Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

VOL. 43 NO. 2 • FEBRUARY 2025

The Master Mediator

Due Process in Mediation: Equity and Fairness

BY ROBERT A. CREO

It is not fair!

— Children to their parents

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Humans are hard-wired to place a premium on fairness and equitable treatment. By kindergarten we learn that treating others fairly is fundamental. Anyone with children close in age experienced this on a regular basis.

CPR

What may be an acceptable award or punishment for behavior becomes outrageous when a sibling in identical or comparable circumstances is treated more favorably. Parents early on learn the importance of instilling common notions of fairness into the value system which guides child behavior.

* * *

Master Mediator **columnist Bob Creo was a Pittsburgh attorney-neutral who retired to Florida early in 2023. He has served since 1979 as an arbitrator and mediator in the United States and internationally handling thousands of cases. For many years, he has authored The Effective Lawyer column for the Pennsylvania Lawyer. He conducts negotiation and decision behavior courses that focus on neuroscience and the study of decision-making. He is annually recognized by Super Lawyers, Martindale-Hubbell, and Best Lawyers in America and was named for 2024, 2017 and 2014 as Pittsburgh Mediation Lawyer of the Year and in 2021 as Pittsburgh Arbitration Lawyer of the Year. He is the author of numerous publications, including "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is Editor-in-Chief for the current updating of Elkouri and Elkouri, How Arbitration Works (BNA/Bloomberg). He is the principal of Steel City Storytellers LLC, which focuses on the spoken word as a means of creating connection, trust, and persuasion. He co-produced a television pilot that won awards in the London Film Festival, the prestigious Telly, and was also nominated for a regional Emmy. See https://steelcitystorytellers.com. He is a longtime member of *Alternatives*' editorial board and of publisher CPR Institute's Panel of Distinguished Neutrals. His website is www.robertcreo.com. He can be reached at racreo@gmail.com.**

Equity is a sort of equality.

— Maxim developed by English Courts of Equity

As the medieval common law evolved with separate courts of equity, the Chancellors of the English courts of equity honored the close nexus between equity and equality. Equity, however, focused on factual and legal differences and similarities. Unlawful discrimination, disparate treatment, and other legal doctrines mandate that to be aggrieved the claimants must be in the same group or class

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The Theme

Master Mediator columnist Robert A. Creo is revisiting and reconsidering fundamental assumptions and practices of mediation and mediators. His column returns to *Alternatives* after a hiatus of 14 months. In a series of summary concluding columns, he intends to consider his work in these pages, and the changes in the mediation profession, over the past two decades, in articles that will run into next year. This month's feature focuses on the how fundamental fairness is integral to the mediation process and its procedural dynamics.

CPR News

Highlights from CPR's Africa Arbitration Day-New York

BY STEPHANIE ARGUETA

The CPR Institute's second annual Africa Arbitration Day-New York featured two panels highlighting important issues in international arbitration for Africa. They are summarized below.

The program, on Nov. 1 at the New York City office of host sponsor White & Case, was designed to foster greater community among international arbitration practitioners in North America and Africa; and help develop the next generation of Africa-related arbitration practitioners.

The discussion of the first AAD-NY panel here is adapted from a Dec. 17 *CPR Speaks* blog post (available at https://bit.ly/41WX2D6); the second panel summary appears below. The second panel's moderator wrote a *CPR Speaks* blog piece last month expanding on the discussion. See Mohannad El-Murtadi Suleiman, "Part 2: CPR's Africa Arbitration Day-New York Panel on Africa Natural Resources Management," *CPR Speaks* (Jan. 7, 2025) (available at https://bit.ly/3Wcv6Hy).

The opening panel offered a comprehensive discussion on the implications of the SOAS University of London Arbitration in Africa Survey Reports. The panel included the report's lead investigator, Emilia Onyema, who is a professor of international commercial law at SOAS University of London and the director of the school's Arbitration and Dispute Resolution Centre. (Earlier in 2024, Onyema was presented with CPR's Outstanding Contribution to Diversity in ADR award. For details, see "CPR News: London Educator/Arbitrator Emilia Onyema Receives CPR's ADR Diversity Award," 42 *Alternatives* 92 (June 2024).) The panelist also included:

- Isaiah Bozimo, a partner in Abuja, Nigeria's Broderick Bozimo & Co.;
- Victoria Kigen, an attorney who formerly was case counsel at the Nairobi (Kenya) Centre for International Arbitration;
- Rémy Gerbay, a Washington, D.C., partner in Hughes Hubbard, and
- Alice Adu Gyamfi, an associate in the New York office of DLA Piper.

In assessing the implications of the SOAS report, the first CPR AAD-NY panel addressed multiple practice topics, including a prominent focus on the under-representation of African arbitrators in international arbitration. Despite the existence of a growing number of highly qualified practitioners across the continent, African arbitrators are often overlooked when it comes time to select tribunal members.

The panel attributed this issue to a perception problem rather than a deficiency in talent or expertise.

International parties and counsel often lack awareness of African arbitrators, perpetuating a cycle where non-African arbitrators are appointed, even in disputes closely tied to Africa.

The panel members emphasized that this lack of visibility undermines

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The author, a student at Brooklyn Law School in New York, was a Fall 2024 intern at *Alternatives*' publisher, the CPR Institute.

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ALTERNATIVES TO THE HIGH COST OF LITIGATION, (Online ISSN: 1549-4381), is published monthly, except bimonthly in July/August by the International Institute for Conflict Prevention & Resolution — CPR, 30 East 33rd Street, 6th Floor, New York, N.Y. 10016 — United States.

Information for subscribers: Requests to sign up for a subscription may be sent to alternatives@cpradr.org.

Back issues: Single issues from current and recent volumes are available from publisher CPR Institute. For pricing, e-mail alternatives@cpradr.org.

Publisher: *Alternatives to the High Cost of Litigation* is published by CPR, 30 East 33rd Street, 6th Floor, New York, New York 10016 — United States; +1.212.949.6490.

Journal Customer Services: For ordering information, claims and any enquiry concerning your subscription contact alternatives@cpradr.org.

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For submission instructions, subscription and all other information, email alternatives@cpradr.org, or visit www.cpradr.org/alternatives-newsletter.

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ADR Innovation

The Benefits of MED-CON, a Mixed-Mode Process Combining Mediation and Conciliation

BY JEREMY LACK

In the field of appropriate dispute resolution—ADR—understanding and using the distinct methodologies and benefits of mediation and conciliation can significantly enhance the resolution of commercial disputes. This article delves into the concept of a mixed mode process, referred to here as MED-CON, which integrates mediation and conciliation into a cohesive approach.

By leveraging insights from the International Mediation Institute's Mixed Mode Task Force, as well as recent findings in neuroscience and social plasticity, this article will explore the differences between mediation and conciliation, the reasons for hiring two neutrals instead of one, the benefits of MED-CON, and the considerations necessary for successful implementation. (Information on the IMI task force is available at https://bit.ly/4hUb9if).

Additionally, this article analyzes the Glasl conflict escalation model and the Riskin Grid to explain the benefits of combining different forms of mediation and conciliation. It will also highlight how mixed mode processes can address various ADR challenges.

Social Plasticity and Its ADR Impact

Recent advances in social neuroscience have highlighted the importance of social plasticity in shaping our interactions, especially when disputes exist. Social emotions such as empathy and compassion play crucial roles in determining how individuals perceive and react to conflict. According to Klimecki (2015) [see Resources box at end for all references in this article], two fundamental neural systems influence our social behavior: one linked to distress and social disconnection, and the other to reward and social connection.

- *In-Group Behavior:* When individuals perceive themselves as part of a cohesive group (in-group), they exhibit prosocial behaviors such as helping and empathy. This is because the reward and social connection system is activated, leading to positive emotions and cooperative behavior.
- *Out-Group Behavior:* Conversely, when individuals perceive themselves as part of competing groups (out-group), they are more likely to exhibit competitive and aggressive behaviors. This activation of the distress and social disconnection system can hinder constructive dialogue and resolution.

This understanding of social plasticity—the ability to adapt behavior based on past experience--is crucial for optimizing ADR processes, as it highlights the unconscious and rapid nature of these changes, occurring in mere hundreds of milliseconds. Moreover, thinking about the future for just one minute has been shown to increase prosocial behavior, emphasizing the importance of mediators focusing on future-oriented solutions (Cernadas Curutto et al. (2022)).

Distinguishing Mediation From Conciliation

Mediation and conciliation aren't synonymous, as many ADR professionals believe. They can have deeply different impacts on group behaviors. Here is the explanation:

Mediation and Conciliation Definitions.
Mediation and conciliation are both facilitated negotiation processes but with distinct roles and objectives. In mediation, the focus is on helping the parties reach their own solutions based on their subjective needs and interests.

In contrast, conciliation aims to help the parties reach a mutually acceptable compromise within a Zone of Possible Agreement (ZOPA), established by applying norms (such as laws) and findings of fact. The conciliator, being an expert, works within a Zone of Permitted Evaluation (ZOPE).

