Alternatives
TO THE HIGH COST OF LITIGATION
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Public ADR

Dispute Resolution and Town Planning

BY ADAM SAMUEL

Town planning makes a nonsense out of traditional notions of dispute resolution.

The fundamental problem is that, in most land-use disputes, there are two identified parties, the developer and the planning authority. But actually three interests need considering. The general public may have a very different viewpoint to the other two. Each needs to be represented in any discussion.

Things become even more complex where local authority regeneration schemes lead to the replacement of buildings where individuals may have property rights which can obstruct much needed redevelopment.

Finally, in some parts of the world, political and historical issues have held back the redevelopment of prime real estate and left a series of problems or disputes that a new generation of politicians, lawyers and architects need to resolve in order to prevent the stagnation of cities.

University of Westminster Senior Lecturer John Somers, in London, organizes an annual Built Environment Law Mini Conference This article could have been a recapitulation of my paper on dispute resolution for last autumn's two-day event at the university. Instead, it reflects what I learned through listening to the other speakers on the day.

Karen Winnard, a planning lawyer in Doncaster, England, went through the elements that she has seen in agreements made between councils and developers entered into to enable otherwise unsuccessful planning applications to succeed. Louis Blair, director at Communities First Foundation, a Croydon, U.K., nonprofit consulting firm, described the enormous difficulties in running regeneration schemes and handling the resulting displacement of residents, both tenants of the local authority and owners of properties within the site.

Finally, Julia Chryssostalis, of the University of Westminster's law faculty, showed a film about District 6, a Cape Town neighborhood from which the South African government expelled non-white residents in 1966 and which has still not been redeveloped after it was left largely deserted, except for a small university, as a mark of respect for the former residents.

The author is an attorney and a barrister in London. He is a neutral and is on the panels of the World Intellectual Property Organization and Hong Kong International Arbitration Centre. His website containing his full CV is www.adamsamuel.com. This semi-monthly *Alternatives* feature, "A Note from the U.K.," provides an examination of conflict resolution practices and processes from London.

Intense Housing Challenges

The background to the first two papers is that England is a small densely populated space. No place is more than 300 miles from the capital, London.

Yet its population reached about 57 million in 2022, of which 9.7 million live in the metropolis. The capital's housing stock still

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CPR News

Kate Vitasek Receives Groton Award for Dispute Prevention Leadership

International Institute for Conflict Prevention and Resolution--CPR presented its third James P. Groton Award for Outstanding Leadership in Dispute Prevention to University of Tennessee's Kate Vitasek in March.

"Kate has taken an under-theorized, under-explored area of managing business relationships," said CPR Vice President of Advocacy and Educational Outreach Ellen Waldman in presenting the award, "and has supplied the necessary research and thinking to guide executives toward more harmonious relationships with strategic partners."

Waldman made the remarks in presenting the award at a ceremony at the 2024 CPR Annual Meeting on March 7 at The Westin Hotel in Philadelphia.

CPR's James P. Groton Award for Outstanding Leadership in Dispute Prevention recognizes a person or organization who has contributed significantly to the development and/or practice of dispute prevention.

Vitasek 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

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Next month: A New *Alternatives* Column

This year's CPR dispute prevention award winner Kate Vitasek will share her expertise with *Alternatives* readers beginning in the next issue.

In September, Vitasek will launch in these pages "Back to School on Dispute Prevention," a monthly column focusing on advancing techniques, practices, systems and tools that seek to head off conflict before it needs alternative dispute resolution or a courtroom.

"The art, science and practice of dispute prevention has evolved significantly over the last decade," says Vitasek. She explains, "My goal with the Back to School column is to bring the latest thinking on dispute prevention to CPR members, ADR practitioners, the general legal community, and beyond to the C suite. I am especially excited about linking the research and the practice together into my articles and sharing great examples that show how some of these innovative dispute prevention mechanisms work in practice.

Contributing to her resume that earned her the 2023 CPR James P. Groton Award for Outstanding Leadership in Dispute Prevention (see the accompanying *CPR News* item), Vitasek has written extensively on the subject. She is author of seven books, including "Vested: How P&G, McDonald's and Microsoft Are Redefining Winning in Business Relationships," and more than 300 articles in national publications. She is a regular contributor to *Forbes*, which can be found at https://bit.ly/3R5I4V8.

"I plan to kick off the first column by introducing the work I have been doing with CPR on taking the concept of a dispute management continuum to the next level," says Vitasek, adding, "From there each month I will explore one of the dispute prevention mechanisms."

Alternatives

CPR

Editor:
Russ Bleemer

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Editor: Russ Bleemer. **Production Editor:** Ross Horowitz.

Address for Editorial Correspondence: Russ Bleemer, Editor, *Alternatives to the High Cost of Litigation*, International Institute for Conflict Prevention & Resolution, 30 East 33rd Street, 6th Floor, New York, NY 10016, email: alternatives@cpradr.org.

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Dispute Prevention

Case Study Shows $1 Billion+ in Major Procurements With No Disputes, On-Time Delivery and No Cost Overruns

BY JUDY WEINTRAUB

Shortly after transitioning from private practice to in-house counsel at Amtrak, I was tasked with negotiating a $100 million acquisition of passenger coaches--a project with a high risk of cost overruns and delays based on past experiences.

According to my general counsel, Amtrak incurred more than $40 million in cost overruns on prior acquisitions.

The passenger coaches were being manufactured by Montreal-based Bombardier Inc., at a facility located in a small town, La Pocatiere, a couple of hours north of Quebec City, Canada, as well as at a facility in Barre, Vt., to meet the Buy America requirements that Amtrak was subject to.

Section 165 (49 U.S.C. § 5323(j)) of the Surface Transportation Assistance Act of 1982, commonly called the Buy America Act, required purchases related to rail or road transportation using funds granted by agencies within the U.S. Department of Transportation to purchase materials made in the United States. Interestingly, the primary industry in La Pocatiere other than Bombardier's manufacturing plant was wood carving.

Monitoring Progress

Reviewing previous acquisitions, I discovered a lack of coordination and cross-departmental communication, as well as a general lack of monitoring of the rail-car manufacturing, leading to significant cost overruns and delays. To address this, I chose to oversee the acquisition and implemented a process designed to enhance coordination and communication, as well as monitor the progress of the procurement, including:

- A collaborative team approach, involving representatives from Engineering Design, Mechanical, Customer Service, Finance and Procurement departments, as well as myself from the Law Department. The representatives from Engineering Design and Procurement attended all of the meetings, with the Mechanical rep attending most meetings, resulting in an average of four or five Amtrak representatives attending the meetings. Washington, D.C.,
- Monthly in-person meetings at the manufacturing sites, with detailed agendas, recorded minutes, and a focus on documenting any changes. With Amtrak's preference for employees to take a train to meetings at least one way, the meetings generally took two days: a day of taking the train from Washington, D.C., or Philadelphia to Montreal, and then flying to La Pocatiere, staying overnight and the next day attending the meeting and flying home.

These measures ensured all departments were (or had the opportunity to be) informed and involved in decision-making, minimizing surprises and allowing for proactive resolution of issues.

I found it surprising that there were always many issues that came up at those meetings. Most likely, had we not held those meetings, we would not have learned of most of those issues until it would have been too late to do much about them, or would have resulted in significant cost or delay.

For example, one issue that arose concerned the installation of the seats in the coaches. Bombardier requested approval to shorten the space between seat rows by 1½ inches. The Amtrak team refused to accede to Bombardier's request, as the amount of leg room is a major comfort issue for passengers.

From an engineering design and mechanical standpoint, that was not a significant issue; but from a customer service perspective, it was critical. Had we not had a team approach, or the meeting where that issue was raised, we might not have been able to prevent the decreased space between rows, or may have later required the removal of the seats and replacement of the seat rows to meet the spec requirement, which would have caused a delay in delivery.

> From an engineering design and mechanical standpoint, the issue wasn't significant, but from a customer service perspective, it was critical.

'Bear Trading'

When an issue arose that had a minor cost or schedule impact, we used a "horse-trading" approach, except in this matter, it was "bear-trading."

There was a small, maybe six-inch wood-carved bear in the conference room at the manufacturing facility where we held our meetings. Whichever side held the bear could decide whether to trade the bear to the other side, which meant the other side had to incur the cost or delay impact, or to keep the bear to use for a future issue and then that party would bear the cost or delay impact—pun intended.

That worked really well, as small issues were resolved very quickly and efficiently.

