Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute for Conflict Prevention & Resolution
VOL. 43 NO. 4 • APRIL 2025

Administrative ADR

Sorting Out Securities Dispute Resolution: A View from Across the Water

BY ADAM SAMUEL

The U.S. Supreme Court decision in *Securities & Exchange Comm'n v. Jarkesy*, No. 22–859 (June 27, 2024) (available at https://bit.ly/431P4cx), that the SEC had to offer someone a jury trial before fining them for fraud, created shockwaves among federal regulators.

The 6-3 majority deduced from the fact that the SEC was claiming penalties for fraud that this was a claim in law and not one engaging its caselaw public rights exemption from Seventh Amendment. By circumscribing tightly that exemption, the Court has thrown a string of U.S. public agencies into reconsidering their internal disciplinary arrangements, notwithstanding their federal legislative basis.

A Note from the U.K.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 allowed the SEC to claim civil penalties for breaches of the anti-fraud provisions of the Securities Act, the 1934 Securities Exchange Act and the Investment Advisers Act against non-registered entities, using its own in-house procedures alongside its powers to claim such remedies in the federal courts.

Jarkesy and his firm launched two funds between 2007 and 2010, raising $24 million, according to the opinion. The SEC alleged that he and his company misled investors in a number of ways, most importantly by inflating the funds' claimed value.

The SEC's own administrative law judge took seven months after the hearing to issue the decision. Even worse, the commission itself then took six years to confirm largely the ALJ findings.

Jarkesy has been litigating over a $300,000 fine and probably more significantly a ban from the securities industry for more than a decade.

While the correctness of this decision is essentially a U.S. constitutional matter, the case has echoes and parallels in the United Kingdom and the other 45 countries that adhere to the European Convention on Human Rights. (To avoid confusion, the Convention belongs to the Council of Europe, not the European Union. Its adherents, including the United Kingdom and Switzerland, go well beyond the borders of the European Union.)

At the same time, 35 years after the U.S. Supreme Court decision in *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989) (available at https://bit.ly/3WJFZAk), U.S. commentators continue to criticize the Supreme Court for insisting on the mandatory arbitration of securities disputes.

The European Union (with different countries to the convention) and the United Kingdom have reached quite different answers to these problems. Their approach has been through legislation and, in at least the U.K.'s

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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.

CPR News

Last-Minute Info on CPR's São Paulo Event and International Mediation Competition

The CPR Institute and its Brazilian Advisory Board are collaborating for the second consecutive year with the University of São Paulo to present a dispute resolution program as part of CPR's International Mediation Competition Week.

Both events are at the beginning of April, so there is still time for some local and traveling readers to sign up to attend at the last minute.

The interactive program provides participants with a foundational panel, and then allows attendees to select from one of two simultaneous workshops. Participants make their choice upon entry.

This year's theme is "Mediation, Negotiation, Facilitation and Dialogue: Prevention and Management of Conflicts, Disputes and Litigation in 2025."

The collaborative CPR-USP event takes place Wednesday, April 2, 2025, from 9:00 a.m. to 12:30 p.m. in the Ruy Barbosa Nogueira Auditorium, on the second floor of the Historic Building of the Faculty of Law at USP, Largo de São Francisco, 95 in São Paulo.

The full agenda can be found with the registration information on CPR's website at https://www.cpradr.org/events/cpr—usp-collaborative-event-april-2025. This program will have simultaneous translation in both English and Portuguese as part of the organizers' commitment to guaranteed accessibility to all.

The full list of sponsors is also being updated at the collaborative CPR-USP event link above.

CPR's IMC Week is held annually and features various programs and events in conjunction with CPR's International Mediation Competition, which brings student competitors, seasoned mediation professionals, and judges from around the world to meet in São Paulo.

The central IMC week event is the mediation competition, in which teams of students come from around the globe to exhibit their conflict resolution prowess. The teams have been working on the problem since last fall. The participating teams are listed in the accompanying box.

The IMC follows the collaborative CPR-USP event on April 3-5, 2025. The IMC will be conducted in English, and hosted by Insper, a nonprofit education and research organization, at its campus at Rua Quatá, 300, Vila Olímpia, São Paulo.

The CPR IMC webpage is available at https://www.cpradr.org/events/2025-international-mediation-competition/.

CPR first brought the IMC to Brazil in 2017 and has continued it as an annual tradition in São Paulo except during the pandemic, when the IMC was presented virtually. Participants returned to an in-person competition in Brazil in 2023 after two years of remote competition.

Students from all around the world apply through a competitive application process to have their school team be selected as one of 18 teams that will compete in the live rounds in Brazil. During the IMC, students have the opportunity to display their mediation skills, network with each other and with ADR professionals, and learn from some of the leading experts in mediation and dispute resolution.

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Alternatives

CPR

Editor:
Russ Bleemer

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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Back to School on Dispute Management

Formal Relational Contracting: Boosting Trust and Collaboration

BY KATE VITASEK

Most contracts–especially buyer-supplier contracts–are transactional contracts. But should they be?

That is the question that more and more academics are researching.

The concept of relational contracting practices has been studied for almost 70 years. Legal scholars Stewart Macaulay and Ian Macneil were early advocates in the 1960s. Macneil actually coined the term "relational contract" in a 1968 book. Ian R. Macneil, Contracts: Instruments for Social Cooperation, East Africa (Hackensack, N.J.: F.B. Rothman 1968).