Conciliation: An evaluative process managed by an expert.
The Purpose: The role of a conciliator is to be neutral, impartial, and evaluative. Conciliation may be considered a form of non-binding arbitration or an expert opinion process, designed to help the parties reach a mutually acceptable compromise. The classic conciliator is usually a learned expert with relevant industry experience and knowledge of the subject matter involved in the dispute, who understands what norms may or should apply in litigation. This process can entail meeting the parties separately, in caucuses, and doing reality testing: challenging the parties' assumptions about the strengths of their respective cases and helping them understand the weaknesses of their positions.

The Process: Conciliation is a form of "objective justice" that is based on the legal syllogism "facts + law = outcome." The conciliator helps the disputants understand the variables in this equation and what is relevant versus irrelevant with respect to the outcome. It is primarily a retrospective approach, seeking to analyze and understand past facts, determining responsibility or liability for a breach or

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tort, and deciding on appropriate damages or remedies.

Mediation: A facilitative process focused on subjective needs and interests.

The Purpose: The mediator's role is to be neutral, impartial (or equally multi-partial), and non-evaluative. Unlike a conciliator, the mediator does not express an opinion regarding the dispute's outcome. Instead, the mediator helps the disputants look to the future and facilitate an interest-based negotiation rather than finding a zone of compromise between different positions. The mediator is primarily there to help the parties exchange meaningful information as part of a joint problem-solving process, treating the disputants as partners seeking mutually acceptable solutions based on subjective considerations.

The Process: Mediation is a form of "subjective justice." The mediator's role is to help the parties assess and define their need for a Zone of Permitted Evaluation (ZOPE) and to help the disputants generate their own norms or exchange information about their subjective needs, interests, concerns, and motives, looking to the future rather than the past. Mediation allows the disputants to explore broader procedural questions, considering a wider range of options that are not constrained by objective norms such as legal precedents or what a court would do.

Why Hire Two Neutrals Instead of One?

Hiring two neutrals—one mediator and one conciliator—leverages their distinct skills and perspectives, enhancing the resolution process.

Complementary Roles: The mediator focuses on facilitating dialogue and understanding the parties' interests, while the conciliator provides legal evaluations and reality checks. This combination ensures that both the relational and substantive aspects of the dispute are addressed comprehensively.

Enhanced Expertise: Two neutrals bring a wider range of expertise to the table. The mediator's skills in negotiation and conflict resolution complement the conciliator's legal knowledge and evaluative capabilities.

Balanced Process: Having two distinct roles ensures a balanced process where neither facilitation nor evaluation is overlooked. This balance is crucial for addressing the multifaceted nature of complex commercial disputes.

How Should They Work Together? For MED-CON to be effective, the mediator and conciliator must work together throughout the process, coordinating their efforts to ensure a seamless and cohesive approach.

Initial Assessment: Both neutrals work together to understand the context of the dispute and the needs of the parties. This involves gathering information and setting expectations for the process.

Mixing It Up

The technique: Broadening conflict resolution options and effectiveness by integrating concepts.

The science: Mixed-mode ADR has been a hot topic. The author brings a distinct European methodology in combining mediation and conciliation.

The path: This involves two neutrals, but it's not as complicated as that might seem. It's a powerful, likely faster, and more efficient way of tackling tough commercial issues.

Collaborative Sessions: Throughout the process, the mediator and conciliator work together in all sessions. The mediator facilitates discussions focused on interests and future relationships, helping parties find common ground. Meanwhile, the conciliator provides evaluations, reality checks, and non-binding proposals based on agreed ZOPEs. This collaborative approach ensures that both evaluative and facilitative techniques are effective.

Role Coordination: The mediator can consult the conciliator as an expert to help explain different Zones of Possible Agreement based on Zones of Permitted Evaluation that the parties agree to, providing greater self-determination and minimizing the impact of unfavorable views expressed by the conciliator. Conversely, the conciliator can work with the mediator to raise and address concerns about how they provide input constructively, without coming across as biased. This collaboration ensures that the strengths and weaknesses of the parties' cases are understood, enabling a constructive conversation focused on the quality of dialogue and working relationships.

Analysis of the Glasl Conflict Escalation Model: The Glasl conflict escalation model named after its inventor, Friedrich Glasl, provides a particularly useful way of visualizing how mediation and conciliation may differ. The model outlines nine conflict stages, each escalating in severity and complexity. Understanding this model is crucial for ADR neutrals, as it helps them identify the level of conflict and apply appropriate interventions. The nine stages are:

1. *Disagreement:* A problem is identified, and the parties realize they disagree.
2. *Debate and Polemic*: People start debating the issues, seeking to convince one another.
3. *Actions, Not Words:* Words seem to be futile and are not having any impact. Actions speak louder than words. Dialogue ceases and the parties cease speaking to one another.
4. *Images and Coalitions:* Formation of coalitions and negative stereotyping. The parties usually seek reassurance from friends, colleagues or experts (e.g., lawyers) that they are "right" and that the others are "wrong."
5. *Loss of Face:* Coalition building leads to perceptions that the other party is seeking to damage their opponent's reputation. The problem is now the other party.
6. *Threats:* The opponent is now viewed as a threat that needs to be managed. Ultimatums are given and threats are made.
7. *Limited Destructive Blows:* Limited attacks are made to cause minimal/proportional harm. The desire is to coerce the other party into more reasonable behavior.
8. *Fragmentation of the Enemy:* Destructive blows escalate in reaction to each party's perceived attacks. Parties adjust systematically to conquer their opponent.
9. *Together into the Abyss:* Destroying the other party becomes a goal in itself. There is pleasure in punishing one's opponent. This

can be to such an extent that so long as the other party suffers or loses more, each party is willing to risk self-destruction.

Glasl's conflict escalation theory is depicted visually at https://bit.ly/4hmtfs7.

Impact of Conciliation on Conflict Escalation: During conciliation, the evaluative nature of the process can inadvertently lead to coalition-building and competitive behavior, particularly in stages four--Images and Coalitions--and beyond. As the conciliator provides evaluations and proposals, parties may become defensive, forming coalitions to strengthen their positions, which can escalate the conflict further. They may start to use the conciliator competitively, seeking to influence the proposals they are likely to make.

Coalition-Building Tendencies: Coalition-building occurs when parties perceive the conciliator's evaluations as a threat to their interests. This can lead to entrenched positions, making it difficult to reach a consensus.

Conflict Escalation: Without proper management, conciliation can exacerbate conflict, especially if parties feel unfairly evaluated or misunderstood. The presence of a mediator can help mitigate these tendencies by fostering communication and collaboration.

Role of the Mediator in Addressing Escalation: The mediator's role is crucial in addressing coalition-building tendencies and preventing conflict escalation. By facilitating open dialogue and focusing on interests rather than positions, the mediator can help de-escalate tensions and guide parties back toward a collaborative resolution.

Preventing Coalitions: The mediator encourages parties to view each other as partners rather than adversaries, fostering a sense of cooperation and mutual respect.

De-Escalating Tensions: Through active listening and empathetic communication, the mediator helps parties express their concerns and interests, reducing the likelihood of defensive reactions and conflict escalation.

The Riskin Grid and Process Design: The modified Riskin Grid (named after its inventor, Harris H. Agnew Visiting Professor of Dispute Resolution at Chicago's Northwestern Pritzker School of Law Leonard Riskin) provided in the chart below helps to explain four variations in mediation approaches. It classifies them based on the degree of control the disputants are willing to give to the ADR neutrals or wish to keep for themselves on procedural as opposed to substantive issues.

When viewed this way, mediation can typically be viewed as occurring in all four quadrants, focusing on the parties' underlying interests and relationships, while conciliation is restricted to the two right-hand quadrants C and D (being evaluative), focusing on legal issues and norms.

MED-CON's approach allows all four quadrants to be integrated as part of a more inclusive process, permitting different quadrants to be used for discussing various topics. The use of two neutrals provides the benefits of being able to work in all four quadrants at any time while keeping distinct roles regarding the ZOPEs of each neutral, and maintaining a constant desire to balance patterns of thinking that will retain both in-group and out-of-group heuristics.

Process Design: The diagram below left shows how process design can impact party autonomy and self-determination. The diagram is structured into four quadrants:

- *Quadrant A (bottom left):* Mediation 1 with full party control over process and outcome.
- *Quadrant B (top left):* Mediation 2 with party control over outcome but some third-party guidance on process.
- *Quadrant C (bottom right):* Mediation 3 or Conciliation 1 with third-party guidance on outcome but party control over process.
- *Quadrant D (top right):* Mediation 4, Conciliation 2, Mediation 4 or Arbitration/ Litigation, with third-party control over both process and outcome.

The difference between Mediation 3 and 4 as compared to Conciliation 1 and Conciliation 2 is that in conciliation, the neutral is a person of high status who is expected to make a proposal whenever they deem it appropriate to do so, and who is expected to do robust reality testing, challenging positions taken by each party, and exposing weaknesses in their arguments.