(continued on next page)

The author is an attorney, dispute resolution practitioner and business owner. She runs three businesses: Weintraub Legal Services, providing business law services to small businesses; Accord LLC, in which she serves as a mediator and arbitrator in mostly commercial disputes; and SkillBites LLC, providing book writing and publishing services. All are based in Valley Forge, Pa. She served as in house counsel at National Railroad Passenger Corp., best known as Amtrak, from 1988 to 1994, at which time she moved into senior management, promoted to General Manager of the Equipment Design and Acquisition Department. She left Amtrak in 1998 to start a dispute resolution practice.

Dispute Prevention

(continued from previous page)

When an issue arose that had a larger impact, the team would discuss how we wanted to handle it, sometimes calling to discuss with company executives. Then I and my counterpart at Bombardier would negotiate the issue, document the result, and move forward.

We did not keep track of the cost that the company was incurring by having the group of us attend the monthly meetings. Based on the likely average salary for the two days per month that five people were attending the meetings, the cost of transportation, lodging and the per diem for meals, I calculated that the cost was likely in the $100,000 to $120,000 range for the duration of the project.

By fostering a united team effort, holding regular meetings, introducing a unique bear-trading strategy for resolving minor issues swiftly, and promptly producing meeting minutes, we were able to complete this $100 million equipment acquisition on time, with no cost overruns and no disputes.

I subsequently used the same procedures on an additional six $50 million-plus rolling-stock acquisition projects, including the $750 million dollar acquisition of the Superliners, which are double-decked coaches, sleepers and dining cars. The results were similar: Not one of them incurred delays, cost overruns or disputes.

In contrast, prior acquisitions had cost overruns of $40 million, and the subsequent acquisition of high-speed trainsets, which I did not run, and which did not follow these procedures, wound up in two years of costly litigation. The investment of $100,000 or so is a small price to pay for avoiding a multi-million dollar expense.

Getting Together

The problem: High-ticket deliveries besieged by delays and cost overruns.

The setting: Rail-car manufacturing under the Buy America Act.

The dispute prevention: A first-hand account of coordinating, communicating, monitoring, collaborating, and regularly scheduled and productive meetings. A comprehensive approach, and impressive savings.

Arbitration Practice/Part 3

The Supreme Court Rules on Continuing Federal Arbitration Act Jurisdiction After Stays—Almost

BY PHILIP J. LOREE JR.

In Part 2 in the June Alternatives*, author Philip J. Loree Jr. continued his discussion of the power under Federal Arbitration Act Section 3 to provide continuing subject matter jurisdiction for a federal court in a stayed-pending-arbitration case to rule on Section 9, 10, and 11 questions of confirming, vacating, or modifying an arbitration award. See Part 2, "More on Independent Actions and the 'Jurisdictional Anchor': Where the Law on Award Enforcement May Be Going," 42* Alternatives *95 (June 2024), and Part 1, "The Fourth Circuit Weighs the Post-*Badgerow *Jurisdictional Anchor—and Finds it Won't Set," 42* Alternatives *73 (May 2024). For more info on obtaining* Alternatives*, see www.cpradr.org/alternatives-newsletter.*

This month, the author wraps up the discussion in light of the case decided by the U.S. Supreme Court just as the June issue closed, Smith v. Spizzirri*, No. 22-1218, 601 U.S. ___ (May 16) (available at https://bit.ly/3wWvalv). For analysis, see Lee-Williams & Russ Bleemer, "More Plain Text: Scotus Says FAA Sec. 3 Requires Litigation Stays,"* CPR Speaks *(May 16) (available at https://bit.ly/3VoY9aQ). Loree discusses how this new case may bear on this important subject matter jurisdiction issue going forward.*

* * *

The June Part 2 of this article noted that the U.S Supreme Court was "now poised in *Smith v. Spizzirri*, No. 22-1218. . . to decide. . . '[w]hether Section 3 of the [Federal Arbitration Act] requires district courts to stay a lawsuit pending arbitration, or whether district courts have discretion to dismiss when all claims are subject to arbitration.'"

This author opined that "[i]n the course of answering this question, it seems possible the Court may provide some guidance bearing on the relationship between Section 3 stays and continuing jurisdiction to hear post-award motions under FAA Sections 9, 10, and 11."

On May 16, as Part 2 was nearing press time, the nation's top Court decided the case, which held that "[w]hen a federal court finds that a dispute is subject to arbitration," a Section 3 stay of litigation pending arbitration is mandatory if requested, and "the court does not have discretion to dismiss the suit on the basis that all the claims are subject to arbitration." *Spizzirri*, 601 U.S. at ___, slip op. at 3.

CPR's blog, *CPR Speaks* [the CPR Institute publishes *Alternatives*], discussed the decision cited and linked in the preface above, and the

The author is principal of the Loree Law Firm. He is a New York attorney who focuses his practice on arbitration and associated litigation, representing corporate and individual clients. He blogs about arbitration-related issues at the Arbitration Law Forum, https://loreelawfirm.com. The views expressed in this and other articles written by the author and published in *Alternatives* are solely those of the author, and do not necessarily reflect those of the author's current or former clients.

author covered it in Philip J. Loree Jr., "SCOTUS Decides *Spizzirri*, Saying that FAA Section 3 Stays of Litigation Pending Arbitration are Mandatory if Requested," Arb. L. Forum (May 21) (available at https://bit.ly/4bIb3q6).

> The prediction that a just-decided SCOTUS case would provide additional guidance about continuing subject matter jurisdiction turned out to be accurate—but the guidance is modest and cryptic at best.

This author's prediction on *Spizzirri* providing additional guidance about continuing subject matter jurisdiction turned out to be accurate—but the guidance is modest and cryptic at best.

In discussing how its holding was consistent not only with the text of the FAA—but also with its structure and purpose—the Court said "staying rather than dismissing a suit comports with the supervisory role that the FAA envisions for the courts." 601 U.S. at ___, slip op. at 6.

The FAA, stated the Court in a unanimous opinion by Justice Sonia Sotomayor,

> provides mechanisms *for courts with proper jurisdiction* to assist parties in arbitration by, for example, appointing an arbitrator, see 9 U.S.C. §5; enforcing subpoenas issued by arbitrators to compel testimony or produce evidence, see §7; and facilitating recovery on an arbitral award, see §9. Keeping the suit on the court's docket makes good sense in light of this potential ongoing role, and it avoids costs and complications that might arise if a party were required to bring a new suit and pay a new filing fee to invoke the FAA' procedural protections. . . ."
>
> 601 U.S. at ___; slip op. at 6 (emphasis added).

The Court's comments concerning the supervisory role of the judiciary contemplated by the FAA do not clearly authorize—or prohibit—anchor or continuing jurisdiction. It says that "the FAA provides mechanisms *for courts with proper jurisdiction* to assist parties. . . ." 601 U.S. at ___, slip op. at 6 (emphasis added). Only "courts with proper jurisdiction" can therefore utilize those "mechanisms" to "assist parties[,]" id., but that is, of course, a truism. It leaves to informed speculation what exactly the Court intended when it used the qualifier, "courts with proper jurisdiction[.]"

Does the court in the suit—which had subject matter jurisdiction to hear it and the arbitration proponent's motions under Sections 3 and 4 for orders compelling arbitration and staying litigation—have "proper jurisdiction" to hear other FAA applications arising out of the arbitration if the court would not have proper jurisdiction but for the existence of the stayed-pending-arbitration litigation?

Or does a court have that "proper jurisdiction" if it had jurisdiction to grant a stay under Section 3?

FAA, Continued And Continuing

The ruling: The U.S. Supreme Court holds that when a party has requested a stay of a court proceeding pending arbitration, Federal Arbitration Act §3 compels the court to issue that stay, and the court lacks discretion to dismiss.

What's next? That's literally the key inquiry in this three-part series: Does the court maintain continuing subject matter jurisdiction to hear moves to confirm or vacate a subsequent arbitration award?

The answer: The Supreme Court's decision language was vague enough that you will have to make an argument to do so. Therefore: We'll see.

These questions remain open after *Spizzirri*, but *Spizzirri*'s reference to the "supervisory role" that the FAA envisions for courts, provides at least some additional, modest support for an argument in favor of anchor or continuing jurisdiction.

That additional bit of support, combined with the other arguments that this author has discussed in favor of continuing or anchor jurisdiction, may prove useful to those who advocate for such jurisdiction in stayed-pending-arbitration cases.

It will be interesting to see how the district and circuit courts address this question in the future.