Their work has inspired dozens (if not hundreds) of research studies from some of the most influential legal, economic, social, and psychology thinkers around the world. See also, David Campbell, The Relational Theory of Contract: Selected Works of Ian Macneil (Sweet & Maxwell 2001).

I've been one of those academics that have challenged the traditional transactional approach to writing contracts.

So just what is a relational contract? And what are the benefits?

What is a Relational Contract?

Relational contracts embrace the fact that many business dealings are not one-and-done deals but rather consist of continuing business relationships where deal partners have a series of interactions over a long period (e.g., franchise agreements, outsourcing agreements, and long-term distribution partnerships).

The idea is that business is dynamic, and contracting parties need to create a flexible contract framework in which they put the relationship first.

Macaulay and Macneil's concept of relational contracts never gained traction in practice, primarily because the "relational" aspects of contracting happened outside of the written contract. Lawyers eschewed relational contracts as "fluffy" and akin to a "handshake deal"—something most lawyers and commercial businesspeople see as risky.

I began to study strategic outsourcing deals in 2003 and, like Macauley and Macneil, found that when companies committed to putting the success of the relationship over the business challenges stemming from contractual issues, they were far more likely to have success–and fewer disputes. My work led to the development of the Vested methodology for creating formal relational contracts in 2010 and I have been hooked on teaching companies how to create formal relational contracts ever since. See www.vestedway.com/what-is-vested.

That work also led me to Harvard University's Oliver Hart, a 2016 Nobel Prize winner in economics for his work on contract theory. In 2019, we collaborated with David Frydlinger on an article challenging business leaders to making the switch to formal relational contracts for business relationships where there is a high degree of dependency needed by the parties to collaborate for optimal success. "A New Approach to Contracts," *Harvard Business Review* (September/October 2019) (available at https://bit.ly/4f2cQaP).

David Frydlinger and I went on to co-write the book, Contracting in the New Economy: Using Relational Contracts to Boost Trust and Collaboration in Strategic Business Relationships (Palgrave Macmillan 2021) (with co-authors Jim Bergman and Tim Cummins).

A key difference between an informal relational contract and a formal relational contract is that the latter formally incorporates the relational elements into a party's physical contract. We define a formal relational contract as: "A legally enforceable written contract establishing a commercial partnership within a flexible contractual framework based on social norms and jointly defined objectives, prioritizing a relationship with the continuous alignment of interests before commercial transactions."

A key goal of a formal relational contract is to create a flexible contracting framework that supports the dynamic nature of the business partner relationship and formalize the relational constructs to help keep the parties stay in continual alignment when "business happens."

Today, more than 150 organizations such as the Intel, DHL, bp, Jones Lang Lasalle, IBM, Securitas and the Swedish telecommunications firm Telia are using formal relational contracts with a great deal of success. I've had the privilege of profiling many of their journeys in formal case studies, all available in the University

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

Dispute Management

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of Tennessee's Vested White Paper and Case Study Library at https://bit.ly/4gXklAx.

Confronting the 'Hold-Up' Problem

In our *Harvard Business Review* article linked above, we articulate why formal relational contracts are an excellent alternative to larger and more complex traditional purchasing contracts.

When organizations seek to protect themselves from their contractual counterpart, it stems from a fear known as the hold-up problem: the fear that one party will exploit the other. The hold-up problem is exacerbated because complex contracts are by nature incomplete: It is impossible to predict the future, and inevitable changes in the business environment often require partners to revisit their contracts and make changes.

In a supply contract, for example, organizations use a range of tactics to ensure their counterpart doesn't take advantage of them after the contract signing. These include contracting with multiple suppliers, forcing suppliers to lock in prices, using termination for convenience clauses, or obligating suppliers to cover unanticipated tasks that arise after the initial contracting phase—a scope sweep clause. Bonnie Keith, Kate Vitasek, Karl Manrodt and Jeanne Kling, Strategic Sourcing in the New Economy: Harnessing the Potential of Sourcing Business Models in Modern Procurement (Springer, 1st ed. 2016). Some companies go so far as to install a "shadow organization" to micromanage the supplier.

A scope sweep clause—used in outsourcing agreements—supplement statements of work by obligating a supplier to perform functions that may not be described in the statement-of-work description but are an inherent part of the services provided.

For example, if a service provider takes over a company's in-house work, the scope sweep clause assumes if the work was being done in-house before outsourcing, the scope would appear in the contract even if the statement of work was silent on the task.

"Contractual shading"—a term that was introduced by Oliver Hart—occurs when a party isn't getting the outcome it expected from a deal and feels the other party is to blame or has not acted reasonably to mitigate the losses. The aggrieved party often cuts back on performance in subtle ways, sometimes even unconsciously, to compensate.

To help understand how contractual shading happens, imagine that a supplier of engineering services submits a proposal in a competitive bidding process and wins the contract. If demand is lower during the contract term than the buyer stated in the request for proposal or the scope expands in an unanticipated area, the supplier's profit will suffer.

If the buyer refuses to adjust the supplier's fee or the Statement of Work (they have a scope sweep clause), the supplier may try to recoup losses by replacing the expensive A team on the project with its less costly C team. This may lead to lower quality performance, which will tempt the buyer to retaliate by evoking a penalty clause. When left unchecked, shading leads to negative tit-for-tat behavior that can become a death spiral and lead to disputes.

A formal relational contract seeks to prevent a death spiral by committing the parties to a flexible contractual framework based on social norms and jointly defined objectives with a vow to prioritize the relationship health before the details of the commercial transaction. This is done by embedding relational constructs into the actual contract (versus having them reside outside of the contract).