In mediation, however, while the Mediator 3 or 4 in quadrants C and D may opine and provide their own views if asked to do so, they may only do so at the request of each party and have a narrow ZOPE in which to do so. And even if they do express a view, it does not carry any particular weight or authority as it is understood to be how one person understands it (the mediator), which could be incorrect.

By combining mediation and conciliation, parties can move fluidly between these modes of thinking and quadrants, benefiting from both facilitative and evaluative techniques as needed, without the risk of triggering out-of-group patterns of behavior or the conflict escalating further.

For a convenient self-evaluation, on the

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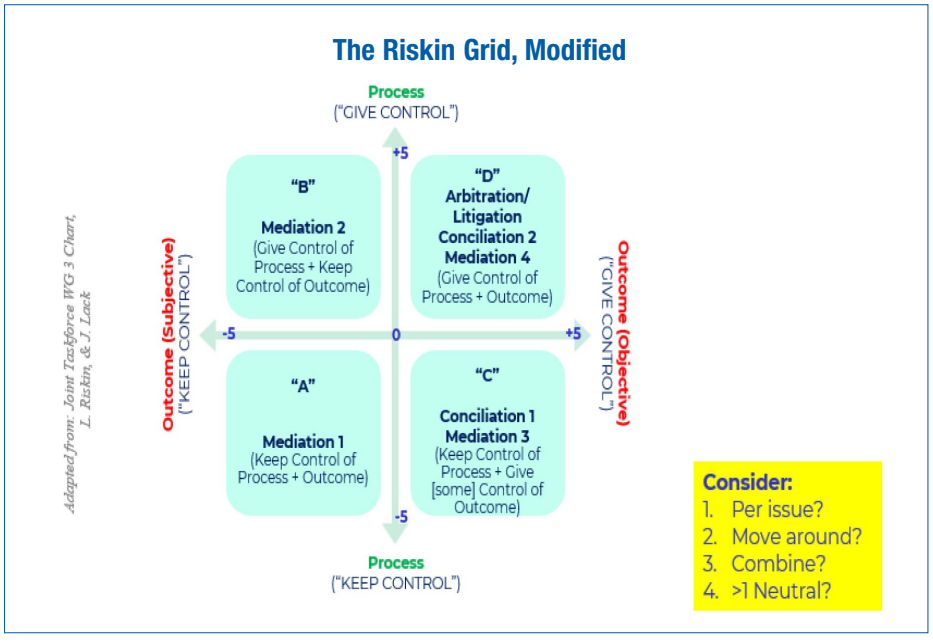

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author's business website (more below), there is a recent simple, visual, two-part diagnostic test. See https://innovadr.com/innovadr-diagnostic-exercise. It will help identify the most appropriate dispute resolution process for a matter. It is based on Leonard L. Riskin, "Decisionmaking in Mediation: The New Old Grid and the New New Grid System," 79 *Notre Dame L. Rev.* 1 (2003) (available at: https://bit.ly/4h4zsZu).

Benefits of MED-CON ADR

Integrating mediation and conciliation into a MED-CON process thus offers several key benefits, especially when two different ADR neutrals are appointed, one as a conciliator and the other as a mediator:

Enhanced Understanding and Flexibility: MED-CON provides a comprehensive approach that combines the evaluative guidance of conciliation with the facilitative negotiation of mediation. This dual perspective ensures a thorough understanding of both the legal and relational aspects of a dispute.

Higher Settlement Rates: Combining mediation and conciliation can lead to settlement rates near 100%. The conciliator provides reality checks and legal assessments, while the mediator facilitates interest-based discussions, leading to more robust and acceptable solutions.

Efficiency and Cost Savings: MED-CON is generally faster and more cost-effective than litigation or standalone ADR methods. The combined process can resolve disputes more quickly by addressing both procedural and substantive issues simultaneously, reducing the need for prolonged negotiations or multiple sessions.

Preservation and Improvement of Relationships: Mediation's focus on future relations and mutual interests, coupled with the clear legal guidance from conciliation, helps preserve and even improve business relationships. This is particularly beneficial in commercial contexts where continuing interactions are crucial.

Increased Satisfaction and Compliance: MED-CON's holistic approach leads to higher satisfaction among disputing parties, as both their emotional and practical needs are addressed. This satisfaction often results in better compliance with the settlement terms, as parties feel more involved and understood in the resolution process.

Practical Implementation: InnovADR (www.innovadr.com), an ADR funder (which this author founded) that finances mediation proceedings on a "no settlement, no fee" basis, often suggests using mediation and conciliation as part of its mixed mode solutions to ensure that evaluative/expert opinions and proposals can be provided by the conciliator, while the mediator can address social plasticity issues and keep the parties focused on mutual goals. This approach helps prevent coalitions from forming and compensates for any recommendations or proposals made by the conciliator that may be unpopular, without compromising the neutrality, impartiality, and independence of the neutrals.

MED-CON Preparations

Implementing MED-CON requires careful preparation and consideration to ensure its effectiveness.

Training and Expertise: Both neutrals should ideally be well-trained in both mediation and conciliation techniques. This requires continuing education and practical experience in handling complex disputes.

Clear Communication: Effective coordination between the mediator and conciliator is crucial. They should maintain clear communication and make sure the parties consistently understand each other's roles to avoid conflicting guidance. Regular check-ins and discussions about the process are recommended.

Party Perception: Parties should understand the distinct roles of the mediator and conciliator at all times. Misunderstandings can lead to confusion and reduced trust in the process. Clear explanations and setting expectations from the outset as well as throughout the process mitigate these risks.

Cost Considerations: While MED-CON can be cost-effective overall, it may initially seem more expensive due to the involvement of two neutrals. Parties should be made aware of the long-term savings and benefits, including faster resolutions and improved working relationships to resolve the conflict in a better manner.

Checklist for Co-Mediating: The checklist provided by Toolkit Co., authored by Manon Schonewille, is an effective way to prepare for co-mediating (available at https://bit.ly/40qT18G). This checklist ensures that both neutrals understand their roles, the flow of the process, and how they will communicate with each other and the parties.

Case Studies

Case Study 1: Software Dispute. In a software dispute involving disagreements on reasonable royalty provisions, the conciliator had extensive industry experience and provided empirical data to help better understand the range of numbers available that would be fair, reasonable and non-discriminatory (FRAND).

With the mediator's assistance, the parties were able to appreciate the range of differences, their possible consequences on their needs and interests, and seek a mutually acceptable alternative royalty structure and solution. This preserved good relationships throughout the discussions and enabled better cooperation between counsel as well, who initially had robustly defended the original valuations and proposals from each party, leading to out-of-group heuristics and conflict escalation.

Case Study 2: Real Estate and Inheritance Dispute. A real estate and inheritance dispute involving significant assets and three generations of a large family was resolved using MED-CON.

Family members disagreed regarding the value and fair market rental of several buildings and residential apartments, some of which were occupied by family members. Working with a retired judge as a conciliator and a real estate evaluator as an expert (two evaluative neutrals in this case, in addition to a mediator), the parties were able to change the debate from original positions to considering a much broader range of options at different valuations using different structures.

The mediator played a key role in taking feedback from the conciliator and the valuation expert to help bring the parties and their counsel back to the advice and recommendations they were receiving, enabling them to find solutions that better considered the interests of different family members, and

preserve better relationships for the younger generation.

Case Study 3: Trademark Infringement Dispute. In a trademark infringement dispute with disagreements on the valuation of certain brands and their validity, as well as fair use in making comparative statements about them, the conciliator provided expertise on trademark case law and permitted comparative uses of other owners' brands in different jurisdictions.

The mediator worked with the parties and their counsel to understand the possible consequences of the ranges of different interpretations in various countries on the parties' future needs and interests in these markets. This helped overcome the legal issues initially dominating the case and explore more holistic and interest-based solutions looking to the future, understanding that consumers were likely to compare these branded products closely in any event. The question became how to do so in ways that would minimize possible confusion regarding the source of goods and brands.

Challenges and Considerations

While MED-CON offers significant benefits, it also presents certain challenges that need careful consideration:

1. *Coordination Between Neutrals:* Effective coordination between the mediator and conciliator is crucial. They must maintain clear communication and understand each other's roles to avoid conflicting guidance.
2. *Party Perception:* Parties must clearly understand the distinct roles of the mediator and conciliator. Misunderstandings can lead to confusion and reduced trust in the process.
3. *Training and Expertise:* Neutrals must be well-trained in both mediation and conciliation techniques. This requires continuing education and practical experience in handling complex disputes.
4. *Cost Considerations*: While MED-CON can be cost-effective overall, it may initially seem more expensive due to the involvement of two neutrals. Parties should be made aware of the long-term savings and benefits.
5. *Complexity of Process:* The complexity of coordinating two ADR processes can be challenging. Clear guidelines and structured processes must be established to ensure that both mediation and conciliation phases are effectively managed.
6. *Cultural Sensitivity:* In international disputes, cultural differences can affect how parties perceive and engage with mediation and conciliation. Neutrals must be culturally competent and sensitive to these differences to facilitate a successful resolution.