The Latest SCOTUS Arbitration Analysis, On CPR's *YouTube* Channel

After the U.S. Supreme Court case that is discussed in the accompanying article, author Philip J. Loree Jr. appeared in a recurring panel on arbitration opinion analysis and hot topics that just marked its fourth year of periodic *YouTube* appearances.

The panel discussed on *Alternatives* publisher CPR's *YouTube* channel, @CPRInstituteOnline, the 2023-2024 Supreme Court term's three arbitration cases: *Bissonnette v. LePage Bakeries Park St. LLC*, decided April 12; *Smith v. Spizzirri*, decided May 16, and *Coinbase Inc. v. Suski*, which was handed down on May 23.

In the video, in addition to covering the U.S. Supreme Court's three recent arbitration decisions, the panel discussed issues in the accompanying article. The Court roundup concluded with a look ahead to next year's Supreme Court term and was followed by current hot ADR topics, including Walgreens Co.'s recent runaway arbitration awards, and Samsung US's mass arbitration case in the Seventh U.S. Circuit Court of Appeals.

Loree, who heads New York's Loree Law Firm, is joined in the discussion by regular CPR *YouTube* panelists Angela Downes, who is University of North Texas-Dallas College of Law Professor of Practice and Assistant Director of Experiential Education, and Richard Faulkner, a Dallas-based attorney-arbitrator-mediator. *Alternatives* editor Russ Bleemer moderates.

The *CPR Speaks* blog post providing background on the video can be found at https://bit.ly/4c58a2K, and the discussion can be accessed directly on *YouTube* at www.youtube.com/watch?v=-3pGv1gzPR0. For more on *Alternatives*' and the CPR Institute's recent work on the Supreme Court arbitration cases, see page 120 of this issue.

ADR Techniques/Part 4

Helping You Do the Best Mediation You Can

BY JOHN LANDE

This is the conclusion of a four-part series. In this month's Part 4, author John Lande discusses designing continuing education programs to improve mediators' real practice systems. It is adapted from a version of this article that is available at https://bit.ly/3K0Yvho. See Part 1 of this series at John Lande, "The Real Practice Systems Project: A Menu of Mediation Checklists," 42 Alternatives *53 (April 2024); Part 2 at John Lande, "Practitioners Tell Why Real Practice System Checklists Are So Useful," 42* Alternatives *80 (May 2024), and Part 3, John Lande, "Why Do Mediators Mediate the Way They Do?" 42* Alternatives *91 (June 2024).*

* * *

Last month, Part 3 of this series reported on the results of an action research study analyzing mediators' reactions to an educational program (referred to below as the "*Why Mediators Mediate* program") helping them reflect on their "real practice systems," or RPS, discussed in the earlier articles all deriving from John Lande, "Real Practice Systems Project," *Indisputably* (Dec. 20, 2022) (available at https://bit.ly/3V2LudS).

RPS theory argues that each mediator has a unique practice system based on numerous variables including their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and subjects in their cases. While mediators consciously use some techniques, much of their behavior is based on unconscious routines. Through reflection, individually and in groups, mediators can become more aware of their systems and consciously improve them.

This article uses lessons from a study to recommend things that mediators can do to improve their mediation practice systems. It also includes suggestions for sponsors of continuing education programs, faculty, and trainers to incorporate these insights and techniques in programs, courses, and trainings.

When asked what they learned from the *Why Mediators Mediate* program, many mediators said that they better understood their techniques and practice systems. Some liked discussing these issues with other mediators and planned to continue reflecting about their systems. The main suggestion for improvement was for attendees to prepare in advance to permit more discussion during the program.

"Action research" is research intended to promote social action. Ideally, it is part of a continuing cycle of research and action, where research findings stimulate actions to promote desired goals, which then are studied to analyze the effects of the actions. The study analyzes the effects of the *Why Mediators Mediate* educational program.

As part of the action research process, this article invites you to learn about your unique system and then share your experiences.

Your Unique Practice System

This section describes a short video, several articles, and some exercises to help you learn about your practice system.

Video: A 20-minute video is designed to help you understand and improve your mediation practice system. You can find it here: https://bit.ly/4bgjk4A.

You can use these ideas in every type of case and at every stage of practice, from novice to mid-career to senior mediator. The video also should help students and trainees who are first learning about mediation, though it particularly addresses people who have mediated regularly.

The video defines general elements of mediators' practice systems:

- Mediators' contributions (personal histories, values, goals, motivations, knowledge, skills, and experiences).
- Typical cases and parties in mediators' practices.
- Practice system design (preparation for mediation sessions, routine procedures, common challenging problems and strategies for dealing with them).

The video describes three hypothetical mediators' systems and the "careers" of their systems. Mediators have careers as they progress through engagement with different employers, clients, and cases.

Mediators' practice systems have *parallel careers*. Mediators start with basic training, observations, and/or intuitive understandings. Over time, they develop more sophisticated insights about the process. Their cases may become more complex and specialized by type of case. They develop conscious and unconscious norms and routines.

Experienced mediators may develop deeply intuitive perceptions and skills enabling them to masterfully help parties work together to reach good agreements. Some mediators operate largely on "autopilot," treating cases pretty much alike rather than addressing the unique circumstances of each party and case.

Systems Articles: The following articles can help you to understand how mediation practice systems work and to analyze your own system.

Ten Real Mediation Systems, eight pages. This article summarizes accounts of 10 experienced mediators who identify factors affecting

The author is Isidor Loeb Professor Emeritus at the University of Missouri School of Law's Center for the Study of Dispute Resolution in Columbia, Mo. This year, he received the American Bar Association Section on Dispute Resolution's Award for Outstanding Scholarly Work. See https://bit.ly/3Tq5YuK. He is a frequent contributor to *Alternatives*. His biography page can be found at https://lande.missouri.edu. **The author acknowledges and thanks Ron Kelly and Peter Salem for comments on an earlier draft.**

their mediation practice systems. It includes links to the mediators' detailed accounts of their systems. Official cite: "Ten Real Mediation Systems," University of Missouri School of Law Legal Studies Research Paper No. 2022-11 (Nov. 7, 2022) (available at https://bit.ly/4aK43IB).

Real Practice Systems Project Menu of Mediation Checklists, 15 pages. This is a menu of detailed checklists for mediators, including checklists of actions before, during, and after mediation sessions. The checklists also include items about information to provide on websites, compliance with ethical requirements, and reflection and improvement of mediation techniques. You can use the checklists throughout your career to improve your skills through systematic reflection and participation in educational practice groups.

The checklists are not recipes to follow strictly, thoughtlessly, or completely. Instead, they should help you decide what to do in any specific case or in your practice generally. You can develop your own checklists by modifying or omitting some items and adding others to reflect your values, practice philosophy, and characteristics of your cases and clients. You can perform almost all of the procedures in the checklists regardless of your views about particular mediation theories. Official cite: "Real Practice Systems Project Menu of Mediation Checklists" (Dec. 1, 2023). University of Missouri School of Law Legal Studies Research Paper No. 2023-17 (available at https://bit.ly/4bg8hbA); see also Part 1 of *Alternatives* series linked above.

Practitioners Tell Why Real Practice System Checklists Are So Useful, nine pages. Following the rave reviews for the Menu of Mediation Checklists, I asked 14 practitioners to describe how they might use them. This article summarizes their ideas, illustrating how you can use the checklists to design your own practice system. Official cite: "Practitioners Tell Why Real Practice System Checklists Are So Useful" (Dec. 27, 2023). University of Missouri School of Law Legal Studies Research Paper No. 2024-08 (available at https://bit.ly/4biR69i); see also Part 2 of *Alternatives* series linked above.

Why Do Mediators Mediate the Way They Do?, 14 pages. This article presents the results of a survey of mediators who attended the *Why Mediators Mediate* program. It described RPS theory, asked mediators to describe their systems, and led discussions of their systems. Mediators said they learned about their systems and planned to be more intentional in their mediation techniques. Official cite: "Why Do Mediators Mediate the Way They Do?" (Feb. 1, 2024). University of Missouri School of Law Legal Studies Research Paper No. 2024-10 (available at https://bit.ly/4aob94O); see also Part 3 of *Alternatives* series linked above.

Enhancing the Product

The four-part series: Mediators constructing and improving their unique real practice systems with checklists and regular reflection.

The conclusion: Mediators can improve their techniques by becoming more conscious and intentional about the way they practice.

The final takeaway: Use your power to make your mediation more effective.