The Problem, the Cause, and the Solution

The Problem	The Cause	The Solution
Traditional purchasing contracts don't work in complex strategic relationships where the parties are highly dependent on each other, future events are unpredictable, and flexibility and trust are required. Instead of promoting the partnership-like relationships needed to cope with uncertainty, conventional contracts undermine them.	Companies have traditionally used contracts as protection against the possibility that one party will abuse its power to extract benefits at the expense of the other. This adversarial mindset creates a downward spiral of negative tit-for-tat behaviors.	A formal relational contract lays a foundation of trust, specifies mutual goals, and establishes governance structures to keep the parties' expectations and interests aligned over time.

Relational Contracting in Action

As part of my University of Tennessee work, we developed a simple five-step relational contracting process that, when applied, creates a formal relational contract.

The five steps were originally proposed in UT coursework. They were later explained in the book, Jeanette Nyden, Kate Vitasek and David Frydlinger, Getting to We: Negotiating Agreements for Highly Collaborative Relationships (Springer 2013), and further "codified" in "Contracting in the New Economy," cited above.

Step 1: Lay the foundation. This step focuses on negotiating the foundation of the relationship before proceeding to the details of the actual deal. This includes having discussions about trust, transparency, and cultural fit between the trading partners.

For example, one effective approach is to openly discuss transparency and agreeing on the types of information that should be transparent between the parties. A second example is addressing potential cultural fit issues. Consciously laying a strong foundation of trust, transparency, and cultural fit helps establish a "partnership mentality" that can prevent an adversarial mindset from eroding the relationship.

Step 2: Co-create a shared vision and objectives. Step 2 starts with contracting parties expressing what they want to achieve from their contractual relationship. It is important that all parties (not just the one with the upper hand) explain their targeted outcomes and goals. Step 2 concludes with the parties agreeing on a shared vision and specific goals for the relationship.

Step 3: Adopt Guiding Principles: Once parties have clearly defined what they are trying to achieve, Step 3 is adopting the "Guiding

Principles" to which the parties commit. Guiding Principles are social norms that, when adopted, can help preemptively steer away from potential potholes.

UT research shows six Guiding Principles that, when combined, can help parties create a fair and balanced contract that helps prevent opportunism. The six Guiding Principles—reciprocity, autonomy, honesty, loyalty, equity, and integrity—form a framework for resolving potential misalignments when unforeseen circumstances occur.

Step 4: Align expectations and interests: In Step 4, the parties align expectations and interests as contractual clauses and schedules. Here, the parties negotiate the specific deal points such as responsibilities, pricing, metrics, etc.

Getting Step 4 right is where the rubber hits the road. Why? Unfortunately, many traditional transactional contracts—especially those written on form agreements—use clauses typically breaching one or more of the Guiding Principles.

While the concept of the clauses themselves is not in breach of the Guiding Principles, the exact wording often favors the party with the most power. Take, for example, the below termination-for-convenience clause required by the state of Alabama:

> The Owner may terminate this contract at any time by giving at least ten (10) days' notice in writing to the Contractor. If the contract is terminated by the Owner …, the Contractor will be paid for the time provided and expenses incurred up to the termination date.

Sample Required Termination Clauses, Alabama.gov (full clause available directly at https://adeca.alabama.gov/wp-content/uploads/Sample-Required-Termination-Clauses.docx).

A termination for convenience clause such as the one cited above creates an inherent perverse incentive for suppliers not to invest in a business relationship that one party can terminate so cavalierly.

Let's revisit the termination for convenience clause through the lens of relational contracting. Relational contracting experts suggest contracting parties replace a termination-for-convenience clause with a termination-for-justified-reason clause. The parties can then specify under what justified conditions to terminate the contract early.

In addition, relational contracting experts suggest drafting exit provisions to align with the Guiding Principles. For example:

- The parties would turn to the reciprocity principle, creating bilateral termination rights for both the buyer and the supplier.
- Using the loyalty principle, the parties would agree on an appropriate off-ramp period, allowing ample time and support for the parties to unwind their relationships. This may or may not be symmetrical based on the dependency and ease of unwinding the relationship.
- The parties would rely on the equity principle when determining how to compensate the supplier for any asset-specific investments they may have made on behalf of the buying company that may not be fully amortized.

Using the Guiding Principles forces the parties to adopt a fresh view on common contractual clauses, shifting from using market or state power to working together to develop more fair and balanced contract clauses that are more fit for purpose. A key benefit is both parties align on more realistic expectations and are likely to work more collaboratively and reduce shading after the contract's signing.

Close Relations

The dispute prevention technique: Formal relational contracts.

The purpose: The deal isn't one and done. A contract often demonstrates a continuing relationship. It should implement that understanding.

What's the difference? A changed orientation to relational contracting from a traditional transactional contracting approach has been understood, studied and deployed since the 1960s.

There is seldom one "right" answer or solution with clauses. For example, a one-sided termination-for-convenience clause might be appropriate for a contract where there is little dependency and investment by the supplier. But in another contract where the supplier has made significant investments, it could easily be incompatible with the equity Guiding Principle because the supplier may not be able to fairly recoup its investments.

Step 5: Stay aligned: In Step 5, the contracting parties define the governance mechanisms they will use to stay aligned after signing the contract. This can involve regular check-ins, follow-ups, and feedback to track progress toward the parties' shared vision and goals.