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MED-CON ADR, as a mixed mode process, offers a powerful tool for resolving commercial disputes by integrating the strengths of both mediation and conciliation.

By treating these processes as separate yet complementary, and using skilled neutrals, parties can achieve faster, cheaper, and more satisfactory outcomes while preserving valuable business relationships. Heated conflicts can be de-escalated, and experts can be brought in without coalition-building. Effective coordination and communication between the mediator and conciliator are essential to ensure the success of this combined approach.

Ultimately, the question for the parties becomes to what extent the disputants really need to: (1) improve relationships and dialogue; (2) exchange information on specific items; and/or (3) negotiate and reach a compromise (e.g., on numbers). It can be a combination of all there, but with differing degrees of importance allocated to each topic, which can also greatly affect the balance between when mediation is needed as opposed to conciliation, or how and when to combine them.

Balancing mediation with conciliation optimizes emotional, social, and rational heuristics, allowing disputants to benefit from prosocial in-group behavior while considering their legal positions and the advice received, without escalating the conflict further. Even more interestingly, they tend to lead to almost 100% settlement rates.

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Back to School on Dispute Management

Busting Barriers for Effective Prevention

BY KATE VITASEK

For many organizations, the concept of dispute prevention may be new. Even if the concept is not new to your organization, you have likely encountered skeptics in your organization that didn't feel there is value in investing in dispute prevention. See Kate Vitasek, "The Business Case for Dispute Prevention," 42 *Alternatives* 157 (November 2024).

Indeed, change is hard. It's why my grandma often said the only person who likes change is a wet baby. And it is why I want to devote this month's column to addressing common obstacles I have heard over the years on why organizations are resistant to adding dispute prevention mechanisms to their dispute management toolbox. But more important, it's why I want to share tips for overcoming each of the barriers.

Resistance to Change

Even if you have executive buy-in and support for implementing dispute prevention mechanisms, you also need to get buy-in from team members–especially those who work in the trenches directly with trading partners who will need to put the concepts into practice.

One lawyer nicely summed up the reason his company has yet to adopt dispute prevention practices: "People get set in their ways. Teaching an old dog new tricks is very tough. Change is upsetting the apple cart and people don't want to hear it."

So, while including dispute prevention may seem logical at first blush, proponents often face significant barriers that make it challenging to adopt and sustain this innovation.

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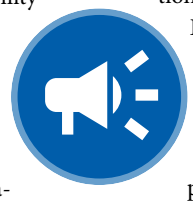
Common reasons cited for not wanting to change include:

- Inside counsel and middle-level employees feel they handle disputes effectively and resent efforts to reduce their autonomy.
- Outside counsel worry about interference with their professional responsibility to produce the best legal results.
- A company culture of fighting the good battle to prove they are right.
- It will likely take more time to embed dispute prevention mechanisms, and the business does not want to face delays when they are eager to enter into a relationship.
- Doing something different seems risky and brings criticism if the new idea does not work well.
- There is a concern, often on the supplier side, that the standing neutral may get "in-between" or block them from building a deep connection with their client.



Overcoming this Barrier: The good news is that as the success of some prevention mechanisms has become better known, resistance is diminishing. For example, using a standing neutral in the construction industry in the form of dispute review boards has taken hold and is even being used in large-scale initiatives such as the Olympics. Andrew Stephenson, "Dispute boards and the Olympic Games: A tried and tested method of dispute avoidance," Corrs Chambers Westgarth (March 2, 2023) (available at https://bit.ly/3ZEfHAH). But sadly, the concept of standing neutrals has not gotten much traction outside of the construction industry.

The best way to diminish resistance is through education on the why, what, and how of using dispute prevention mechanisms. The good news is that you won't have to wait too much longer to find a great resource for helping people understand the various dispute prevention mechanisms available in your toolbox.

My latest book–Preventing the Dispute Before It Begins–is being published by the American Bar Association and will come out soon. In the book, I team with dispute prevention guru Jim Groton, the CPR Institute's Ellen Waldman and DLA Piper counsel Allen Waxman [who is CPR's former president and CEO; CPR publishes this newsletter] to bring the latest thinking on proven dispute prevention mechanisms.

But even if people are aware of dispute prevention mechanisms, they are often hesitant to change unless the pain to change is less than their current pain. In this case, try piloting the concept as a way to reset a strained business relationship.

This is something Canada's Island Health Authority did when it decided to give formal relational contracting a try to help improve trust and collaboration with its hospitalists. The result was a significant turnaround in the relationship, which was profiled in a *Harvard Business Review* article. See David Frydlinger, Oliver Hart, and Kate Vitasek, "A New Approach to Contracts," *Harvard Business Review* (September-October 2019) (available at https://bit.ly/4f2cQaP).

Another good way to get buy-in is putting in preventive techniques such as measuring dispute prevention versus disputes, and charging the dispute costs to the department(s) involved. This fact-based data will open the eyes of individuals to the hidden cost of traditional approaches.

The Hope There Won't Be Problems

It is human nature to ignore issues and hope they go away.

Organizations and individuals often believe they will find ways to work through friction with strong personal relationships. Sometimes this strategy can work, but often it does not.

Rather, research shows it is easy to fall into a negative tit-for-tat trap that leads from a win-win discussion to win-lose and ultimately a lose-lose mindset and behaviors which can easily lead to the concept of "shading," which was explored previously in this Back to School on Dispute Management column. See Friedrich Glasl, Konfliktmanagement: Ein Handbuch Für Führungskräfte, Beraterinnen und Berater (Freies Geistesleben, 10th ed. 2011) and Oliver Hart & John Moore, Contracts as Reference Points, 123 *Q.J.E.* 1, 3–4 (2008) (definition of "shading," which is retaliatory behavior in which a party stops cooperating). See also Kate Vitasek, "Confronting Conflict: Recognizing When the Alarm Bell Rings," 43 *Alternatives* 7 (January 2025).

Indeed, some fear that addressing the subject of dispute prevention is akin to suggesting to a happily engaged couple they should sign a prenuptial agreement. Just acknowledging the possibility of future disharmony might lead to resentment or even conflict.

But even the most trusting relationships can falter over time and benefit from having dispute prevention mechanisms in their toolkit. Take, for example, Huy Fong Foods, the maker of the popular "Rooster" Sriracha sauce. Huy Fong Foods' founder and CEO had a "close and friendly" relationship with the owner of Underwood Ranches for more than 25 years. Underwood Ranches had an exclusive relationship with Huy Fong to provide peppers. The more Rooster sauce Huy Fong sold, the more peppers they would buy from Underwood Ranches. Together the parties collaborated to dominate the Sriracha sauce market.

That was until Huy Fong tried to hire a key employee from Underwood Ranches and slowly began to take actions to develop other pepper supply sources. Huy Fong's actions strained the relationship. But because the parties didn't have dispute prevention mechanisms such as a standing neutral or relational negotiations, the parties let their tension grow.

The once-trusting relationship grew apart until the relationship reached a breaking point ending up in a suit--with Underwood Ranches winning a $23 million settlement for breach of contract. *Huy Fong Foods Inc. v. Underwood Ranches LP*, 66 Cal.App.5th 1112 (2021) (available at https://bit.ly/3DmJN4n).

Huy Fong has faced numerous supply-chain problems and production gaps in working with other suppliers, while Underwood Ranches launched a hot sauce brand of its own. For more background, see "How Did the Sriracha Shortage Happen?" *CNBC* (Aug. 16, 2023) (available at https://bit.ly/4iI5vQk).

Break on Through

The task: Getting beyond the nice words about dispute prevention to steps to install the techniques that can get it done.

The problems, the remedies: Columnist Kate Vitasek provides common reasons organizations can't move to dispute prevention policies and how they can overcome those barriers.

The biggest obstacle: Change is hard. '[C]hange has no constituency.'

Overcoming this Barrier: Have team members complete a "what if" exercise: "What if a new sheriff comes in and demands the supplier to cut cost by 20%?" or "What if XX happens, how will you deal with it fairly?"

Augment this exercise by having team members share real stories of what has happened in other business relationships. Then, look at the existing processes for managing disputes.

What would happen if one of these "what ifs" or war stories arose in your relationship, and all you had was your existing dispute management process versus embedded practices for more collaborative and early resolution?

Process Slowdown?

There may a perception that adding dispute prevention slows down the processes the deal undertakes.

Some people may feel that adopting dispute prevention and resolution mechanisms adds unnecessary costs and time. For example, partnering may distract from real work. Or the parties may need to cover the cost of embedding a standing neutral into the party's continuing governance structure to monitor relationship health when it might never be used.

Overcoming this Barrier: The Association of Corporate Counsel reports problems that evolve into disputes are expensive and take valuable time to resolve. The State of Corporate Litigation Today Survey Report, Association of Corporate Counsel (Oct. 22, 2022) (available at https://bit.ly/4eIxM6H). According to the report, companies with revenue of more than $1 billion spend on average more than $200,000 per litigation. Smaller companies also suffer. In addition, the survey reports that 71% of disputes related to breach of contract last longer than one year, with 22% taking more than two years.