Takeaways From "How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?," 13 pages. This article summarizes **How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?** (the full 54-page article can be found at John Lande, "How Can Courts–Practically for Free–Help Parties Prepare for Mediation Sessions?" (July 27, 2023). *J. of Disp. Res.* (forthcoming 2024). University of Missouri School of Law Legal Studies Research Paper No. 2023-11 (available at https://bit.ly/3QhBDyG)).

Preparation can make a big difference in mediation because parties are more likely to achieve their goals if everyone is well prepared before a mediation session. Although the article is oriented to court mediation programs, individual mediators can use the recommended procedures. The full article includes an extensive appendix of publications, videos, website materials, and technological materials that parties, attorneys, and mediators can use. Official cite: "Takeaways From 'How Can Courts–Practically for Free–Help Parties Prepare for Mediation Sessions?" (July 27, 2023). University of Missouri School of Law Legal Studies Research Paper No. 2023-10 (available at https://bit.ly/4bASWlH).

Real Mediation Systems to Help Parties and Mediators Achieve Their Goals, 42 pages. This law review article provides a thorough explanation of RPS theory. It identifies problems with traditional mediation theories, argues that dispute system design theory provides a more useful general framework, outlines the rationale for RPS theory, and uses the mediation practice systems of 10 experienced mediators to illustrate RPS theory. Official cite: "Real Mediation Systems to Help Parties and Mediators Achieve their Goals" (Dec. 19, 2022). 24 *Cardozo J. of Conflict Res.* 347 (2023), University of Missouri School of Law Legal Studies Research Paper No. 2022-14, (available at https://bit.ly/43exZsi).

Real Practice Systems Project Annotated Bibliography, 49 pages. This bibliography organizes publications about various topics related to RPS theory. Most pieces are short blog posts and articles, though it also includes law review articles and books. There are links for the entries so you can access them in one or two clicks. Official cite: John Lande, Real Practice Systems Project Annotated Bibliography (Dec. 1, 2023) University of Missouri School of Law Legal Studies Research Paper No. 2023-16 (available at https://bit.ly/4bG3FvY).

Written Exercises: *Create an Overview of Your Mediation Practice System.* Fill out this 18-question mediation practice system self-assessment worksheet at https://bit.ly/4aiizGT to help you recognize basic elements of your practice system.

Develop a Detailed Design for Your Mediation Practice System. Use the RPS Project Menu of Mediation Checklists to describe and refine your practice system. See it at https://bit.ly/4bg8hbA.

Continuing Ed Programs

This section builds on insights from the *Why Mediators Mediate* study and is particularly directed to sponsors of continuing education

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ADR Techniques

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programs. The attendees at the *Why Mediators Mediate* program really enjoyed discussions with other mediators. Some suggested that attendees do some preparation before the program to allow more time for discussion during the program.

Attendees at continuing education programs generally are not used to doing "homework." To get the benefit of advance preparation, a substantial proportion of attendees must prepare in advance. Program sponsors should send messages to attendees about needed preparation *early and often*.

In programs to help mediators understand and improve their practice systems, attendees could do some of the activities listed above. Watching the video would help everyone get on "the same page."

Reading the Ten Real Mediation Systems article would be particularly helpful because it concisely summarizes key elements of mediators' systems. Attendees might also review the Menu of Mediation Checklists. Mediators often want to discuss the nitty-gritty of mediation techniques, and the checklists can help them think about details of their own practices.

Mediators completing the mediation practice system self-assessment worksheet before the program will get a deeper understanding of what they do.

For small group discussions, it helps attendees to get clear written instructions. Each group should have a moderator to keep the conversation on track. The moderator should manage the time, ensuring that everyone gets a chance to speak and no one dominates the conversation.

Group discussions generally should involve a small number of questions. In a program to help mediators improve their practice systems, attendees might discuss:

- What are most important factors affecting how you mediate?
- What did you learn from this exercise?
- How can you improve your mediation techniques?
- Would it be worthwhile to work more on your exercise?

Many mediators like to discuss specific mediation techniques. In programs focusing on such details, the programs might focus on some elements of the checklists, such as what mediators do before, during, and after mediation sessions and/or their routines for complying with ethical requirements. That's a lot to discuss, and you might select only one of these topics or plan a series of programs.

Educational Practice Groups

Some mediators in the *Why Mediators Mediate* programs expressed interest in participating in ongoing educational practice groups.

I participated in a group when I was in private practice doing divorce mediation in the mid-1980s. Being in this group was one of the most satisfying experiences in my career. It consisted of eight people including mediators, attorneys, and therapists, and we focused on family cases. We met twice a month in people's homes or offices. We "checked in" at the start of each meeting to see how everyone was doing. This built strong relationships and helped us to be candid about problems in our cases.

We spent much of our time discussing challenging cases, and people often asked for advice. Of course, we protected confidentiality by withholding identifying information and not repeating our discussions outside the group.

Our group also did a variety of other things. Sometimes we discussed books or articles, and other times we invited guests to talk with us. We developed close personal and professional relationships, and sometimes our gatherings were purely social.

The Reflective Practice Institute International explained the value of participating in practice groups: "Most conflict practitioners work in a bubble. Only the parties and representatives participate. There are no outside observers who might comment on our work or provide feedback. Moreover, with few exceptions, we seldom receive feedback from the parties or their representatives. As a result, we have little if any basis for understanding whether our efforts were effective and responsive."

People who want to form such groups need to make some important decisions. Groups should not be too big or too small. I think that five to eight people is about right.

I also think that it's a good idea to have a fixed membership with a commitment to participate for an extended time such as at least six to 12 months. This should help people feel comfortable sharing potentially sensitive experiences.

Groups should consider what similarities or differences they want in the members. Similarities provide a common knowledge base and differences can help provide valuable insights. For example, in my group, we all handled family cases in different professional roles.

A group whose members all handle tort cases might include plaintiff's attorneys, defense counsel, insurance company executives, and mediators. Some groups might limit membership to mediators and invite mediators who handle different types of cases such as commercial, employment, and family cases.

Groups may want to include members with similar amounts of experience. For example, seasoned mediators may prefer that all the members have substantial experience. Some groups might include mediators with different amounts of experience. Relatively new mediators would value learning from mid-career mediators. The latter might benefit from seeing things from the perspective of a "beginner's mind," generating insights by raising questions that they take for granted.

Groups should consider whether to meet in person or by video. Meeting in person provides the opportunity for physical connection, not to mention refreshments. Meeting by video offers convenience and the opportunity to interact with people over long distances--but no shared food and drinks.

Groups also should consider the types of activities they do. For example, as noted, my group analyzed cases and also did other things such as discussing readings, talking with guests, and having social get-togethers. Your group might discuss issues in the self-assessment questionnaire or mediation checklists.

Some groups may focus primarily on discussing cases. In particular, they may want to use reflective practice techniques. Author Laurel Tuvin Amaya wrote that in reflective practice groups, "practitioners help each other find their own answers to their practice problems. When a member identifies challenging problems in his or her case, colleagues ask questions to elicit the member's own evaluation of

the situation rather than offering their ideas and suggestions. This helps practitioners dig deeper and see things that may have eluded them." Laurel Tuvin Amaya, "Mediators Can Greatly Improve Your Skills Using Reflective Practice Groups," Indisputably.org Theory-of-Change Symposium (Jan. 19, 2020) (available at https://bit.ly/3K9uMDi).

The Reflective Practice Institute International provides valuable resources for people who want to use this approach. The RPS menu of mediation checklists includes a lot of questions to promote mediators' self-assessments.

The reflective practice process is very helpful, in part by practicing good mediation skills of helping people develop their own insights. Groups may use it to start discussion of challenging cases. After some discussion, it can be helpful for members to share their experiences in similar situations and brainstorm strategies for dealing with difficult situations.

Court ADR programs, bar and mediation groups, and ADR panels can help mediators organize educational practice groups. The organizations can identify mediators who want to participate in such groups, help them connect with each other, and train them how to organize and run them well. The RPS checklists identify considerations in forming and operating a good practice group.

In part, this is a function of a synergy of interests, personal chemistry, and serendipity.

Using the Resources

In their courses, faculty can use the resources described above—for example, assigning watching the video and reading some of the articles. For model assignments for student papers, see John Lande, "Resources for Using Real Practice Systems Materials in Teaching," *Indisputably.org* (Dec. 22, 2022) (available at https://bit.ly/4bjgrjo).