A key point in a relational contracting process is for the parties to define their governance, and commitments to good governance practices, before signing the contract. These governance mechanisms are formally embedded into the parties' contract (typically in the form of a governance schedule) and become a contractual commitment. For example, in a strategic outsourcing agreement, the parties may agree to "Monthly Operations and Performance Reviews" and "Quarterly Business Reviews" that are more strategic.

When to Use?

It is important to understand that relational contracts are not for every business relationship.

First, going through a relational contracting process takes time and effort. A typical organization has hundreds, if not thousands, of contracts. Investing in the process will not be worthwhile for smaller and low-risk contracts.

So, when should you invest the time?

The choice to use a relational contracting process should be based on the deal's characteristics and the parties' relationship. At a high level, the two most important features to focus on are the dependency between the parties and the risks involved in the deal and relationship.

The overall logic is simple: the higher the dependency and risk, the more crucial it is to apply a relational contract designed to continuously align the parties' interests and expectations. Relational contracting is a good fit for complicated outsourcing and purchasing

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Dispute Management

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arrangements, strategic alliances, joint ventures, franchises, public-private partnerships, major construction projects, and collective bargaining agreements. See, above, "A New Approach to Contracts."

A Case Study

Vancouver Island Health Authority (Island Health) and South Island Hospitalists Inc. (SIHI) had reached the ultimate contract standstill. See Kate Vitasek and William DiBenedetto, The Island Health—Hospitalist Journey to Vested: A New Day, A New Way, University of Tennessee (2018).

Between 2000 and 2014, Island Health and SIHI had gone through contentious contract negotiations four times. Despite attempts at negotiation, the contract expired in July 2014; even after the sides reached an interim agreement, a long-term agreement seemed out of reach, and the parties engaged a deal facilitator to help them work through the relationship issues, causing a negotiation standstill.

As part of the discussions, the deal facilitator introduced using a relational contract. As part of the process, the parties developed a Statement of Intent (shared vision and Guiding Principles). The first two pages of the contract formally embedded the Statement of Intent into the contract. The contract reads:

> The Parties enter into this Agreement with the following Statement of Intent as our mutual-relationship philosophy and the principles under which we commit to operate. The Parties endeavor to abide by the Statement of Intent in all dealings during the term of this agreement in pursuit of our common shared vision. Together, we are a team that celebrates and advances excellence in care for all through shared responsibility, collaborative innovation, mutual understanding, and the courage to act in a safe and supportive environment.
>
> We will achieve this by building a relationship grounded in trust and respect, anchored in the following Guiding Principles and behaviors.
>
> Our Guiding Principles are social norms that will guide us in our actions and decision-making, especially during times of adversity.
>
> • **Reciprocity:** We conduct ourselves in the spirit of achieving mutual benefit and understanding. We recognize that this requires ongoing give and take. We each bring unique strengths and resources that enable us to overcome our challenges and celebrate our successes.
>
> • **Autonomy:** We give each other the freedom to manage and make decisions within the framework of our unique skills, training, and professional responsibilities. We individually commit to make decisions and take actions that respect and strengthen the collective interest to achieve our shared vision.
>
> • **Honesty:** We will all model truthfulness and authenticity even when that makes us vulnerable or uncomfortable. This includes honesty about facts, unknowns, feelings, intentions, perceptions, and preferred outcomes.
>
> • **Loyalty:** We are committed to our relationship. We will value each other's interests as we value our own. Standing together through adversity, we will achieve our shared vision.
>
> • **Equity:** We are committed to fairness, which does not always mean equality. We will make decisions based on a balanced assessment of needs, risks, and available resources.

Figure 1. The Island Health/Hospitalist Relationship Description 2016–2018—Word Cloud *Before* Vested (May 2016)

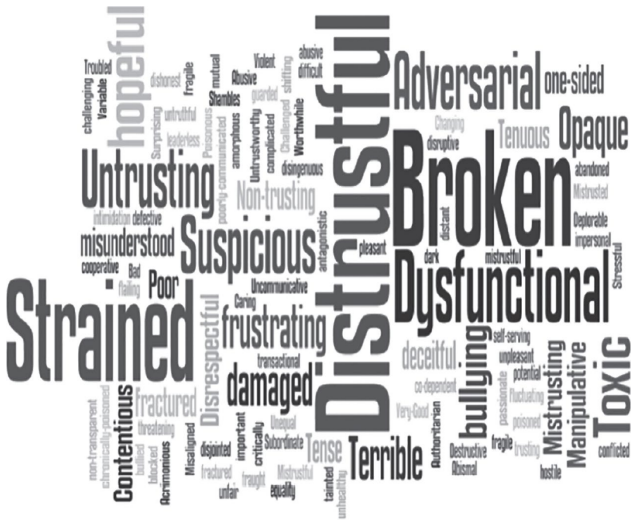

Figure 2. The Island Health/Hospitalist Relationship Description 2016–2018—Word Cloud *After* Vested (October 2018)

• **Integrity:** To achieve extraordinary results, our actions will be intentionally consistent with our words and agreements. Decisions will not be made arbitrarily but will align with our shared vision and principles. Our collective words and actions will be for the greater good of the relationship and the provision of patient-centered care.

The parties then worked through Step 4—aligning interests with the scope, metrics, and pricing model. SIHI lead negotiator Dr. Jean Maskey points to the Statement of Intent as a key success factor in helping the parties shift to relational contracting and putting the concept into the contract clauses: "During the contracting workshops, we often referred to our Statement of Intent, especially during difficult conversations where people might fall back into their old 'us versus them' mindset." Id.

