on *Westlaw*), the following clarifications and correction should be noted:

- The mediation statistics cited were based on data available at the time the underlying research was conducted. Subsequently published statistics of the Statistical Guide of Justice, from the Ministry of Justice, indicate that the mediation index—the percentage of cases going to mediation—increased to 2.3% in 2025. References in the article to mediation rates of about 1% therefore reflect earlier reporting periods and should be read in that context.
- The correct year of adoption of the Code of Ethics for Polish Mediators is 2008.
- References to the National Register of Mediators (Krajowy Rejestr Mediatorów – KRM) concern the pilot register operating at the relevant time. For the avoidance of doubt, the KRM remains a pilot program and does not yet constitute a statutory, legally binding national register of mediators.

Alternatives apologizes for the error.

Letter to the Editor

In your June 2026 article, "Narcissism, Alternative Dispute Resolution, And the War with Iran," 44 *Alternatives* 108 (June 2026) [available on Westlaw or by request from Alternatives@cpradr.org)], author S.I. Strong introduces "a new field of scholarly inquiry known as narcissism theory." She advises that labeling Donald Trump a "narcissist" is a novel and useful way for dispute resolvers to explore resolutions to the war with Iran.

This desire to speculate about parties' possible mental health problems is not actually new. The article cites to Strong's "Narcissism Theory and the Goldwater Rule: An Empirical and Interdisciplinary Analysis" (available at https://bit.ly/4cTLcyQ), which defines narcissism by explaining narcissistic personality disorder (NPD).

Narcissistic Personality Disorder was first added to the Diagnostic and Statistical Manual of Mental Disorders (DSM) over 45 years ago after research helped validate the longstanding concept that some people are socially disabled by their excessive self-focus and lack of empathy.

Research has also shown high provider stigma toward NPD, meaning that even mental health professionals have biases and prejudices that influence how they practice or do research. A 2017 study, "Personality Disorder: Still the Patients Psychiatrists Dislike?" (available at https://pmc.ncbi.nlm.nih.gov/articles/PMC5288087/) harks back to research from the 1980s that shows that mental illness prejudice is a longstanding, age-old problem that can taint all sorts of expert analyses.

The more informal "narcissist" label has been used by laypeople and professionals alike to refer to individuals they believe have psychiatric disabilities. Whenever they describe a "narcissist" as staying stuck in dysfunctional behavior, being unable to change, and requiring a different approach than normal people—they are clearly describing the "narcissist" as disabled by a mental impairment.

Disability labels can undermine an analysis by adding in biases that detract from otherwise productive ideas. As one example, Strong writes, "recourse to the [Hague-based Permanent Court of Arbitration] could satisfy Trump's *narcissistic* desires for aggression, albeit with less damaging fallout." [Emphasis added.] It would be better to just say "desires for aggression" and lose the "narcissistic" focus.

Focusing on the behavior allows researchers an opportunity to dive deeper into the objective specifics of the actual, tangible aggression being discussed. But adding in broader stereotypes based on presumptions about a presumed "narcissistic" disability affecting the president—these generalizations detract from studying what is actually happening, all while amplifying harmful prejudices about mental illness.

I commend Prof. Strong for suggesting that the PCA might be a good recourse for resolving the war, and for looking for ways to still engage with President Trump's apparent preferences and interests where many others have just given up talking to the people they have written off as "narcissists."

But Strong's ideas for resolving the war in Iran are undermined by including stereotypes about mental health problems. Her suggestions there are "benefits that are attractive *even to those with narcissistic mindsets*" [emphasis added] further stigmatizes and alienates people with that particular disability.

And to what end? Yes, Strong's article cites some important studies that may support some valid empirically driven population-level inferences about people with certain psychopathologies. But we must remember that there are also studies, on a population level, about what to expect from a person of a certain gender or race or sexual orientation. That does not make it appropriate to then use those generalizations to stereotype and dehumanize specific individuals during dispute resolution processes.

Beyond how the focus on narcissism shifts attention away from the merits of Strong's PCA proposal, consider how the decision to link this proposal to blatant disability-related attacks on the president might actually land with him or any of his advisers. This is a publicly published piece aiming to help resolve a horrendous war. If Strong's goal was for parties to actually take her advice, couching it in slurs about the president's presumed disability is unlikely to grease those wheels.