You can assign students to participate in practice groups to discuss actual or simulated cases. For example, you can designate groups of three or four students to review one case handled by each student. The groups might meet for an hour outside of class for each case, and this activity need not be graded.

Using the reflective practice process would help students develop important mediation skills and the habit of reflection. This can be an extremely valuable learning experience because students can't learn everything they need to know in school, and practitioners need to continue their education throughout their careers.

Trainers can adapt these ideas to fit your trainings.

Sharing Your Experiences

The action research process involves a continuing cycle of research and action. The *Why Mediators Mediate* study prompted me to suggest the ideas in this article. If you use these ideas, you can share your experiences to help refine them. This can be as simple as writing a few paragraphs or a few pages about your experiences doing the exercises described above, noting what worked well and what might be improved. Similarly, members of practice groups can describe experiences with your group.

Sponsors of continuing education programs can describe their impressions of the programs. Sponsors often conduct evaluation surveys, and you can include questions specifically related to practice system issues. Whenever appropriate, use open-ended questions, asking for responses in people's own words rather than checking boxes in multiple-choice questions. This provides richer data, as illustrated in the *Why Mediators Mediate* article linked above.

To get the most useful survey data, it's important to get as many attendees to complete the survey as possible. Because few people

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Letter to the Editor

New York: April's issue featured a menu of checklists from John Lande, explaining they were suggested by Gary Doernhoefer and incorporated into Doernhoefer's *ADR Notable* software. [John Lande, "The Real Practice Systems Project: A Menu of Mediation Checklists," 42 *Alternatives* 53 (April 2024).] The article says the checklists are designed to help mediators develop routines and they should tailor the checklists based on their values, practice philosophies, and characteristics of their cases and clients.

I'm writing to suggest that all mediators remove the checklist item "Assess potential problems with participants' ability to participate effectively due to factors such as domestic violence, intimidation, or disabilities" which was listed on the "Compliance with Ethical Requirements" checklist on page 63 of the *Alternatives* April issue.

The Americans with Disabilities Act, and other disability laws, often make it illegal for professionals to engage in inappropriate inquiries and exams into whether someone has a disability, its nature, or its severity. Therefore, this Real Practice System checklist item directs people inappropriately and likely illegally to assess parties' disabilities. If it is possible to update or remove this item from *Alternatives* reprints, *ADR Notable*, the SSRN and *Indisputably* postings of the material, and any other location, then those changes may prevent many mediators from accidentally learning to perform illegal disability assessments based on this checklist.

For more resources to prevent this kind of problem, readers can look at my article in the same April issue. See Dan Berstein, "Mistakes? Tools for Publishers and CLE Providers to Prevent Discriminatory Dispute Resolution Guidance," 42 *Alternatives* 59 (April 2024). That article includes a link to a set of three checklists to help mediators develop their real systems while complying with the law and mediation ethics, available at https://bit.ly/PreventADRMisconduct, and more general resources for vetting dispute resolution guidance at www.mhsafe.org/drguidance. My article also stresses there is no shame in acknowledging mistakes, improving how we practice, and updating our guidance much like John Lande is encouraging readers to regularly update their own systems and customize their checklists. Thanks to John and Gary for encouraging everyone to create and evolve checklists to improve how they practice and providing a platform for this kind of reflection.

—Dan Berstein

The author is founder of consulting firm MH Mediate, at mhmediate.com.

ADR Techniques

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respond after educational programs, if feasible, stop a few minutes before the end of the program and urge attendees to complete the survey before they leave.

Faculty and trainers who use techniques and assignments described above can write about experiences and collect data about them as part of a regular evaluation processes.

If you would like to share your experiences, please email them to me at landej@missouri.edu and I can post them on the *Indisputably* blog. Of course, be sure to protect the confidentiality of anyone you mention.

* * *

By investing as little as one hour, mediators can increase their understanding of their mediation practice system and improve it.

You can watch a short video, read some articles, and map an overview of your system. If you devote more time, you can use checklists to design it in more detail, by identifying your normal procedures and adding others.

You can organize or attend continuing education programs to learn about others' systems and get ideas to enhance your system. Better yet, you can participate in an ongoing educational practice group.

Faculty and trainers can use these ideas and materials to help your students and trainees develop skills, get realistic expectations, and plan for their careers.

This article is part of an action research project in which research is designed to help mediators improve their practices. This process involves a continuing cycle of research and action. So I invite you to share your experiences to my email above.

Public ADR

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shows some of the effects of the Second World War, with many poorly constructed homes put up to replace dwellings destroyed or damaged during that conflict.

Demand for London-area housing remains an intense challenge for local authorities. At the same time, the rapidly eroding countryside or green belt around London continues to worry environmentalists. Planning and zoning matters here. Planning applications go initially to the local authority with an appeal to the Secretary of State (essentially, the relevant government minister) who delegates most of the decision-making to the Planning Inspectorate. It deals with cases using a combination of written representations, hearings and inquiries.

Appeals concerning projects of strategic importance or national infrastructure projects are dealt with directly by the Secretary of State (in about 1.6% of cases). M. Stubbs, "The New Panacea? An Evaluation of Mediation as an Effective Method of Dispute Resolution in Planning Appeals," 2(3) *Int'l Planning Studies* 347, 348 (1997). Administrative law proceedings can be brought to challenge the minister's decision on limited grounds (typically procedural).

Despite disputes in this area frequently appearing in national and local press stories, the ADR literature remains limited. The subject seems to defy generalization and stretches traditional dispute resolution notions. It is just too difficult. A commercial mediator focuses on whether the parties have reached agreement. That approach, though, will not work where the results of a private agreement between a developer and an under-resourced planning authority may damage individuals or sectors of the population. They may not have been adequately represented or their relatively weak bargaining position could result in a mediated settlement failing to address adequately their needs.

For an arbitration, the amorphous concept of the general public as a party creates its own issues. Anyway, those most affected may not be able to afford the arbitral process. Yet disputes exist and courts can be painfully slow, inconsistent with effective property development of the type that London desperately needs.

Property Development

Let us start with a standard land usage problem. 100 Avenue Road was an office block, housing among others, legal publishers, Sweet & Maxwell (now owned by Thomson Reuters). The purchasers of the site sought planning permission to build accommodation and business premises on a prime highly visible site. They have made numerous applications with varied results. In 2020, the Local Planning Officer finally granted permission subject to a section 106 agreement which had been entered into in 2015. See the document at https://bit.ly/3y8rzB0.

Section 106 of the Town and Country Planning Act 1990 allows a local authority to enter into an agreement with anyone interested in land in their area to restrict the use of its development permanently or otherwise. This can and does involve the developer paying money, including supporting local causes.

Unusually, the agreement binds subsequent owners of the land as if it was a restrictive covenant. At the same time, this type of accord cannot prevent the authorities exercising their powers under the act, the development plan which they have to follow, or following the government's directions. As Karen Winnard explained, a section 106 agreement cannot be imposed unless the planning application would fail without it. It has to relate directly to the development and be fairly and reasonably related in both scale and kind to it.

This 100 Avenue Road's 83-page document was agreed to when the original refusal of planning permission was being appealed. The dispute resolution provision, paragraph 7.10 on page 42 at the link above, is unusual in that it provides for binding expertise, not arbitration.

A common problem with these agreements which emerged in the 100 Avenue Road story concerns the undertaking to supply affordable housing. The 100 Avenue Road developers sought unsuccessfully to obtain a reduction in the amount of such accommodation set out in the agreement. Aaron Morby, "Stalled £100m North London build-to-rent tower to start," *Construction Enquirer* (2022) (available at https://bit.ly/4aefo31). The Camden Council, which passes on the local zoning and development issues for the area, has refused to give way despite the usual argument that such cheaper homes rendered the construction financially unviable.

The Council may have done this because of its embarrassment over the site of the Fitzrovia workhouse on the street in which Charles Dickens wrote Oliver Twist. Linus Rees, "Developer wants to reduce social housing on Middlesex

Annex site," *Fitzrovia News* (July 3, 2021) (available at https://bit.ly/3UPZrLL). There, the Council failed to enforce the agreement in a timely way which would have enabled it to buy the site from the charity owners for £1 and ended up effectively waiving its section 106 rights. Linus Rees, "Camden 'discussing the final terms' with UCLH Charity after losing in High Court over social rented homes," *Fitzrovia News* (Nov. 3, 2023) (available at https://bit.ly/3WuP8xV), and *University College London Hospitals Charity & Middlesex Annexe LLP v London Borough of Camden* [2023] EWHC 1070 (KB) (05 May 2023) (available at https://bit.ly/4dHQoEi).