Finally, the parties worked through Step 5 and developed a governance structure—something that was not present either formally or informally in the previous agreements.

For example, the parties established a "best value team" co-chaired by an Island Health administrator and a hospitalist that meets once a month. The team works through the budget and data to determine how to best handle external developments that pose financial challenges. For example, how would the parties address changing requirements when the Canadian government passed the law to allow Medical Assistance in Dying (MAID)? The parties adopted governance structure and protocols into their contract as part of a schedule.

As SIHI's Dr. Ken Smith reflects, "The contract really did mark a profound fundamental change that has persisted in our relationship with the administration and our group. We now work together on our goals. We are actually helping each other get past the hurdles as opposed to putting up barriers. The change is quite profound."

Janet Grove, Island Health's outside counsel, explained how the relational contract differs from a traditional contract: "The contract sets the shared vision and the Guiding Principles upfront. As such, you see more decisions referred to that are trusted to the governance framework than in a normal contract. There is a recognition that things will evolve and how you manage the evolution is entrusted to a framework."

The before and after descriptions of the relationship are nothing short of transformational—with a shift to 86.2% positive words from 84.5% negative words in less than two years (see Figures 1 and 2 at the bottom of the previous page).

The Covid-19 pandemic put the parties' relational contract to the test. Would their flexible contract framework allow them to navigate prolonged and persistent stress and pressure?

Kim Kerrone—Island Heath's Vice President, Chief Financial Officer, Legal Services & Risk—reflected on the pandemic's challenge: "[W]e were suddenly faced with a 60% reduction in the overall patient census on the one hand—yet on the other hand, physicians needed to manage higher-risk Covid-19 patients. The impact on budget and workload was drastic: physicians treated far fewer yet higher-risk patients. Questions such as who would get to work what hours and who would have to work in the new high-risk Covid-19 ward were front and center."

Jean Maskey explained how the parties' formal relational contract helped them be ready to address the changes fairly and flexibly: "Our Vested (formal relational contract) agreement uses Guiding Principles such as autonomy and equity. Using these Guiding Principles as the backdrop for decisions, we found an effective way to rethink schedule allocations to reduce hospitalist hours while keeping all physicians employed. Part of the process also "banked" hours, which can be used for future surges. Without our Vested contract, this would have been arduous under the old contract."

The relationship is still going strong, and the parties continue to use their governance structure and Statement of Intent to keep the parties in continual alignment, which has let them prevent disputes.

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case, the creation of the Financial Ombudsman Service, an idea copied with varying degrees of accuracy and success around the world.

Jarkesy and the ECHR: The Same but Different

The surprise engendered by this decision in the U.S. fell a little flat in European circles.

There has long been concern that regulators should not be able to be both prosecutors and judges of firms they regulate. The big difference between Europe and the U.S. lies not in the Supreme Court's approach but in the insistence generated by the U.S. Constitution on a jury trial. The expense and necessary time-delay involved lies really at the heart of United States concerns, alongside a necessary worry about juries understanding the issues involved.

Neither the European Convention on Human Rights (often abbreviated to ECHR) nor any European Constitution of which the author has knowledge has a right to jury trial enshrined in it. Juries in European civil cases are largely confined to U.K. libel cases and even then appear extremely rarely.

A European approach reaches the same place as the U.S. Supreme Court but at the same time does so with a different result, namely the need for a public hearing rather than a jury trial in a regulatory penalty case.

ECHR Article 6(1), which backs the U.S. Supreme Court's general approach, says:

> In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly. …

So, if the *Jarkesy* case had happened in an ECHR country with no right to jury trial, the court would have reached the same conclusion but ordered instead a trial in front of state-appointed judges. (Parties to a conventional arbitration agreement essentially waive their Article 6 rights in doing so, unless, like sports people, they have no choice but to agree to arbitration in order to earn a living. *Mutu and Pechstein v. Switzerland* [2018] ECHR 778 (Oct. 2, 2018) (available at https://bit.ly/3CUsjMS.))

The U.K.'s Former Structure

A UK answer to the *Jarkesy* question This problem arose in Britain in 2000, when the

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United Kingdom dispensed with its previous strange regulatory structure of a Treasury agency (the Securities and Investment Board (SIB)) supervising and approving self-regulating organizations (SROs).

Before these changes came into force with the Financial Services and Markets Act 2000 (FSMA) at midnight on Oct. 31, 2001, a firm conducting investment business had to be registered with either an SRO or SIB.

It could be argued that the firm had a choice as to the selection of the regulator who could discipline it. Nobody ever challenged an SRO fine in court and SIB bizarrely had no power to fine anybody. It could only remove the party's authorization.

It would have been an interesting question as to whether an SRO being a private body with a public function would have counted as providing a form of mandatory dispute resolution such as to engage ECHR Article 6's fair and public hearing right. The argument against this would have been the firm's option of being regulated by SIB and not being exposed to fines at all.

Under the FSMA 2000, the SROs disappeared, and SIB essentially became the Financial Services Authority, the sole regulator for the financial services industry, or at least those parts within the FSMA. In the run-up to the legislation going through Parliament—it was based on a 1997 proposal made in the first week of the Blair government—much concern was expressed at the need to change the disciplinary processes to avoid breaking Article 6 of the European Convention on Human Rights.

A solution emerged in FSMA Part IX: the creation of what the legislation called the Financial Services and Markets Tribunal, a national court to judge appeals by way of rehearing against the Financial Services Authority's decisions.