More likely, anyone reading this piece will walk away with increased stigma toward narcissism and less desire to label themselves with NPD in order to get treatment—President Trump included (if Strong and her colleagues' speculation is accurate and he truly is disabled in the ways she describes).

There are resources available to help dispute resolvers avoid succumbing to prejudices about folks with mental illness, or other protected groups of people. Anyone can visit BiasResistantCourts.org to access free tools for discussing challenging behaviors without relying on biased backstories based on someone's disability, gender, race, or other identity features. BiasResistantCourts.org is a project of the CUNY Dispute Resolution Center and MH Mediate, which was founded by me, and funded by the AAA-ICDR Foundation. It was designed to teach 12 simple skills to practice in trauma-informed ways that prevent discrimination.

Anyone who sees mental illness prejudices in professional guidance can also report it at DisabilityRadar.com. That website is operated by my Mental Health Safe Project (MH Safe), which has successfully advocated for the removal of stigmatizing or discriminatory dispute resolution guidance. Beyond seeking removal of harmful content, MH Safe also shares free resources with the community so everyone can learn not to discriminate based on guessing or knowing someone has a disabling mental impairment.

This *Alternatives* Letter to the Editor is part of those efforts, hoping to reach people affected by the narcissism content in your June publication.

Dan Berstein
New York

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Letter to the Editor

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S.I. Strong responds:

I begin by thanking the editor for this opportunity to respond to Dan Berstein's letter commenting on my recent article, "Narcissism, Dispute Resolution, and the War with Iran." I have known Berstein for some time and applaud his efforts in the field of mental health. However, I believe it necessary to correct some misinterpretations reflected in his letter and provide additional empirical support for the analysis and conclusions contained in my article.

First, I am not claiming to (1) diagnose Donald Trump or (2) be one of the first to do so. Although my article refers to the work of qualified psychologists and psychiatrists who began flagging concerns about then-candidate Trump's mental health as early as 2015, I agree with Berstein that those who are not mental health professionals should not diagnose others. However, that is not the case here.

Instead, my article focuses on the emerging strand of scholarly analysis known as narcissism theory and applies that work to the current war in Iran. The earliest research in narcissism theory that I cite is from 2013, although the field has diversified and expanded significantly since then. The term "narcissism theory" now encompasses matters ranging from political narcissism and national narcissism to the effect of individual narcissism on foreign policy and organizational behavior.

Rather than seeking to pillory particular individuals, as Berstein seems to suggest, scholars working in narcissism theory undertake interdisciplinary analyses combining (in my article) international relations, political theory, and political psychology to provide new perspectives on some of society's most challenging problems. Reliance on empirical research allows theorists to provide cogent explanations for otherwise inexplicable behavior while also helping predict additional actions and outcomes. As such, narcissism theory is a useful analytical framework for lawyers, diplomats, and voters.

Second, Berstein appears to interpret various conclusions reflected in my article as denoting personal prejudice built on stereotyping. One line that he refers to describes narcissists' (in this case, Trump's) predilection for aggression. That statement relies directly on a 2021 meta-analytic study, cited in the article, of 437 different empirical studies finding that narcissism is irrefutably linked to aggression and violence of all types. Sophie L. Kjærvik & Brad J. Bushman, "The Link Between Narcissism and Aggression: A Meta-Analytic Review," 147 *Psych. Bull.* 477 (2021) [available at https://bit.ly/3RGfbSK]. There is no way that study, or my statement referring to that study, can be described as reflecting either prejudice or stereotype.

As part of his laudable efforts to avoid stigmatizing those with mental illness, Berstein fails to appreciate important nuances. For example, he expresses concerns that people won't talk to those labelled as narcissists.

Setting aside the fact that my article focuses on a very narrow and specific category of narcissist–i.e., those with armies at their command–narcissists are well able to get people to talk to them. Indeed, narcissists can be incredibly charming and can enjoy a great deal of popularity. Mitja D. Back, Stefan C. Schmulke & Boris Egloff, "Why Are Narcissists So Charming at First Sight? Decoding the Narcissism-Popularity Link at Zero Acquaintance," 98 *J. Personality & Soc. Psych.* 132, 140 (2010) [available at https://bit.ly/44TmppB].

With time, however, narcissists' maladaptive behaviors tend to sour relationships or at least the relationships that the narcissist no longer values. Id. Indeed, it is frequently the narcissist who cuts off communication.