As part of your diagnosis step, one approach is to analyze recent disputes to understand how key data, such as how long disputes take to resolve and how much they cost (factoring in direct and indirect costs), affect your organization. Mapping out one or two disputes should be eye-opening for revealing why it would be better to embed a dispute prevention mechanism that can help business partners solve problems while they are still relatively small, and the parties are still in a win-win mindset.

A Lack of Trust in Trying New Approaches

Many times, you will find yourself entering a new relationship with a party. It is already complicated and taxing enough to put in place the framework for a new transaction. You now begin to suggest innovative ideas for deploying dispute prevention mechanisms. Your counterparty is skeptical about trusting you to go in these new directions.

How to respond?

Overcoming this Barrier: Return to the purpose of the mechanisms you are proposing and align around some of the following basic principles:

- Both contracting parties should view their relationship as one of mutual trust working

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Dispute Management

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together to advance the business enterprise or transaction.

- Both contracting parties should strive to understand and respect the forces driving their counterparty.
- Neither party should seek an unfair advantage or "something for nothing."
- Both parties should recognize the reality that problems and unexpected events will occur during the course of their relationship.
- Both parties should recognize the expense and waste inherent in an extended and escalating dispute resolution process.

These principles are designed to help you and your counterparty realize the full value of the work and effort you are putting into building this framework. Disputes will dissipate that effort. Instead, the mechanisms described in the forthcoming book discussed above are meant to better align you and your business partner to make sure that the inevitable conflict that arises will not become toxic or disruptive. The book's tactics can be used to describe the mechanisms and the case studies demonstrating their effectiveness to convince your business partner and stakeholders that it will serve everyone better to establish a framework.

Natural Skepticism

It is natural to be skeptical of something new. So it's not surprising that some outside counsel don't support prevention.

For example, some cynical lawyers criticized the ADR movement in the late 1980s and early 1990s, saying that the initials "ADR" stood for "Alarming Drop in Revenues." Richard Susskind's book, "The End of Lawyers?" uses the metaphor of a lawyer watching a client walking precariously along the edge of a cliff. The lawyer, instead of erecting a barricade or warning lights at the top of the cliff, simply parks an ambulance at the bottom of the cliff. Richard Susskind, The End of Lawyers? (Oxford University Press, Revised ed. 2010).

The perception of outside lawyer antagonism to the prevention objectives of ADR was illustrated by the voting at the Global Pound Conference series, which brought together numerous dispute resolution stakeholders world-wide in 2016-2017 to commemorate a seminal 1970s event, and to move the profession forward. The GPC provoked debates on dispute resolution tools and techniques.

In response to the question, "Which stakeholders are likely to be the most resistant to change in commercial dispute resolution practice?" the overwhelming verdict among the GPC delegates--including the lawyer delegates--was "external lawyers." Global Data Trends and Regional Differences, Global Pound Conference Series 1–36 (2018) (available at https://bit.ly/3ZJrMEK) (on outside lawyer antagonism).

But the good news is that since the GPC, many outside lawyers have stepped up to lead dispute prevention efforts at organizations like CPR and elsewhere.

Overcoming this Barrier: There are two ways to overcome this barrier. First and foremost, continuing resistance reflects the transformative nature a focus on dispute prevention presents and underscores the opportunity for leadership at the bar. In that sense, don't run from the barrier; instead, embrace it as a challenge to be overcome.

Second, it is important to make sure you are working with an outside lawyer that is open to–and preferably already practicing–dispute prevention. If you find your existing outside counsel is resisting your need to apply the various dispute prevention mechanisms (which are profiled in the forthcoming book), consider asking the lawyer's firm to assign someone else in their firm to work with you who may be more open to exploring these mechanisms. Alternatively, if your existing outside counsel is not open to working with you in your desired approach, consider finding a different firm.

* * *

Progress is the building block for the future. So when you sense resistance to change, stop and ponder the advice of General Electric Co.'s former CEO and management guru Jack Welch. He believed that inertia is one of the worst traits an organization falls victim to:

> When I try to summarize what I've learned since 1981, one of the big lessons is that change has no constituency. People like the status quo. They like the way it was. When you start changing things, the good old days look better and better. You've got to be prepared for massive resistance.

The Master Mediator

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and similarly situated.

The Science

One of the most successful strategies in navigating conflict and cooperation is tit-for-tat, responding proportionately and in like manner to an offer, infraction, or other action of another person. It is common across cultures to react in kind to provocation or other adverse actions.

The Biblical injunction, an eye for an eye, is well-known and ingrained as a default or early option in decision making. On the positive side, gift-giving or other forms of hospitality are also common across cultures. The golden rule, another universal, time-tested maxim, is also rooted in fairness and reciprocity. See Robert Axelrod, The Evolution of Cooperation (Basic Books; revised edition 2006).

The universality of the fairness dynamic being central to evolutionary success is demonstrated by experiments on primates conducted at Emory University. Capuchin monkeys were paired in two separate glass enclosures with rewards of a cucumber being given upon completion of handing a rock through a hole to the researcher. Both monkeys were content doing this repeatedly for the same reward until the researcher acted unexpectedly by giving one a grape and the other a cucumber for successfully completing the task.

The monkey on getting only the cucumber for identical work was so highly aggrieved that the cucumber was angrily rejected and returned to the researcher! Here, nothing was worse than being treated unfair despite the fundamental premise of classical economic theory that any economic benefit or improvement is better than nothing. See Sara Brosnan, and Fran de Waal, "Monkeys reject unequal pay,"

Nature 425, 297 (2003) (available at https://bit.ly/4gwK3wt); see also links to *You Tube* videos: Capuchin Monkeys Reject Unequal Pay, and https://bit.ly/41ScSyX.

Researchers and trainers in negotiation theory, mediation, and the science of decision-making have shown the central importance of fairness via an exercise called the Ultimatum Game. It has been presented by me hundreds of times with predictable outcomes.

There are two people, designated as Player 1 and Player 2. Each Player 1 is given a sheet with an imaginary $100 to divide between them and Player 2 by making a written offer to Player 2 on how to allocate the $100. If the offer is accepted, the money is shared accordingly, and if the proposal is rejected, both players get zero.

Classical economic theory where actors maximize personal gain predicts that Player 1 should divide them unequally, with a small amount going to Player 2. What occurs, however, is that a plurality, if not the majority, proposes 50% each, and a supermajority offers between 40% and 60%. Offers under 30% are typically rejected. See Matt Johnson, The Ultimatum Game and The Psychology of Impulses, *Psychology Today* (Sept. 22, 2020) (available at https://bit.ly/3VXfasM); see also "The Ultimatum Game, The Greatest Example of Human "Irrationality"" *YouTube* (Feb. 1, 2022) (available at https://bit.ly/49UVlbc).

Over the years, I have integrated this concept into how the mediation process is conducted, and as the key material constituting the tools in my own kit. Although often it is about the money and not leaving any on the table, focusing solely on this may not break impasse.

This *Master Mediator* is broken in two parts: "procedural" fairness below, with the next installment in April focused on substantive equity. The division can be framed as process being distinct from outcome.

In mediation terms, procedure is often addressed as neutrality or fairness, and substantive issues as evaluative and how active a role the mediator plays in guiding the parties to specific terms and conditions of a resolution. Robert A. Creo, "Fair and Balanced Is in the Eyes of the Mediation Parties. Not Yours." 38 *Alternatives* 48 (March 2021).

My conclusion is that it is appropriate to frame mediation procedures, logistics and mechanics in terms akin to due process, i.e., equitable and fundamental fairness. In the context of meeting the expectations of the mediation participants, a 2004 article appears to be the first time I used the term Procedural Due Process. Robert A. Creo, "Mediation 2004: The Art and the Artist," 108 *Penn State L. Rev.* 1017, 1026 (2004) (available at https://bit.ly/40lN5xV).

This is identical to due process as defined and applied by the courts. The legal system has basic principles and procedures applied consistently and with the intent to be predictable so that behavior can be conformed to align with expectation of justice as administered by the judicial system.

Fair Play

The mandate: Mediation must be fair and equitable.

The execution: The mediator is in charge. She or he brings the procedural due process/fairness discussed in this article.

The evolution: The theory that parties own every aspect of the process fades away here. The context of mediation as a legal process increasingly requires the neutral's strong guidance with attention to equality and creativity.

Due process is primarily grounded in the U.S. Constitution, especially the Bill of Rights. In general, due process attaches when someone is deprived of a liberty or property interest. Claims involving liberty usually involve freedom of speech, religion, association, or assembly, and protections in the criminal justice system such as prohibitions against unreasonable search and seizures, self-incrimination, effective counsel, and application of criminal codes.

There are many areas of the civil law, especially labor and employment matters, where liberty and property interests have been applied to mandate an opportunity to be heard--for example, the *Weingarten* right to request a union representative when facing discipline and public-sector *Loudermill* rights to a hearing before the imposition of discipline or termination.

The just-cause standard in collective bargaining agreements is interpreted by arbitrators to include procedural protections such as an investigation, notice of charges, and an opportunity to provide information before being disciplined or discharged. In the educational system, there are similar requirements before students can be expelled from school or faculty terminated.