To make matters worse, the charity bypassed the section 106 agreement by filing a new planning application and succeeding on appeal to the Planning Inspector and then obtaining a court declaration that the offending part of the agreement was unenforceable.

It appears as though Camden Council in the 100 Avenue Road project has decided not to give way, probably because, unlike with the workhouse case, the developer was not a charity. Mediation might well have eroded the public's right to affordable housing enshrined in the section 106 agreement in much the same way that Council sloppiness did so over the former workhouse.

Karen Winnard at the conference pointed out that her standard section 106 agreement has a clause providing for arbitration with the arbitrator appointed by the Royal Institute of Chartered Surveyors. That itself does not entirely solve the problem. A fresh planning application can go before the council and generally an appeal to the Planning Inspectorate. As the workhouse case illustrates, planning permission can be modified even while the council seeks to enforce its section 106 agreement.

If that was not enough, the local government and Social Care Ombudsman can deal with complaints from the public about the planning authorities' behavior and the contents of section 106 agreements. Developers also have similar rights, this time limited to concerns about the handling of their applications. The Ombudsman has no binding powers here. So, developers would probably do better to use the planning appeals system.

Section 106 agreements are binding and almost certainly should contain arbitration clauses to enable disputes between the council and developers to be resolved. They do, though, put an onus on the planning authorities to enforce the rights contained in them.

There is nothing, though, to stop a fresh planning application going in to circumvent the agreement which makes it crucial for the terms to cover that eventuality or accept it as a risk. The 100 Avenue Road agreement providing for binding expertise is interesting and could be highly effective as a way of managing simple factual disputes or even supplying a view of the agreements' terms. Its lack of an arbitration provision makes it more difficult for the Council to collect its entitlements under the agreement.

Getting It Right

The problem: City planning and development. The affordable housing crisis.

The question: ADR's role in settling, or maybe just calming, the conflicts.

The techniques: Government probably needs to drive the quality and availability of resources that are the cause of and the solution for these disputes.

Bring on the Ombuds

Regarding neighborhood regeneration plans: Is it time for a binding Ombudsman scheme?

Louis Blair's presentation at the conference on neighborhood regeneration raised a whole series of concerns about statutory powers given to local authorities and other landlords to regenerate areas.

A U.K. complexity is that councils were encouraged in the 1980s to sell on long leases council housing, typically to existing tenants at significant discounts. Blair described a full range of rules about ballots and compensation for both tenants and leaseholders and issues to which these projects give rise.

The South Kilburn plan (available here: https://bit.ly/3yd1fpl) presents an example. Dispute resolution doesn't appear in any of the Council's public documents on this. Blair's own organization effectively works as tenants' advocates. This, though, creates genuine concerns that the Council's inability to deliver on its promises will only be subject to a referral to the non-binding Local Government Ombudsman.

There is a good case for future schemes to be subject to a binding and externally managed Ombudsman arrangement to ensure that individual claims are proactively investigated and resolved.

A Detour Into the Literature

The literature predictably raises more questions about this.

Susan A. Moore's "Defining 'successful' environmental dispute resolution: Case studies from public land planning in the United States and Australia," 16(3) *Environment Impact Assessment Rev.* 151 (May 1996) (available at https://bit.ly/4acrNoa), looked at public-private projects for managing public land in the United States and Australia. A quarter of the United States and half of the Australian interviewees regarded success as conditional on the outcome or delivery of the agreed plan.

Reaching agreement itself--the traditional mediation answer--is not enough.

Intriguingly, when describing the U.S. project, Moore quoted a respondent, "This is a reason for success we hardly ever talk about. We didn't gore anybody's ox. All our management emphasis was on education. We didn't take any management action that was going to affect anybody directly."

In other words, the project taught everyone about each other but did not actually resolve any disputes as such.

Joanna M. Beyers, in "Model Forests as Process Reform: Alternative Dispute Resolution and Multistakeholder Planning" in the book "Canadian Forest Policy: Adapting to Change," 172 (Michael Howlett ed., 2001) (available at https://bit.ly/3whkde4)), looked at model forest programs. She explained that co-management is "not envisioned." Id. at 190. She reported that while the joint arrangements

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were good at handling minor matters, they could not solve the "more fundamental disputes: those to do with actual land use." Id. at 191.

This is reflected in the U.K. mediation literature. In 1997, in M.D. Stubbs, "The new Panacea? An evaluation of mediation as an effective method of dispute resolution in planning appeals," 2(3) *Int'l Planning Studies* 347 (1997) (available at https://bit.ly/3Qzbxqk), suggested that mediation worked best when applications had failed because of a design issue--typically for fewer than 10 homes or for domestic extensions, about 5% of the total number of planning appeals in England in 1994-1995.

Stubbs felt that mediation worked best where the "principle of development" was accepted. Id. at 363. Sometimes, it was a good way for the council to back off after rejecting an application of this type and avoiding a full planning appeal. Id. at 358. There was also reluctance from planning officers and consultants in New South Wales, Australia, reported in this paper, to involve third parties in any mediation, although local councilors tended to prefer mediations to occur in public in order to ensure that the result was politically acceptable. Id. at 357.

M.D. Stubbs, Urban Planning and Real Estate Development, 2nd ed. (2004), reported that, in a 1998-1999 pilot study of mediation in U.K. planning cases, more than half covered the same type of cases, often where there are normally no conflicts with key land use policies. Id. at 136. As Stubbs explains, any settlement will only produce a refreshed planning application with a better chance of success. The council's representative typically lacks the authority to bind anyone. Id at 139.

The Case for Dispute Boards

The case for mediation and other shared project management techniques, then, is uncomfortable.

Mediation can reduce planning appeals where the principle of development is accepted. Where the big issues of local land use come up, however, its inability to cope with the public interest and in particular the need for area residents to have their say, problems come up. Even joint developments of forests and the like fall afoul of the power relationships held typically by the developer or exploiter of the resource and the state at the expense of other interested parties. Co-management of land resources seems to have had a difficult history.

One idea from the construction world may provide a panacea or a way forward. Dispute boards either empowered to implement or at least encourage different forms of dispute resolution to suit the situation might impose a degree of control on some of our situations.

It will not stop developers from trying to lean on local authorities into letting them off provisions of their section 106 agreements. It will not prevent new planning applications being made that seem to counter the idea of the earlier arrangements.

It might, though, subject such efforts to a dispute resolution process of an arbitral- or mediation-type involving the local community and other interested parties. What we are really discussing here is the difference between pre- and post-dispute planning. One can follow the sensible advice of Karen Winnard and insert an arbitration clause in a section 106 agreement with perhaps an option for the parties of selecting binding expertise instead.

It would, perhaps, make things more publicly accountable and manageable if one had a dispute body overseeing everything.

Planning Disputes After Apartheid

Town planning or zoning problems take a huge variety of different forms. Sometimes, the political history of a dispute and politicians more generally can obstruct a rational solution.

Julia Chryssostalis delivered a presentation at the Mini Conference on District 6, a neighborhood of prime real estate in Cape Town, South Africa. In 1966, relying on the 1960 Group Areas Act, the government declared the area to be "whites-only" and expelled the non-white residents--the vast majority--to townships typically around 25 miles from Cape Town.

There, the state of housing and supporting utilities were appalling. Even after the end of apartheid, conditions remain sub-standard. Almost as important, the absence of effective transport from the townships into the major towns continues to be somewhere between poor and non-existent.

Until very recently, District 6 has been occupied partly by a small university and a great deal of sand where once a thriving multiracial community existed. This takes dispute resolution into a rather different place.

There has already been a claims process whereby expelled residents were invited to present their claims. Bulelwa Payi, "District Six claimants return home, finally," *IOL* (May 8, 2022) (available at https://bit.ly/3Wxpvww). Some did so after the closing date. The government has made a terrible mess of processing the claims, resulting in a class action to force the state to implement the decisions. The problem here is that the dispute resolution process has already happened, and either been managed or had its results implemented incompetently.

It would have been better if the scheme had been administered from beyond South Africa away from the stain and emotions of apartheid. A commission consisting of foreign lawyers and planners should have been invited to come up with a solution, a process for making claims for recovering property or receiving compensation and then administered it impartially.

Instead, the story of District 6 in recent times has been one of prolonged mourning–a sort of extended Truth and Reconciliation Commission. Now, the best way to resolve the immediate dispute is to build the housing as efficiently as possible and make the neighborhood as vibrant as it once was.