Narcissists are also not known to be disadvantaged in the workplace. To the contrary, studies show that narcissists tend to be extremely successful in obtaining leadership positions in politics and business, even though narcissists are no more, and often less, competent than non-narcissists. Charles A. O'Reilly & Jeffrey Pfeffer, "Organizational Power and Politics: The Narcissist's Advantage?" 182 *Personality and Indiv. Differences* 111061 (2021) [available at https://bit.ly/4bhskZg].

Narcissists are also very good at protecting their own reputations, even as they decimate the lives and reputations of people around them. Charles A. O'Reilly & Jennifer A. Chatman, "Transformational Leader or Narcissist? How Grandiose Narcissists Can Create and Destroy Organizations and Institutions," 62 *Cal. Mgmt. Rev.* 5, 7-12, 16 (2020) [available at https://bit.ly/4gVNi3x] (noting how Hitler and Trump were able to convince world leaders and constituents that they were not threats); O'Reilly & Pfeffer, above ("To gain status, narcissists are willing to violate social norms and even behave unethically to gain and maintain power."). In short, this is not a class of individuals who cannot take care of themselves.

Not only do narcissists fail to suffer material harm from their mental status, they also tend not to suffer emotional harm as a result of their narcissism. According to one empirical study, neither grandiose nor vulnerable narcissists demonstrated guilt as a result of their problematic behavior. Pauline Georgees Poless et al., "Guilt and Proneness to Shame: Unethical Behavior in Vulnerable and Grandiose Narcissism," 14 *Eur. J. Psychol.* 23 (2018) [available at https://bit.ly/4hxmkiP].

While Berstein expresses concern about the mental health of the narcissist, the focus should be on the mental, physical, and emotional toll imposed by the narcissist on others. Bullying, gaslighting, and other forms of narcissistic abuse often cause victims to experience depression and suicidal tendencies when experienced in the interpersonal context. Vickie Howard, "Recognizing Narcissistic Abuse and the Implications for Mental Health Nursing Practice," 40 *Issues in Mental Health Nursing* 644, 644 (2019) [available at https://bit.ly/4gWq2m1].

When narcissism is experienced in the political realm, the injuries are commensurately broader, including economic, environmental, and humanitarian harm on a national and international scale. Mircea Cătălin Dîrțu & Oara Prundeanu, "Narcissism and Pro-Environmental Behaviors: The Mediating Role of Self-Monitoring, Environmental Control and Attitudes," 51 *Sustainability* 1571, 1582 (2023) [available at https://bit.ly/4yQ8wq7]; Sophie Lilli Stoffel & Philipp Y. Herzberg,

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When Your Ally Turns Narcissistic: A Self-Help Manual for Europe Navigating Transnational Relationships (Oct. 2025) [available at https://bit.ly/4vOjppt].

Narcissism involves a complex set of interrelated behaviors. Reframing narcissistic behavior as simply a "desire for aggression," as Berstein suggests, fails to recognize that narcissistic aggression is typically accompanied by other relevant traits such as a failure to listen to experts and irrational thought processes regarding outcomes and strategies. Charles A. O'Reilly & Nicolas Hall, "Grandiose narcissists and decision making: Impulsive, over-confident, and skeptical of experts–but seldom in doubt," 168 *Personality & Individual Differences* 111280 (2018) (available at https://bit.ly/4tlL7cb).

In his letter, Berstein downplays the empirical research cited in my article. However, one of the biggest problems in academic and policy work involves research silos, where information is trapped in one discipline rather than benefitting scholarly thinking across fields.

Narcissism theory not only repudiates the notion of research silos, it also explicitly embraces interdisciplinary analysis in order to provide tangible assistance to both individuals and society. For example, one of the studies cited herein notes that narcissists' lack of guilt makes it unlikely that they will change unethical behavior, a conclusion that "may be important in job recruitment, e.g., employment of trustworthy people." Poless, above.

Other studies discussed here and in my article on the Goldwater Rule mentioned by Berstein similarly seek to improve society through a better understanding of narcissism and narcissists. Dîrţu & Prundeanu, above (discussing strategies on how to affect narcissists' behavior regarding the environment); John Harden, "On Narcissism and War," *Political Violence at a Glance* (Nov. 14, 2022), (advising voters to avoid electing any individual who lacks empathy for others, including members and leaders of opposing parties as well as voters themselves, since empathy is particularly difficult for narcissists to feign); Howard, above (calling for increased understanding of the effects of narcissistic abuse to help mental health nurses treat victims), and Stoffel & Herzberg, above (discussing how political leaders should respond to foreign leaders displaying narcissistic behavior).