Since 2013, the Authority has been split into the Financial Conduct Authority and Prudential Regulation Authorities (FCA and PRA). The Bank of England owns the PRA and regulates some other aspects of financial services in its own right. The Financial Services and Markets Tribunal has merged into the Upper Tribunal (Tax and Chancery) whose other major activity involves dealing with appeals on taxation matters. Neither change affects the equivalent of the *Jarkesy* issue.

The FCA is the securities fraud regulator and the Upper Tribunal hears challenges to its decisions both to penalize or censure firms or individuals—disciplinary references—and those about refusals to authorize, the removal or suspension of authorization, and the imposition of requirements on firms' permissions (that is, their FCA license)— non-disciplinary references.

The FCA has continued the FSA's enforcement approach of having a Regulatory Decisions Committee (RDC). This in turn followed the approach of the pre-2001 SROs.

The Policing State

The tension: Efficient industry proceedings conducted by the government crashes into the need for the protection of a public court hearing. Your administrative law learning, back to square one.

The trigger: Our international columnist analyzes how the U.K. and Europe have addressed administrative law questions now facing the U.S. Securities and Exchange Commission, and the U.S. justice system, in the wake of SCOTUS's *Jarkesy* decision last year.

The future: As always, TBD, but securities disputes need a familiar, fast forum. *Jarkesy's* jury trial demand calls for better contract drafting to encourage better ADR processes.

This all may resemble *Jarkesy's* administrative law judge. The FCA employs its RDC members. The RDC will refuse to allow the issuing of a Warning Notice, which typically commences enforcement proceedings and judges disputes as to whether to fine or censure individuals and firms. It also handles challenges to the regulator's decisions to remove authorization and other similar things.

Often, the firm or individual will negotiate a settlement with the FCA or accept the RDC's view. The RDC, however, is not a court and it certainly does not operate in a way that complies with EHCR Article 6. That is the Upper Tribunal.

This all sounds quite simple. There have been some problems. Many stem from the function of the Upper Tribunal. It both resolves disputes and acts as a surrogate regulator, protecting the public. This appears from FSMA 2000 section 133(4), which allows the Tribunal to

> consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time.

This is, then, not an appeal or setting-aside process but a re-hearing of the matter, using material that may not have existed at the time of the original regulatory decision. In *Financial Conduct Authority v. Hobbs* [2013] EWCA Civ. 918 (available at https://bit.ly/415n9Wr), the Tribunal dismissed the regulator's primary case that Hobbs should be fined for market abuse. It did not consider whether his admitted lies to the Tribunal rendered it appropriate to ban him from his trading activity or the industry generally. The Court of Appeal ruled that was wrong and sent the case back to the Tribunal for a decision on the point.

The issue of what the Tribunal can decide continues to cause problems. The official commencement of enforcement action comes with a Warning Notice actually issued by the RDC. It may reject the views of the regulator about what should be presented, and often does.

At the end of the FCA process, the same committee decides on whether to uphold the regulator's claims and the correct solution if any to impose. To what extent does the case presented to the Upper Tribunal have to resemble the original Warning Notice or the regulator's decision? The problem stems from the clumsy drafting of sections 67(5B) and 208(4) of the Financial Services and Markets Act covering actions against individuals and firms respectively. The latter reads:

> If a regulator decides to—…
>
> (b) impose a penalty on an authorised person under section 206(1), or
>
> (c) suspend a permission of an authorised person, or impose a restriction in relation

> to the carrying on of a regulated activity by an authorised person, under section 206A,
>
> the … person may refer the matter to the Tribunal.

The person or individual fined or suspended can refer not the decision but the "matter" to the Tribunal. Equivalent rules exist for disciplinary action taken against individuals.

From the start, the Tribunal has been troubled by the question of what the "matter" is that is being referred. It is clearly not the regulator's decision. In particular, can the regulator rephrase its case after the Warning Notice or the RDC's decision?

The latter may reveal something else about which the regulator ought to be taking action. Bear in mind that any evidence can be supplied to the Tribunal, even material that did not exist at the time of the disciplinary process. The regulator could also prefer to argue that what it originally suggested was dishonesty or a lack of integrity actually amounts to a failure to use due skill, care and diligence.

The problem here is that the Tribunal performs both a public regulatory function and a conventional dispute resolution function. Anyway, the Court of Appeal recently tried to define the "matter" referred in *Fin. Conduct Auth. v. BlueCrest Capital Mgt. (UK) LLP* [2024] EWCA Civ. 1125 (available at https://bit.ly/3CXjj9H):

> "The matter" encompasses anything which arises from the same factual situation which gave rise to the regulatory action in the statutory notice referred to the Tribunal or is otherwise connected with the circumstances, the evidence and/or the allegations, whether factual or legal, which were before the FCA's decision-maker. …
>
> [T]here must be some sufficient relationship between the matter referred and the decision which triggers the right to refer. … [T]he decision is a stage in the regulatory process, and the Tribunal reference a further stage in that process. … [S]omething is sufficiently related to the decision which triggers the reference to amount to or be included in "the matter" if it has a real and significant connection with the subject matter of the process, in the sense of its procedural or substantive content, which has culminated in the decision. … Such connection must be real and significant, not fanciful or tenuous. But if so, that is sufficient.
>
> It need not be something upon which the FCA has specifically relied during the process. … What is required when the FCA seeks to rely on something new in the Tribunal is an examination of what is new, and of the procedural or substantive content of the process culminating in the decision or supervisory notice, and the establishment of a real and significant connection between them. If what is new has this connection it is within the Tribunal's jurisdiction. It is a separate … matter for the exercise of the Tribunal's case management powers as to whether it would be just and fair. …
>
> I do not agree … that the FCA always bears a heavy burden if it wishes to rely on something which was not in the warning notice. …
>
> [R]elabelling the conduct which was already alleged as a breach of different regulatory rules … falls within the matter referred. …
>
> [Amendments] arise out of the same facts and matters as were contained in the [decision notice] and the [warning notice]. They do not change the action which the FCA asks the Upper Tribunal to confirm by dismissing the references. They can readily and without any prejudice be addressed by [BlueCrest Capital Management] in the course of the reference. …
>
> There is nothing inherently improper about the FCA raising something to meet an argument advanced during the course of the reference.