Entities and individuals having commercial contracts with the federal, state and local governments, or receiving entitlements and benefits, also have appeal and other rights to be heard before termination of the contract or benefit. There are regulations, policies, programs, and practices administering appeals processes to implement the procedural due process requirements which are subject to review and action by the courts.

Mediation is designed to be flexible and fluid. It is not a rigid or formulaic application of rules, tactics or models. The process is customized to not only the dispute's subject matter but to the nature and dynamics of the individual participants, with the mediator deploying different strategies and techniques on any given day.

Although there are similar elements, mediation due process differs from judicial procedural due process, which tends to be rule-based and more formal. The central tenet in both, however, is the opportunity to be heard. Except as limited by legislation or court rules, including the codification of mediator standards of conduct or codes of ethics, mediators have broad discretion on how to conduct the mediation process.

The due process evolving during any specific dispute is based upon the mediator crafting the process in the context of the expectations and input of the participants. See Robert A. Creo, "A Brief Stroll on the Roundabout of Authenticity, Confidentiality & Impartiality," 34 *Alternatives* 57 (April 2016).

I am in the camp of mediators, academics, researchers and practitioners who contend that the fundamental fairness platform of mediation due process is rooted primarily in fundamental fairness and equity. Mediators are in charge of the process. Yes, mediators often must negotiate the terms and conditions of the

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The Master Mediator

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process, but self-determination of the parties does not mean that the mediator is unable to say "No." The mediator also maintains self-determination on how to conduct a fair and equitable process.

Process Equity

A colleague once presented in a group of mediators that her way of ensuring neutrality was to act with complete equality in the mechanics of the mediation session. Everyone was treated identically in terms of process logistics and mechanics. This meant using a timer to ensure that each party spent exactly the same amount of time in caucus with the mediator.

It's potentially a great idea but clearly not for everyone. I discussed the concept of equality of time with Steve Frankel, who at the time was the mediation counsel for John Deere US. The company had developed an innovative, progressive, and comprehensive claim mediation product program for product liability matters and catastrophic loss cases in the 1990s.

Steve quickly a shot down the timer idea with the insight that the more time the mediator spent with the other side the better he felt about the process in his own case. His perception was that if the mediator was spending significant time with the other party, that mediator was working to move the other party and persuade the party.

Another practice was to not engage in extraneous dialogue or small talk or otherwise customize what occurred in each session. Participants were told if they ran into the mediator in the hallway or bathroom that they would be acknowledged with only a stoic nod. During any lunch or refreshment break, the mediator would only mix either with all participants or take the break alone. Equality, not equity or fairness, was the bedrock of neutrality.

In my next few cases, I experimented with a stricter balance of procedures to promote neutrality. I concluded this extreme deference to identical mediator conduct was silly. It created an artificially mechanical and rigid process which hindered the development of the rapport and trust often necessary to break impasse.

In cases involving longtime past, present or future relationships between the disputants, it was often counterproductive. It stifled creativity. It defied mediator sense that guides experienced mediators. See Robert A. Creo, "The Large Power of Small Talk," 39 *Alternatives* 139 (October 2021).

Theory Rejected

My evolving mediation process rejects the theory that parties own every aspect of the process, despite this having been the orthodoxy promoted by mediator trainers and commentators.

Over my 40 years as a mediator, the process has moved from being in the "shadow of the law" to being in the context of the law. To the extent it was alternative . . . not anymore! The process is still conducted in a vastly different and "alternative" way--not comparable to adjudication, but as a supplement, complement, or derivative of the legislative or the judicial system.

Settlements of legal claims have always been enforceable by the courts. Interpretation of confidentiality and privilege statutes, court rules or contractual clauses are in the bailiwick of the judicial system.

At least five developments have contributed to mediation being part of the legal system and how conflict is addressed:

1. Statutes and court rules are common, mandating mediation. Mediation and confidentiality legislature is universal.
2. Both the private and the public sector have embraced mediation and internalized the process with protocols and conflict resolution programs. At the same time, education at all levels—particularly and notably first-year law school programs—has gradually and increasingly embraced mediation and dispute resolution as academic disciplines.
3. Human resources "open-door" policies have been supplanted or supplemented by formal ombuds process personnel who report directly to top leadership.
4. The fourth is the establishment of regulations or voluntary ethical codes of conduct for mediator behavior. Many states, including California, Georgia, Florida, New Jersey and Ohio having codified ethical rules, with the Georgia Commission of Dispute Resolution stating that the mediator "acts as overall guardian of the process." See John M. Barkett, "A Mediator's Dilemma: Evaluating Without Compromising Self-Determination or Impartiality," 39 *Alternatives* 26 (February 2021). One commentator opines that some conflicts of interest are not waivable under the Model Standards of Conduct for Mediators, contending that Standard III (E) focuses not on a lawyer's nor on a mediator's belief on whether the mediator can be fair but on the integrity of the process from a reasonable person's perspective. To the extent the Model Standards are binding, then they have trumped the ability of the parties and the mediator to fully address procedural due process. See Art Hinshaw, "An Unquestionable Mediation Conflict of Interest—The MGM Mandalay Bay Shooting Settlement," 38 *Alternatives* 102 (July/August 2020).
5. The fifth is that the perspective of many mediators to assume more control of the logistics and mechanics of the process and sessions. There is a good argument that the trend to conduct more sessions remotely has enhanced the control of the mediator over the process. The participants are scattered with disjointed communication modalities, and with an inability or at least obstacles to have spontaneous interactions between the participants. The mediator as host orchestrates what happens.

My conclusion is that it is appropriate to frame mediation procedures, logistics and mechanics in terms akin to due process, i.e., equitable and fundamental fairness. Robert A. Creo, "A Brief Stroll on the Roundabout of Authenticity, Confidentiality & Impartiality," 34 *Alternatives* 57 (April 2016).

Like many of my colleagues, and as noted above, I contend that the mediator "owns" the process but defers and modifies procedural elements upon appropriate input from the parties. The mediator is responsible for designing and implementing a fair and equitable process that does not impinge upon neutrality and impartiality in a manner which prejudices any participant.

Best practices include a periodic "check-in" with the participants, usually in caucus, on technical and process points. If one or both parties want to ask a mediator to do a specific task or to make strategic or tactical choices that may be counterproductive or unwise, it

is proper to decline providing that the fundamental fairness is maintained.

My view is that the most prominent example of parties weakening the efficacy of mediation is the elimination or restriction of joint sessions. In multiple training courses I attended in the 1980s and 1990s, the model emphasized the critical nature of all participants hearing the identical introductions and orientations with the opening setting the stage for the entire process.

Experienced mediators have moved beyond this orthodoxy. The joint session-caucus model has evolved and improved over the years. Joint substantive opening sessions are disfavored by the parties and most mediators.

I have always rejected the contention that joint sessions only polarize the parties, which makes settlement more difficult. My job as a mediator is to deal with the emotion or hardening of adverse positions. That is why mediators are hired.

Do the parties think it is going to be less adversarial or unpleasant in adjudicatory proceedings? If they are uncomfortable in the same room as the adversary, how do they think they are going to do in court? Also, this discomfort itself becomes a dynamic in why the participants should compromise and resolve the dispute.

Alas, I confess that the resistance is often too strong for me to return to my traditional way of substantive opening sessions with the clients talking, and more important, listening.

What has evolved as a best practice is to start separately with each party and then conduct a shorter and more focused joint session. This does work and has distinct advantages of the mediator building rapport and trust in a less stressful environment. The mediator can prep the layperson and representatives for what may occur in a joint session.

* * *

Human nature and just systems of jurisprudence are both hardwired for fairness and equity. Whether it is framed as neutrality, impartiality, balance, fairness, equity, ownership of the procedures and conduct of the sessions, mediation is now an integral element in dispute resolution conducted in the context of the law.

The fundamental elements of mediation are voice and empowerment and recognition of the disputants themselves. See, e.g., Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: The Transformative Approach to Conflict (John Wiley & Sons 2005). Equity and fundamental fairness/procedural due process provides a safe space for voice, empowerment, and recognition. The multiple ways in which mediation provides procedural flexibility are manifested by the mediator acting equitably rather than imposing a rigid set of rules.

* * *

The next Master Mediator *column in this multi-part treatment in the April* Alternatives *continues with the theme, "Is mediation an equitable process?" Both equity and mediation have moved beyond initial intentions and applications. Both are complex adaptive systems which respond to the prods and pressures of exigent circumstances. Future 2025 columns will look at the impact of neutrality/impartiality and evaluative models on procedural and substantive mediation equity and fairness. Stories and commentary from experienced mediators and academia will conclude the series.*

International Arbitration

Cybersecurity in Focus: A Plan for Protecting The Integrity of Dispute Resolution in the Digital Age

BY ARAY OZBEKOVA

In today's interconnected world, international arbitration plays a key role in resolving cross-border disputes. According to a global study conducted by Queen Mary University of London and the law firm White & Case, International arbitration has become "the preferred method of resolving cross-border disputes for 90% of respondents, either on a stand-alone basis (31%) or in conjunction with ADR (59%)." 2021 International Arbitration Survey: Adapting arbitration to a changing world, White & Case and Queen Mary University of London School of International Arbitration Centre for Commercial Law Studies (2021) (available at https://bit.ly/4fjoldL).