Contrary to Berstein's claims, narcissism theory is not meant to, nor does it, demonize those suffering from narcissism. Instead, it provides useful, empirically based guidance to help those in corporate, political, and other settings protect themselves and their institutions from narcissists' problematic behavior. O'Reilly & Chatman, above (noting narcissists can destroy organizations from the inside out).

While my original article focused on the sitting president's decisions to initiate and continue a war with Iran, scholars working in narcissism theory have been studying narcissistic presidents for more than a decade. Indeed, one particularly prescient study came out two years before Trump descended a golden escalator to declare his candidacy for the presidency. Ashley L. Watts et al., "The Double-Edged Sword of Grandiose Narcissism: Implications for Successful and Unsuccessful Leadership Among U.S. Presidents," 24 *Psychol. Sci.* 2379 (2013) (available at https://bit.ly/45pJ9O6).

One wonders whether the world would be a different place if the electorate had been aware of studies that not only set forth the observable hallmarks of narcissism but also the types of behavior that can be expected of a narcissist in high elected office. While there is no way to know for sure, surely an informed electorate is better than the alternative.

In 2023, several British scholars called for an improved public understanding of the social scientific endeavor to combat the "devaluing, or 'flattening', [of] social science expertise in public fora" and thereby improve "the quality of public debate and policy making." Jamie Lewis et al., "Why we need a Public Understanding of Social Science," 23 *Pub. Understanding Sci.* 658 (2023) (available at https://bit.ly/44SGMTS). My original article and this response have both been written in the hopes of furthering that goal.

Berstein is correct that prejudice and stereotypes are problematic, particularly in the field of mental health. But so, too, is the willful discounting of reliable, peer-reviewed, empirical research that has the capacity to improve our world.

S.I. Strong
Atlanta

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this backdrop, he emphasized that the evening's three topics were not arbitrarily chosen but instead form a single, tightly interconnected system.

Buschmann illustrated this with vivid examples relating to other use cases–from drones that spray pesticides with surgical precision, through the satellite-supported management of water shortages, to AI agents whose models calculate weather scenarios. He noted that there are many other applications for drones besides military use, but that they all rest on the same pillars: satellite communications and data centers.

The substantial investments by the private sector and the public sector are driving a historical shift in the global economy, he argued, and that will be reflected in the disputes to come. Using the example of military equipment procurement, he made the particularities clear:

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Military equipment was traditionally designed for human use. This led to long production and testing cycles. The failure rate had to be kept as low as possible.

The emerging use of satellite-based and AI-enhanced–and therefore unmanned–drones represents a significant change: Production and innovation cycles are markedly shorter. Contractual frameworks are to reflect a new kind of agility. The same applies to mechanisms for resolving future legal disputes in that area.

The Panel Discussion

A panel was then introduced: Stefanie G. Efstathiou, Legal Counsel at DENIC eG, in Frankfurt, Germany–the largest European country-code top-level domain registry, for .de domains; she is qualified in Greece and Germany with a focus on intellectual property, data protection, AI, and dispute resolution; Michael Barth, Head of Legal, Germany, at data center developer CyrusOne, in Berlin, and a member of the Executive Board of the German Datacenter Association (GDA), which advocates for data centers to be recognized as infrastructure of overriding public interest; and Dr. Jan Frohloff, a partner at SRP Schmitt Reichert Partners and one of the leading European experts on satellite and space-related disputes. Buschmann remained with the panel as a voice from legal practice, legislation, and policy.

Drones and Defense

In the first segment, Buschmann explained why matters relating to drones, defense and regulation can no longer be regarded as niche. A glance at recent headlines–from SpaceX and rocket launches to satellite infrastructure projects–leads directly to the core business of AI and, ultimately, to the data centers that support it.

He reiterated that this historic economic shift will inevitably be mirrored in future disputes and emphasized that it remains crucial for lawyers to understand the underlying technology and negotiate sound agreements.

Efstathiou described, from the perspective of an organization relying on digital infrastructure, how quickly a technical issue can become a wider legal and commercial one: client transactions would be interrupted through data-center problems, revenue could be lost and reputational, contractual, and regulatory risks may arise. While acknowledging the importance of regulation, especially in critical sectors, she stressed that over-regulation is not the solution and makes matters more complex for lawyers.