As Julia explained, that alone, though, will not resolve the bigger problems of which District 6 is just an example. There were other forced removals where the real estate was not left unused. Others have compensation claims. Even more painfully, the families of the people thrown out of Cape Town have lived in infrastructure-deprived townships. This continues the ghettoization that apartheid created.

The broader solution has more to do with the government, both national and regional,

building transport links from the city to townships and sorting out the housing quality issues. These types of issues occur in deprived neighborhoods worldwide. Arbitration and mediation will not solve them.

* * *

Resolving town planning or zoning disputes cannot be done by flicking the usual dispute resolution switches.

Mediation works well with small disputes about details. It does not do the job when issues of planning policy or major developments arise.

In agreements with local authorities entered into to avoid an otherwise unsuccessful planning application, arbitration and expertise clauses make obvious sense. Mediation can end up compromising vital societal interests where a developer seeks to hold an authority to ransom by not developing prime real estate.

Perhaps, when complex projects receive the go-ahead, a disputes board with representation from the community could be appointed to select the right dispute resolution tools to resolve the problems as and when they actually arise. Redevelopment of substandard housing has to be a good thing.

A binding Ombudsman scheme to deal with any arguments about compensation packages particularly when local authorities seek to redevelop whose swathes of housing makes good sense. After a while, though, as the District 6 story shows, the best answer remains the construction of good quality housing and proper transport links.

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https://haslam.utk.edu/people/profile/kate-vitasek/.

Kate Vitasek

She has been pioneering dispute prevention techniques as part of the school's Certified Deal Architect program since 2003. Her research and field-based work on innovative dispute prevention mechanisms has helped companies worldwide prevent disputes and create healthy and sustainable business relationships.

Vitasek "straddles both the corporate world and the academic realm," said Ellen Waldman at the awards presentation, adding that Vitasek has been "consulting with business since the 1990s . . . focusing with ever-increasing precision and creativity on those dispute mechanisms that really do help businesses stay aligned stay in communication and stay out of dispute."

The honoree, in thanking CPR, noted she had been inspired in her work by award namesake Jim Groton, a retired Georgia attorney (see jimgroton.com for more information).

"There are so many amazing dispute prevention mechanisms," Vitasek told the CPR Awards dinner audience, "and I encourage this community to just start to explore. . . . Wouldn't success be that you never a had a dispute? Think of that."

CPR established the award after Groton, an early pioneer in and advocate for dispute prevention, was recognized for his lifetime achievements in March 2022. Last year, the award was presented to Joan Stearns Johnsen, Director of the Institute for Dispute Resolution at the University of Florida Levin College of Law in Gainesville, Fla.

The CPR Awards presentation will be reviewed with highlights and excerpts in *Alternatives* throughout the year; watch www.cpradr.org for the announcements on submitting materials for the written awards, as well as nominations for the Groton Award for dispute prevention.

Details on judging for this year's awards program can be found at www.cpradr.org/events/2023-annual-awards. CPR members can view a video of the March awards ceremony after logging in at www.cpradr.org/2024-annual-meeting-videos.

Ready for Fall? CPR Sets September Events

CPR is a participating in a major international arbitration training program in September.

Registration is now open for the Columbia Law School and Chartered Institute of Arbitrators (CIArb) "Comprehensive Course on International Arbitration," taking place in New York City, from Monday Sept. 9 to Thursday, Sept. 12, at the office of Hogan Lovells.

The 28-member faculty of top international practitioners includes many arbitrators and advocates long active in CPR and members of the CPR Panel of Distinguished Neutrals. The roster includes several former board members. CPR President and Chief Executive Officer Serena Lee is on the faculty, along with current board member Pamela Bookman, a law professor at New York's Fordham University School of Law.

The list is led by former CPR board member George Bermann, a Columbia University Law School professor who is director of the school's Center for International Commercial and Investment Arbitration. Also on the faculty is American Arbitration Association President and CEO Bridget M. McCormack of the American Arbitration Association-International Centre for Dispute Resolution.

The training is a systematic and comprehensive examination of the law and practice of international arbitration. It includes lectures with interactive opportunities plus a number of engaging simulations.

The course includes simulations of both a preliminary conference and an evidentiary hearing. The course's substantive discussions focus on every aspect of the international arbitration process. The topics include:

- The New York Convention, model law and other national statutes, UNIDROIT Principles;

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- The arbitration agreement;
- Separability, allocation of competence;
- Illegality, arbitrability, scope and other factors relating to the nature of the dispute;
- Appointment of arbitrators; challenges to arbitrators;
- The arbitral seat;
- Arbitral institutions and ad hoc arbitration;
- Arbitrator terms and conditions of appointment; arbitrator power and jurisdiction;
- Tribunal obligations; parties' responsibilities and obligations;
- Emergency relief; security for costs and interim measures;
- Procedural issues: discovery, evidence and confidentiality;
- Non-signatories; multi-party issues;
- Choice of law;
- Deliberation and award; costs, interest and attorneys' fees;
- Overview of investor state arbitration;
- Ethical issues for arbitrators & counsel;
- Annulment and interlocutory matters, and
- Recognition and enforcement.

Upon successful completion, the attendees will receive a certificate from Columbia Law School and the Chartered Institute of Arbitrators' New York Branch. Application for CLE credit for New York State is pending.

An opening reception for registrants, faculty and invited guests including CIArbNY Branch Members is expected to take place at the end of the first day. A faculty/registrant dinner will be held at the end of the second day.

Registration is open via CPR's website at www.cpradr.org/events/comprehensive-course-on-international-arbitration. For full information on the agenda and the faculty, please visit the Chartered Institute's website at https://bit.ly/4aQ8PnA.

* * *

CPR also has set a Dispute Prevention Committee meeting for Sept. 19. For information, visit https://bit.ly/3KIdNYT.

Deeper into fall, please save these dates: CPR's second Africa Arbitration Day will be held Friday, Nov. 1, in New York. More information will be in *Alternatives*' September issue, and can be found at https://bit.ly/3VCHC3k on CPR's website. CPR's Mediation Committee will reconvene on Nov. 20 via Zoom. More information here: https://bit.ly/3X9W9Vb.

Alternatives on the Move

Alternatives to the High Cost of Litigation began a new publishing program in March. There's more to come.

To ensure continued service, *Alternatives* subscribers via longtime publisher John Wiley & Sons should update their email address as soon as possible at *Alternatives@cpradr.org*.

The CPR Institute soon will announce new access for *Alternatives* archives for all content since the publication was founded in January 1983, replacing the Wiley Online Library. Articles dating back to 1991 will continue to be available on Lexis and Westlaw. Since our March 2024 issue, *Alternatives* is online only.

CPR will email issues to all general subscribers as well as CPR Institute members, who will continue to receive *Alternatives* as a benefit of membership. Print subscribers are being converted to online access. We will continue to deliver the same award-winning content you expect, now exclusively in an online format.

So please update your contacts at the email address above. And for special library considerations or other questions, please email at the above address.

Rounding Up the Supreme Court On CPR's Website, In *Alternatives*, And Beyond

Alternatives' publisher, the CPR Institute, summed up its arbitration coverage of the U.S. Supreme Court's 2023-2024 term in May soon after the last of three decisions was handed down.

The following is a summer guide to the coverage and analysis from this term.

And: there's more to come in the September *Alternatives*.

The just-ended term's cases were *Bissonnette v. LePage Bakeries Park St. LLC*, No. 23-51, decided April 12; *Smith v. Spizzirri*, No. 22-1218, decided May 16, and *Coinbase Inc. v. Suski*, No. 23-2, which was handed down May 23. All three of the cases were decided unanimously.

CPR's coverage in *Alternatives* and on *CPR Speaks* is fully annotated, with links to primary documents including court docket pages, party and amicus briefs, oral argument audio and transcripts, and select commentary. More commentary links are available on @Alternatives on X, formerly *Twitter*, and on @alternatives_newsletter on *Threads*.

The starting point is in this issue, the accompanying Philip J. Loree Jr. analysis of *Smith v. Spizzirri* (see page 110), on delegating a consumer dispute to arbitration or a court. The article updates the author's analysis in the two most recent previous issues of *Alternatives*. See Part 2, "More on Independent Actions and the 'Jurisdictional Anchor': Where the Law on Award Enforcement May Be Going," 42 *Alternatives* 95 (June 2024), Part 1, "The Fourth Circuit Weighs the Post-Badgerow Jurisdictional Anchor—and Finds it Won't Set," 42 *Alternatives* 73 (May 2024).