Digitalization, dealing with updating processes and workflows more broadly than digitizing data, has greatly simplified the interaction of arbitrators, lawyers and parties, allowing efficient document exchange and communication over long distances. This progress, however, is accompanied by serious cyber risks.

Given the importance of confidentiality and maintaining the integrity of the arbitration process, all participants need to pay special attention to the challenges associated with cyber threats.

The volume of cross-border commercial transactions in electronic form is growing annually. In 2016, the first major foreign economic transaction using blockchain was concluded. "The world's first real trade deal using blockchain technology was carried out," *Vedomosti* (Sept. 16, 2016) (available at https://bit.ly/4gud7US). It's an area of electronic transactions that has grown and is expected to soar. Report ID: GVR-4-68040-073-8, "Smart Contracts Market Size & Trends, Grand View Research Inc. (available at https://bit.ly/3DdXzpO). The parties to such transactions require fast, efficient and cost-effective dispute resolution.

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International Arbitration

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The Digital Era

Many countries seek to optimize the dispute resolution process by providing the parties with new technological capabilities, including modern electronic document management tools. The tools in turn affect the practice of arbitration institutions with remote communication and electronic justice technologies.

The digital age has radically changed international arbitration. Today, parties actively use electronic filing systems, cloud storage, and virtual platforms for holding hearings, which greatly simplifies the arbitration process.

These technologies increase efficiency and help reduce costs, especially in cases involving multiple jurisdictions.

But despite the obvious advantages, digital administration processes also carry risks. Sensitive data such as trade secrets, business strategies, and personal information are often transferred and stored digitally, becoming potential targets for cyberattacks.

Online dispute resolution procedures have become popular in the United States, especially in domain name cases. An example is the Domain Name Dispute Resolution Policy (UDRP) developed by ICANN. (See the policy at https://bit.ly/3DuzjzN.) This global process helps trademark owners effectively combat unfair domain name registration. According to ICANN and the administrator, the Word Intellectual Property Organization's Arbitration and Mediation Center, more than 67,000 disputes have been successfully resolved using UDRP.

One of the first examples of online arbitration was the Virtual Magistrate project, created with the support of the American Arbitration Association. On May 8, 1996, the project resolved a dispute exclusively through electronic communications, which was the first practice of this kind.

Modern technologies simplify arbitration, improve its quality and reduce costs. Today they are actively used: correspondence is conducted by email, procedural documents and evidence are submitted digitally, and, of course, organizational meetings are held through video and telephone conferences (see, e.g., Paragraph 2 of Article 3 of the ICC Arbitration Rules 2017 at https://bit.ly/3ZHVDxg, and paragraph 1 of Article 4 of the LCIA Rules (available at https://bit.ly/3ZxbvTe)).

The minutes of the hearings are created using systems that display transcripts in real time. The practice of electronic evidence disclosure--e-discovery--is also developing in a number of countries. See, e.g., Article 3.(a) of the Rules of the International Bar Association on Obtaining Evidence in International Arbitration in 2010 (available at https://bit.ly/3ZVIH8o), and Article 4.7 of the Rules for the Effective Organization of the Process in International Arbitration (Prague Rules) (available at https://bit.ly/3ZHNady).

International arbitration institutions are implementing online platforms for information exchange and communication. Since 2014, the rules of the London International Court of Arbitration (LCIA) have allowed the use of electronic documents and templates from the court's website. See Articles 1.2-1.3, and 2.3 (available at https://bit.ly/49CV7p3).

Since 2018, similar systems have been operating at the Vienna International Arbitration Center (VIAC) (see VIAC Arbitration Rules 7, 12, and 36 (available at https://bit.ly/49HYGdE), and the Hong Kong International Arbitration Center where, under Article 3.1(e) of the HKIAC Arbitration Rules, the parties can agree to submit documents via a secure online platform (available at https://bit.ly/4gB4RCl). In 2019, the Arbitration Institute of the Stockholm Chamber of Commerce launched a case management and procedural calendar platform. (See https://bit.ly/4iCcz13.)

Tech Planning

The issue: How secure are our communications?

The issue: There's a lot out there on ADR cybersecurity. But is the practice meeting the demands?

The status: The online platforms are in the business**.** But international arbitration matters still need an integrated, multi-faceted plan at the outset. Is yours thorough enough?

The Threats

There are numerous present and former online dispute resolution platforms such as Aviation-ADR.eu, ICANN, Modria (which is owned by the American Arbitration Association), court platforms, and others. These technologies simplify arbitration and make it accessible to small and medium-sized businesses, reducing transportation costs and geographical barriers. Now such companies can resolve disputes with international corporations through arbitration.

Cyber threats related to international arbitration can manifest themselves in various forms:

- Hacks and data leaks--Attackers can gain access to confidential arbitration materials, which may cast doubt on the fairness of the proceedings.
- Phishing attacks--Sophisticated phishing schemes can trick participants into revealing confidential data or providing access to secure systems.
- Ransomware attacks--Cybercriminals are able to encrypt important arbitration documents, demanding a ransom for their recovery, which can disrupt the course of the process.
- Insider threats--Employees of organizations or members of the arbitration group may inadvertently or intentionally violate data security.

These threats can cause serious damage, from loss of reputation and legal liability to undermining the fairness of the arbitration process.

Confidentiality is a key element of international arbitration. Its violation can undermine the credibility of the process and cast doubt on the recognition and enforcement of arbitral awards in accordance with international agreements such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, best known as the New York Convention. Moreover, lawyers have an ethical obligation to protect their clients' information. Ignoring cybersecurity issues can lead to accusations of professional negligence or misconduct.

Institutional and Regulatory Measures

A number of arbitration institutions are aware of the importance of cybersecurity and offer appropriate guidelines and protocols:

- The ICCA-NYC BAR-CPR Protocol on Cybersecurity in International Arbitration: designed to manage cyber risks, with an emphasis on cooperation between parties, lawyers and arbitrators. (Available at https://bit.ly/3P0innu.) [The CPR Institute publishes this newsletter].
- Arbitration rules: Institutions such as the International Chamber of Commerce and Singapore International Arbitration Centre have included provisions to encourage the use of secure technologies and ensure data protection.
- Data protection rules: Compliance with regulations such as the European Union's General Data Protection Regulation, available at https://gdpr-info.eu, adds complexity and imposes additional responsibility on participants in the arbitration process.

Improvement Strategies

In order to ensure the safety of international arbitration proceedings, all participants must apply an integrated approach:

- Risk assessment and planning--Initially, it is necessary to conduct a detailed assessment of cybersecurity risks, including identifying vulnerabilities in communication systems, document management platforms and virtual hearing tools.
- Technical protection measures--The implementation of reliable technical solutions is critical for data protection:
  - Encryption of data both at rest and during transmission.
  - Multi-factor authentication for access to arbitration platforms.
  - Regular security software updates and fixes.
- Education and awareness raising--The human factor plays an important role in cyberthreat incidents. Regular training sessions will help arbitrators, lawyers, and technical staff recognize and prevent potential threats.
- Incident response plan--Having a detailed plan for responding to cyber incidents guarantees a quick response in the event of a security breach. This includes notifying the affected parties, minimizing damage, and gathering evidence for possible litigation.

Ensuring cybersecurity in arbitration requires the joint efforts of all participants. Lawyers, arbitrators and arbitration institutions should work together to develop and adhere to adapted security protocols for each specific case.

Development Prospects

The global regulatory environment in the field of cybersecurity continues to change in response to the increasing threats of cyberattacks and the rapid growth of risks.

The 2024 World Economic Forum report "Global Cybersecurity Outlook 2024" (available at https://bit.ly/3DvY6U4) notes a gap between organizations that intensively introduce protection measures and those that operate without a long-term strategy.

New technologies, including artificial intelligence, have a significant impact on cybersecurity, which requires an understanding of their short-term and long-term consequences. The report highlights the need for a strategic approach, collaboration and commitment to cyber resilience. Spencer Feingold & Filipe Beato, "Cybersecurity rules saw big changes in 2024. Here's what to know." *World Economic Forum* (Oct. 17, 2024) (available at https://bit.ly/3P61YxD).

The future of cybersecurity in international arbitration is likely to include the following areas:

- Standardization: The establishment of uniform cybersecurity standards in various arbitration institutions to reduce uncertainty and improve compliance.
- Technological innovation: The introduction and/or expanded use of advanced technologies such as blockchain for secure document exchange, as well as the use of artificial intelligence to identify threats.
- Improved regulation: The creation of an international regulatory framework for cybersecurity in arbitration that will ensure a balance between the flexibility of processes and the need for security.