Buschmann added, with a view to the role of the state, that in the defense industry the state effectively holds a monopoly as a buyer–with the consequence that companies may be reluctant to sue the state, so as not to jeopardize the contracting relationship. All the more important, therefore, was the protection of one's own intellectual property.

With a view to state action–procurement decisions, export restrictions, sanctions, security classifications–the discussion highlighted how delicate the handling of classified information and security clearances is before state courts: state court proceedings are public, so that sensitive information may be abused by foreign powers or competitors if such sensitive information is not protected in a reasonable way.

Satellite and Space Disputes

Jan Frohloff then introduced the audience to the legal relationships of the satellite and space industry–from manufacturing, launch, sale and purchase, through operation and insurance, to frequency regulation.

He explained both the steps and the legal relationships required to getting a satellite into orbit and emphasized that the use of frequencies is granted only to member states of the International Telecommunication Union. For a private company to use them requires a frequency allocation order.

Therefore, a multitude of legal relationships is already in place before a final consumer, i.e., a user of the satellite's services, even enters the stage. The known categories of satellite disputes to date included launch failures, manufacturing defects, delayed delivery, satellite sale and purchase issues, frequency interference, and orbital slot issues. As a future field of disputes, Frohloff identified, in particular, collisions of satellites.

Asked about state intervention, Marco Buschmann pointed out that, as a state, it is at times a necessity to intervene in satellite and drone matters: private companies should not have the power effectively to decide a war. Looking ahead to AI, Buschmann stressed the concept of "dual use"–once AI is considered dual-use, virtually any application that incorporates AI can also fall under dual-use regulations and restrictions. According to Buschmann, it is an important task to refine the concept of dual use in the age of AI.

Data Centers and Digital Infrastructure

Michael Barth opened the next segment with the provider-side perspective. Data center projects could be divided into three phases: planning and permits–including land acquisitions, construction, and operation.

Disputes, for example, may arise in connection with access to the electricity grid due to the newly introduced maturity assessment procedure (*Reifegradverfahren*), as access to power becomes the most limiting growth factor for the industry. During the construction phase, International Federation of Consulting Engineers contracts are frequently used. Many questions and contentious matters, however, are more technical than legal in nature and are typically resolved commercially at management level.

With a view to the industry's expectation of "Ready for Service" construction, where time to market is crucial, Barth made the chain

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of responsibilities clear: when the contractor fails, the data center provider fails too vis-à-vis its customer, typically one of the "hyperscalers."

Intellectual property and scarce supply chains were further recurring themes. It was notable that, despite a high propensity for potential disputes, comparatively little room remained for litigation and arbitration, because the number of key market participants that drive the exponential growth was small and many of those involved tried to handle differences commercially.

Stefanie Efstathiou then added the customer and in-house perspective. What mattered is to understand the business pre-contractually and to align the rights and obligations with those of the data center operator as well as with one's own customers.

As key pillars, she identified transparency–i.e., clear reporting obligations and clauses–the alignment on the critical issues, ensuring that mission-critical workloads are appropriately priced, and well-defined responsibilities and escalation paths up to management level.

In practice, the service level agreements and stipulated specifications are therefore central. She added that from a customer perspective, it is important to assess a provider's real-world incident readiness even pre-contractually, if possible, by engaging in joint incident simulations or exercises.

Because such relationships could remain operationally critical even during a dispute, the design of dispute resolution was decisive–for example, multi-tiered clauses with early expert determination for technical matters, followed by mediation and/or expedited arbitration as next steps.

Asked whether the comparatively older satellite industry could serve as a model for the younger data-center sector, Jan Frohloff noted that disputes in the satellite industry were also mostly solved amicably in its early years when there were relatively few market participants. This may indicate that data center disputes become more frequent as the sector develops and the number of players increases.

Arbitration Design

The closing round focused on concrete recommendations and an outlook. Michael Barth emphasized the importance of getting the Service Level Agreement provisions right at the outset. Frohloff noted that satellite disputes are not a new phenomenon, but that the labels they received in the past have been different. Stefanie Efstathiou advocated for a combination of well-drafted clauses and procedures, with, ideally, dispute resolution experts drafting the relevant clauses.