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Loree, who heads of New York's Loree Law Firm, appears on a

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recurring CPR Institute panel on Supreme Court arbitration opinion analysis that just marked its fourth year of periodic *YouTube* appearances. It can be found *Alternatives* publisher CPR's *YouTube* channel, @CPRInstituteOnline.

The latest panel discussion video, in addition to covering the Supreme Court's three recent arbitration decisions, discussed conflict resolution hot topics. The Court roundup concluded with a look ahead to next year's Supreme Court term and reviewed Walgreens Co.'s attempts to overturn two recent big arbitration awards, and Samsung US's mass arbitration case, currently awaiting a decision on the next steps in the Seventh U.S. Circuit Court of Appeals.

Loree is joined in the discussion by regular CPR *YouTube* panelists Angela Downes, University of North Texas-Dallas College of Law Professor of Practice and Assistant Director of Experiential Education, and Richard Faulkner, a Dallas-based attorney-arbitrator-mediator. The moderator is Russ Bleemer, editor of CPR's *Alternatives to the High Cost of Litigation*.

A *CPR Speaks* blog post providing background on the video can be found at https://bit.ly/4c58a2K, and the discussion can be accessed directly on *YouTube* at www.youtube.com/watch?v=-3pGv1gzPR0

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There is more Supreme Court analysis from the CPR Institute Arbitration Committee. A June 12 committee event covered the Supreme Court's arbitration cases. The panel featured Viren Mascarenhas, a partner in Milbank's New York office and Vivasvat Dadwal, a New York-based King & Spalding associate in the International Arbitration and Litigation Group.

Information on the committee and accessing the video can be found at www.cpradr.org/events/arbitration-committee-meeting. The committee is for CPR Institute members only. More information on CPR membership can be found at www.cpradr.org/membership-information.

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Most of CPR's Supreme Court coverage was on *CPR Speaks*, the institute's free blog, which focused on day-of coverage for decisions and each of the arguments. Lee Williams, CPR's full-year Howard University School of Law consortium intern, was present in the Supreme Court for each of the three arbitration arguments. The blog also provided detailed previews before and during the Court term.

The resources include:

- "Hot Topics: A #SCOTUS '23-'24 #Arbitration Roundup and more …," *CPR Speaks* (May 30) (available at https://bit.ly/4c58a2K) (summarizing and linking to the *YouTube* discussion noted above);
- Russ Bleemer & Lee Williams, "This Time, the Court Decides: SCOTUS, Clarifying Delegation, Rejects Coinbase Mandatory Arbitration," *CPR Speaks* (May 23 (available at https://bit.ly/4cdHdKc) (opinion release-day coverage and commentary of *Coinbase Inc. v. Suskie*);
- Lee Williams & Russ Bleemer, "More Plain Text: Scotus Says FAA Sec. 3 Requires Litigation Stays," *CPRSp-eaks* (May 16) (available at https://bit.ly/3VoY9aQ) (opinion release-day coverage and commentary of *Smith v. Spizzirri*);
- Lee Williams & Russ Bleemer, "Today's Scotus: Does Federal Arbitration Act Sec. 3 on Litigation Stays Allow Dismissal?" *CPR-Speaks* (April 22) (available at https://bit.ly/3Rmbq1v) (oral argument-day coverage and analysis of *Smith v. Spizzirri*);
- Lee Williams, "Supreme Court Expands Federal Arbitration Act Exemption from ADR," *CPR Speaks* (April 12) (available at https://bit.ly/3RkMojc) (opinion release-day coverage of *Bissonnette v. LePage Bakeries Park St. LLC*);
- Lee Williams, "Preview: The Amicus, From Both Sides, on SCOTUS's April 22 Arbitration Procedures Case," *CPR Speaks* (April 12) (available at https://bit.ly/3KyZOEu) (summary analysis of every amicus brief filed in *Smith v. Spizzirri*);
- Russ Bleemer & Lee Williams, SCOTUS Frustration: How to Move the Coinbase Arbitrability Case Forward, *CPR Speaks* (Feb. 28) (available at https://bit.ly/45glhf2) ((oral argument-day coverage and analysis of *Coinbase Inc. v. Suskie*)
- Lee Williams, "SCOTUS Arbitration Argument Preview: Why Coinbase Employees' Amici Want the 9th Circuit Affirmed," *CPR Speaks* (Feb. 25) (available at https://bit.ly/3x9e8Rb) (a review of amicus briefs arguing on behalf of customers that arbitrability under the company's two consumer contracts should be decided by a court);
- Lee Williams, "SCOTUS Arbitration Argument Preview: Why Coinbase Petitioner's Amici Want the 9th Circuit Reversed," *CPR Speaks* (Feb. 22) (available at https://bit.ly/3XjuPE7) (a review of amicus briefs arguing on behalf of the company that arbitrability under its two consumer agreements be decided by an arbitrator, not a court);
- Lee Williams, "Tuesday's Supreme Court Federal Arbitration Act Exemption Arguments," *CPR Speaks* (Feb. 20) (available at https://bit.ly/4aPjI9a) ((oral argument-day coverage and analysis of *Bissonnette v. LePage Bakeries Park St. LLC*).
- Lee Williams, "The Respondents: Why the Supreme Court Should Affirm in *Bissonnette*," *CPR Speaks* (Feb. 17) (available at https://bit.ly/4bRFri2) (a review of amicus briefs arguing on behalf of the company that a Federal Arbitration Act exemption from ADR does not apply to its employees, who should be required to arbitrate);
- Lee Williams, "Arbitration, Ready to Argue: Amicus Views on Overturning *Bissonette* at the Supreme Court," *CPR Speaks* (Feb. 7) (available at https://bit.ly/4aPhSFe) (a review of amicus briefs arguing on behalf of workers that the FAA exemption applies to their disputes with their employer, which should be sent to court);

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- Lee Williams, "Stay or Dismiss? The Supreme Court Grants Cert on Its Third Arbitration Case This Term," *CPR Speaks* (Jan. 15) (available at https://bit.ly/4270bOH) (a review and analysis of the *Smith v. Spizzirri* grant of certiorari);
- "Discussing *Coinbase*'s #SCOTUS Arbitration Return," *CPR Speaks* (Nov. 10, 2023) (available at https://bit.ly/3z4IowY) (highlights and link to a CPR *YouTube* panel discussion on the *Coinbase v. Suskie* cert grant);
- Lee Williams, "Who Decides? *Coinbase* Returns to the Supreme Court to Examine Arbitration Delegation," *CPR Speaks* (Nov. 6, 2023) (available at https://bit.ly/4c9miry) (a review and analysis of the *Smith v. Spizzirri cert* grant);
- "#SCOTUS Preview: The Limits of the Federal Arbitration Act's Exemption from ADR," CPR Speaks (Oct. 24, 2023) (available at https://bit.ly/3VAqJWM) ((highlights and link to a CPR *YouTube* panel discussion on the *Bissonnette* case), and
- Jonathan Baccay, "The Supreme Court Will Address a Circuit Split on a Federal Arbitration Act Exemption" (Sept. 29, 2023) *CPR Speaks* (available at https://bit.ly/3Qo36y5) (a review and analysis of the *Bissonnette v. LePage Bakeries Park St. LLC* cert grant).

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Alternatives took deeper dives into the Court's arbitration docket, too, in the period:

- Imre Szalai, "To Stay or Not to Stay: Scotus Continues Fine Tuning the Federal Arbitration Act," 42 *Alternatives* 37 (March 2024) (commenting on the potential use of text-based analysis to decide the Court's arbitration docket).
- Lee Williams, "Scotus's Arbitration Winter: More FAA Refinement," 42 *Alternatives* 45 (March 2024) (previewing *Smith v. Spizzirri*).
- Kristen M. Blankley, "*Coinbase v. Bielski*—More than a Case About Stays for Arbitration Appeals?" 41 *Alternatives* 118 (September 2023) (analyzing the previous term's sole arbitration case and discussing how it is likely to affect future Supreme Court arbitration jurisprudence).

Finally, after this combined summer July-August issue, *Alternatives* will return ahead of Labor Day with an expected September cover story by leading arbitration scholar Imre Szalai, a professor at Loyola New Orleans Law School. Szalai will provide commentary on this year's arbitration docket and how it will impact future cert grants and Federal Arbitration Act analysis.

For more info on obtaining *Alternatives*, see www.cpradr.org/alternatives-newsletter.