So by referring a decision to the Tribunal, a firm or individual risks significantly widening the case. Either side can appeal to the Court of Appeal and from that with permission to the Supreme Court but only on a question of law.

A 2013 change to the Financial Services and Markets Act reduced the scope of review of the Tribunal of non-disciplinary references. These concern questions of whether firms should be authorized or de-authorized and any requirements that the Financial Conduct Authority wishes to impose on the firm's license (called a "permission"), rather than sanctions such as penalties and public censures.

Here, the Tribunal can correct any conclusions of fact or law by the regulator and remit the case back to the Authority for its decision on that basis, rather than make the decision itself. This is relevant in *Bluecrest* because the FCA had sought to impose on the firm an obligation to carry out a pro-active business review. Although the 2013 change is controversial, it emphasizes the need for regulators to make the ultimate decisions on the basis of Tribunal input, rather than the other way around.

The Tribunal normally consists of a judge and two financial services specialists sitting on an ad hoc basis. Recently, this has proved to be an interesting way of integrating technical experts into the legal system and largely does away with the need for expert evidence. In a world without the Seventh Amendment, this provides a more skilled tribunal.

The Different U.K./EU Approach

Paradoxically, all but one of the Supreme Court majority in *Jarkesy* have been strong supporters of mandatory private arbitration of securities disputes rather than allowing consumers to bring their claims to court.

Complaints about the accessibility and neutrality of mandatory arbitration in U.S. securities cases have been aired since the late 1980s decision in *Rodriguez de Quijas*. Nevertheless, Congress has never decided to ban or limit it. The wording of the Federal Arbitration Act and the caselaw on it makes it reasonably clear that legislation is the only way to restrict or eliminate the mandatory imposition of consumer arbitration.

In this area, the EU and the U.K. take almost exactly the opposite approach to the US.

The U.S. discussion often proceeds in a binary way: enforce mandatory arbitration clauses or allow access to court. The U.K. approach, copied with variable success around

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Administrative ADR

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the world, includes a third way (and possibly a fourth and fifth way too): the creation of an institutional decision-making body to which consumer and small business complaints can be referred for binding adjudication.

Unenforceability Presumed

A 1993 EU directive and the U.K.'s Consumer Rights Act presume unfairness and unenforceability against consumers of arbitration clauses.

To begin with the binary question, the EU in its Council Directive 93/13/EEC of 5 April 1993 (available at https://bit.ly/4hZZ9uK) on unfair terms in consumer contracts addressed the issue of consumer arbitration reasonably directly.

Article 3(1) begins by explaining that a "contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

Sub-paragraph (3) goes on to say that the "Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair." Article 6(1) says "that unfair terms used in a contract concluded with a consumer by a … supplier shall, … not be binding on the consumer." Article 6(2) requires member states to ensure that a choice of law cannot deprive consumers of these rights.

The Annex paragraph 1(q) lists as a type of term presumed to be unfair, one that is

> excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions. …

By 1993, the United Kingdom already had the now-repealed Consumer Arbitration Agreements Act 1988. Section 1 prevented the enforcement by the business of a pre-dispute agreement involving a consumer. That was unless either the court referring the case to arbitration concluded that such a course was not detrimental to the customer (section 4), or the agreement was "international" (section 3).

The English courts declared section 3 to contravene EU law because it discriminated against EU consumers. Paragraph 20 of Schedule 2 of the Consumer Rights Act 2015 currently contains paragraph 1(q) of the Annex to the 1993 Directive. Since 1993, firms have faced an uphill battle at least in the English courts in proving that a mandatory arbitration clause is fair and, therefore, enforceable other than at the request of the consumer. *Nifty Gateway v. Amir Soleymani*, [2022] EWCA Civ. 1297 (available at https://bit.ly/3X0Mkbm) (involving the purchase of a non-fungible token).

The Third Way: An Ombudsman Scheme

The Third Way involves building an Ombudsman scheme as the U.K. did in 2001 with its Financial Ombudsman Service (FOS).

The word Ombudsman is Swedish and the "man" does not refer to anyone's sex in that language but just means "person." For most of its history, the Chief Ombudsman has been a woman.

This covers complaints relating to both matters regulated under the Financial Services and Markets Act (which grow almost every year) and various subjects previously covered by similar schemes with which FOS replaced.

Some countries have Ombudsman schemes which they do not use properly for this purpose. They either keep the maximum award too low, exclude entrance to small businesses, charge complainants for using the service, fail to publish their decisions or an account of them and generally deter complainants from using them.