See, generally, Diana Sulamazra Abdul Rahman, "The Role of Arbitral Institutions in Cybersecurity and Data Protection in International Arbitration," *Kluwer Arbitration Blog* (Nov. 24, 2020) (available at https://bit.ly/41EeA70).

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Cybersecurity has ceased to be a secondary task and has become a key element for ensuring the integrity of international arbitration. With the development of digital technologies in the field of dispute resolution, participants in the process need to remain alert and ready for action. The implementation of comprehensive cybersecurity measures will allow the arbitration community to remain committed to the principles of fairness, confidentiality and efficiency in the digital age.

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trust in African arbitrators and restricts their opportunities to gain the experience and recognition needed to compete on a global scale. The panelists proposed solutions including the development of comprehensive, accessible directories of African arbitrators, increased advocacy to promote African talent, and the creation of networks to build trust and credibility.

Events like CPR's Africa Arbitration Day-New York were lauded as vital platforms for showcasing African arbitration professionals and fostering meaningful connections.

Strengthening African Arbitral Institutions

With more than 90 arbitral institutions on the continent, the panel underscored the importance of strengthening these entities to enhance Africa arbitration.

The existence of numerous institutions was seen as necessary for

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meeting the diverse needs of Africa's 54 countries, which vary widely in legal systems, languages, and economic conditions. But not all institutions are equally equipped to handle disputes, with some focused on training and networking rather than administering cases.

The panel highlighted the critical need for institutions to establish clear, effective rules and demonstrate robust case administration capabilities. Examples like the Nairobi Center for International Arbitration and the Arbitration Foundation of South Africa: AFSA illustrated how institutions could thrive by offering transparent and efficient services. The panel also explored the potential benefits of regional cooperation, proposing the idea of regional hubs that could collaborate with local institutions to streamline and strengthen arbitration services across the continent.

Leveraging Opportunities

The African Continental Free Trade Area, or AfCFTA (discussed here in a World Bank report), emerged as a central focus of the discussion. With its potential to boost intra-African trade and create the world's largest free trade area, AfCFTA is expected to generate an increase in commercial disputes, making arbitration a crucial mechanism for resolutions.

To prepare for these opportunities, the panel recommended that African law firms:

- Expand networks across African jurisdictions: Building trusted partnerships with law firms and institutions in different countries will enable better handling of cross-border disputes.
- Specialize in key sectors: Expertise in areas such as energy, natural resources, infrastructure, and finance will position firms to capture AfCFTA-related disputes.
- Understand AfCFTA's dispute resolution mechanisms: Familiarity with the Dispute Settlement Body, or DSB, and its arbitration framework will be critical in advising clients effectively.

The panel also discussed the potential for regional or continental enforcement mechanisms to address the challenge of enforcing arbitration awards across jurisdictions, a critical step in making arbitration more effective under AfCFTA.

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Addressing Barriers

The insight from this panel underscores the urgency of addressing systemic barriers to African participation in international arbitration and preparing for the transformative opportunities presented by AfCFTA.

Stakeholders across the arbitration world were encouraged to collaborate in promoting African talent, supporting the development of institutions, and fostering a robust framework that can handle the complexities of intra-African trade.

The panel members agreed that initiatives such as the SOAS Arbitration in Africa Survey Reports and CPR's Africa Arbitration Day-New York are instrumental in achieving these goals. By engaging actively with these platforms, stakeholders can contribute to building an inclusive, effective arbitration system that reflects Africa's growing prominence in international trade and dispute resolution.

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The second panel at the Second Annual CPR Africa Arbitration Day--New York, titled "Navigating the Shifting Sands: Arbitrating Natural Resources Disputes in Africa," was moderated by Mohannad A. El Murtadi Suleiman, a Dubai partner in Curtis, Mallet-Prevost, Colt & Mosle, and featured panelists

- Jennifer Glasser, a partner in AAD-NY's event host White & Case in New York;
- Ahmed Abdel-Hakam, a partner in Volterra Fietta in London;
- James Gathii, Wing-Tat Lee Chair in International Law, Loyola University Chicago School of Law, and
- Ucheora Onwuamaegbu, a consulting attorney in the Washington, D.C., office of ArentFox Schiff.

The discussion centered on the complexities of arbitrating natural resources disputes in Africa, driven by recent legislative reforms and global energy transitions to renewable energy to address climate change. Key themes included export restrictions, ESG considerations, strategies for navigating regulatory uncertainty, and the future of dispute resolution mechanisms.

Restrictions on Raw Mineral Exports

African nations are increasingly imposing restrictions on the export of raw minerals, mandating local beneficiation and in-country processing—that is, keeping refinement and improvement of raw materials at home. These measures aim to maximize domestic value, foster industrial development, and create employment.

Prof. James Gathii contextualized these policies within global trends such as the U.S. Inflation Reduction Act and the European Union Raw Materials Initiative, which pursue similar goals in their jurisdictions.

While the panel members recognized the developmental objectives behind these restrictions, they acknowledged challenges for foreign investors.

Panelist Ahmed Abdel-Hakam emphasized the need for states to align these policies with clear, actionable objectives, such as price control, export monitoring, and capacity building. Panelist Ucheora Onwuamaegbu highlighted the importance of timing and careful implementation to avoid abrupt regulatory changes that may deter future investments.

ESG Considerations and Sustainable Investment

The growing prominence of environmental, social, and governance (ESG) considerations was a focal point of the discussion. Prof. Gathii advocated for moving beyond bilateral contracts to multiparty agreements that integrate local communities, referencing frameworks like the UN Guiding Principles on Business and Human Rights.

Panelist Jennifer Glasser underscored the role of investor-state arbitration in encouraging sustainable practices by holding governments accountable for regulatory frameworks that balance development, ESG, and community rights.

But Abdel-Hakam warned of the misuse of ESG principles, citing a situation where unfounded ESG claims were leveraged to extract additional concessions from investors in a long-term negotiation.

The panel members agreed on the importance of due diligence, transparent contractual provisions, and robust enforcement mechanisms to prevent such misuse.

Navigating Regulatory Uncertainty

Jennifer Glasser identified strategies for investors to mitigate risks associated with evolving regulations, such as:

- Stabilization Clauses: These ensure that the legal framework governing investments remains unchanged for a specific duration, providing predictability for investors.
- International Arbitration: The use of neutral arbitration venues and governing laws can safeguard investors against perceived biases in domestic courts.
- Political Risk Insurance: Instruments like the World Bank's Multilateral Investment Guarantee Agency (see www.miga.org) can mitigate risks arising from government non-compliance or adverse regulatory changes.

Glasser stressed the importance of securing dispute resolution provisions, including waiver of execution immunity clauses, to ensure the enforceability of awards against sovereign states, as well as discussing financing issues and the necessity of dispute resolution in those deals.

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Future of Investor-State Dispute Settlement in Africa

The panel debated the implications of some African states, such as Tanzania and South Africa, moving away from investor-state arbitration.

Ucheora Onwuamaegbu observed that such hesitancy wasn't new or specific to Africa, noting that the concerns align with global developments, such as the United States-Mexico-Canada Agreement (USMCA), which also limits investor-state dispute settlement provisions.

Jennifer Glasser highlighted countervailing trends, such as the increasing caseload of African arbitral institutions and legislative reforms in countries like Nigeria and Malawi, which she said indicate arbitration remains relevant.

The panel also discussed the potential of the Singapore Convention on Mediation as a complementary mechanism for resolving disputes, particularly where maintaining long-term relationships is critical.

The panel emphasized that the natural resources sector in Africa is undergoing significant transformation, driven by global energy demands and the continent's moves to maximize resource value. Stakeholders, including governments and investors, must collaborate to navigate these shifts effectively. The panel highlighted the importance of striking a balance between developmental objectives and investor protections to foster a sustainable and mutually beneficial investment climate.

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Videos of the two panels from the 2024 Africa Arbitration Day-New York can both be found on the CPR Institute's AAD-New York event page, here, as well as on the CPR *YouTube* Channel at www.youtube.com/@CPRInstituteOnline. Video recordings for panel presentations at the inaugural Dec. 8, 2023, CPR Africa Arbitration Day-New York, at the New York City Bar Association, can be found here. For more on the 2023 program, see Naomie Malumba, "Pressing Issues and Emerging Trends at Africa Arbitration Day-New York," 42 *Alternatives* 124 (September 2024).

In addition, the CPR AAD-New York event web page also contains the full details and results of the 2024 AAD-NY Moot Competition, which was held concurrently. The Best Written Submission was awarded to Feven Negussie, a student at the Antonin Scalia School of Law at George Mason University in Arlington, Va. The Best Oralist was awarded to Wanjiru Vicky Mwangi, a student at the University of Nairobi School of Law in Nairobi, Kenya.

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Nawi Ukabiala, of Debevoise & Plimpton in New York, is chair of the 2024 AAD-NY Steering Committee, whose members can be found at the event link above; CPR staff liaison is Knar Nahikian, who is the NYC nonprofit's Director of International Initiatives. Watch www.cpradr.org for the announcement of the date of CPR's AAD-New York 2025 later this year. For more information, email info@cpradr.org.