In light of questions from the audience, it became clear that the concrete design of clauses–particularly multi-tier clauses–remains open to debate. The event therefore concluded at a highly informative level and with a strong sense that the topic on satellites, drones, and data centers as well as their legal implications will continue to develop in an exciting way.

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Survey Call Looks for Commercial Mediation Experience

The International Institute for Conflict Prevention & Resolution is supporting an important National Commercial Mediation Survey, conducted by the Center for Negotiation & Dispute Resolution at the University of California College of Law, San Francisco (formerly UC Hastings).

The study seeks participants with commercial mediation, defined to exclude employment, labor, family law, and probate matters.

In a late July email to members, CPR President Serena Lee emphasized the importance of the work, and urged recipients to participate. "Commercial mediation resolves billions of dollars in business disputes every year," Lee wrote, "yet surprisingly little is known about how experienced users view the process. This study seeks to change that by identifying what works well, what does not, and where commercial mediation can be improved. The results will be published in a national report intended to provide meaningful guidance for businesses, counsel, mediators, ADR providers, and policymakers."

The survey is supported by the CPR Institute, its wholly owned subsidiary CPR Dispute Resolution Services LLC, as well as the American Arbitration Association/International Centre for Dispute Resolution, and JAMS Inc. The survey is led by Prof. Hiro Aragaki, who is director of the Center for Negotiation & Dispute Resolution.

The survey takes about three to six minutes to complete and is anonymous.

The survey can be found at https://uchastings.co1.qualtrics.com/jfe/form/SV_2mksy1nMILZIxLw.

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2026 CPR Awards Open For Nominations

The CPR Institute's 2026 Awards Program is now open for submissions.

Entries should cover the publication period of November 2025-October 2026. The deadline for submissions is Friday, Nov. 16. The awards will be presented at a dinner ceremony at the CPR Institute's Annual Meeting, which will be held Feb. 3-5, 2027, in New Orleans. (For information on the Annual Meeting, see www.cpradr.org/events/2027-annual-meeting.)

The CPR Awards honors outstanding scholarship and practical achievement in alternative dispute resolution. Award criteria focus on processes, techniques, systems, commitment, and scholarship which address the resolution, prevention or creative management of major

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disputes involving public or business institutions between corporations, between government and corporations, or among multiple parties.

This year will be the 44th time CPR has presented its Annual Awards. See this webpage for details on last year's winners, which were awarded Feb. 12: https://www.cpradr.org/news/cpr-institutes-43rd-annual-awards.

Excerpts from the 2025 CPR Award winners can be found at "The Winners: Highlights from the CPR Institute's 43rd Annual ADR Awards," 44 *Alternatives* 90 (May 2026) (available on Westlaw or by emailing Alternatives@cpradr.org). See this CPR Institute webpage for historical awards information: www.cpradr.org/news/annual-award-winners.

A CPR Awards review committee comprises judges and lawyers from leading corporations, top law firms, and academic institutions across the U.S. The committee list can be found at www.cpradr.org/annual-awards.

The following are categories for this year's awards:

- *James F. Henry Award*—Beginning in 2002, the James F. Henry Award honors outstanding achievement by individuals for distinguished, sustained contributions to the field of ADR. Candidates for the James F. Henry Award, named for CPR's late founder, will be evaluated for leadership, innovation, and sustaining commitment to the field.
- *Book Award*—A book published by academics and other professionals during the publication period that advances ADR understanding. Books must be submitted in pdf or similar format. We regret that we cannot accept hard copy submissions.
- *Joseph T. McLaughlin Original Student Article or Paper*—The submissions should cover events or issues in the ADR field. Outstanding papers prepared for courses requiring papers as substantial part of grade must be recommended for submission by professor.
- *Professional Article & Short Article*—These awards are for articles published by academics and other professionals that advance ADR understanding.

To submit an entry, send electronic file nominations (in PDF or MS Word format), via email to Helena Tavares Erickson, Senior Vice President, CPR Institute & Corporate Secretary, at herickson@cpradr.org. Please include a cover letter with your submission with your name, address, telephone, and email address. If you are nominating someone for an award, please supply their contact information as well. Nominations for the James F. Henry Award should set out how the nominee fulfills the criteria of leadership, innovation, and sustaining commitment to the field.

While it is expected that submissions will be in the English language (or accompanied by a translation), CPR reserves the right to consider submissions not in English. CPR also reserves the right to submit outstanding candidates that have not been nominated.

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