For all its many issues, FOS does not have these faults. For an event after April 2019, the maximum award is £430,000 plus any costs, which are rarely awarded, plus interest. The Ombudsman website (www.financial-ombudsman.org.uk) has guides to how the Service decides cases and a regular Ombudsman News with relevant case studies.

The huge advantage of FOS over an arbitration tribunal is that it has an institutional memory and knowledge bank. It learns about problems through seeing cases and sometimes becomes stricter as with experience it becomes able to see through certain arguments.

The Financial Services and Markets Act 2000, sections 228-229, gives the Ombudsman the power to reach fair and reasonable results. The FCA's rules only require the Financial Ombudsman Service to have regard to the law, regulatory guidance and rules and "good" industry practice. Its publications have essentially developed over nearly a quarter of a century a form of regulatory lex mercatoria. Adam Samuel, Consumer Financial Services Complaints and Compensation: A Guide for the Financial Services Market (Second Edition Thomson Reuters 2017) endeavored to document it!

The courts can only review Ombudsman decisions on public law grounds, namely procedural unfairness, lack of jurisdiction, total unreasonableness, and the misapplication of law when the Ombudsman chooses to apply it. These challenges rarely succeed.

Customers are not bound by the FOS result or even required to use it. They have to be careful not to become time-barred in the courts by awaiting the decision (there is provision for individuals with substantial claims to start court proceedings and then halt them to await FOS' result: DISP 3.3.4AR(4)).

Firms who wish to avoid the excitement of litigation should insert in their responses to litigation threats their own provision that, in the event of a trial, they will tell the judge of the availability of the Ombudsman scheme and apply for a costs order to reflect the fact that the customer could have used it without using lawyers or paying court fees.

The Financial Ombudsman Service's awards bind the firms. That has given rise to concerns of an almost *Jarkesy* type of situation regarding firms' compliance with EHCR Article 6. FOS at its peak was deciding more than 500,000 cases annually, rendering the use of open public hearings wholly impractical in other than exceptional cases.

The modern FOS originated in some private voluntary schemes which could always avoid Article 6 by arguing that membership was not compulsory. Again, in 2000, worries emerged that the Convention would create chaos.

So far, FOS has been very lucky. In *Heather Moor & Edgecomb Ltd. v. United Kingdom—Application No.* 1550/09, [2011] ECHR 1019 (available at https://bit.ly/40ZQrFT), the

European Court of Human Rights ruled that there was no requirement to hold a hearing if such an occasion was unlikely to cast any new light on what happened. It commented:

> According to the Court's well-established case-law, an oral and public hearing constitutes a fundamental principle enshrined in Article 6 § 1. … As the Court recognised in that and other cases, however, the holding of a hearing is not an absolute obligation. There may be proceedings in which it is not required, where the courts, or other deciding authority, may fairly and reasonably decide the case on the basis of the parties' written submissions and other written materials. … Considerations of efficiency and economy may also be relevant in certain contexts. … The present context is of protection for consumers in the domain of financial services and investment advice. Parliament's intention, clearly stated in the legislation, was to provide for the resolution of certain disputes quickly and with minimum formality. It notes in this respect the very high number of disputes that FOS deals with annually, which the Government put at 150,000. The Court does not find such a legislative policy inappropriate.

The Administrative Court reached the same result for similar reasons in *Calland, R (on the application of) v. Fin. Ombudsman Serv. Ltd.* [2013] EWHC 1327 (Admin. Ct.) (available at https://bit.ly/3QlwgNG).

The Fourth and Fifth Ways

There are not just three ways of influencing the resolution of securities disputes in the United Kingdom.

The Financial Conduct Authority can also require individual firms or whole sectors to review past business and offer compensation or fix products for their customers. *Bluecrest* above involved an example of first type.

It can also direct businesses to deal with complaints in particular ways or just enforce its own requirements that authorized entities handle complaints fairly in line with what the FOS is saying. Final Notice to Clydesdale Bank PLC (Sept. 24, 2013) (available at https://bit.ly/41huVOf).

* * *

The United States can have all these things. It just needs Congressional will to address these issues.

Without it, the Federal Arbitration Act will continue to operate in the consumer space where it basically does not belong. Regulators will be stuck having to hold jury trials when they wish to extract penalties. But they can always encourage those they regulate to waive this right on the basis that a jury might be more likely than an administrative law judge to come up with lurid findings of multiple compliance breaches for each of which the fine can reach $750,000!

Worldly Perspectives

Does Mediation in Austria Need a Jumpstart?

BY GIUSEPPE DE PALO & MARY B. TREVOR

Starting in the early 2000s, the Austrian legislature developed legislation to promote mediation use. Consequently, mediation has a stable foundation in Austria, whether at the level of professional law or with regard to consensus-promoting positioning as a method in both procedural and substantive law regulations.

Development in the past decade or so, however, has been stagnant, leading to a possible need to reassess mediation matters in Austria.

The Foundations

In the years leading up to 2000, official recognition of mediation in Austria was largely statute-based.

In the criminal area, for example, the 1988 Juvenile Courts Act authorized a conflict regulator to assist in mediation-styled conflict management between the accused and the victim. Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG), BGBl 599/1988 idF BGBl I 34/2024; siehe auch AB 929 Blg XXV. GP.

By 1999, the Code of Criminal Procedure was amended to include the procedure for adults as well. Strafprozessordnung 1975 (StPO), BGBl 631/1975 idF BGBl I 96/2024; siehe auch AB 1403 Blg XXV. GP. As another example, in the family law area, mediation was

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This month's column was prepared in collaboration with Sascha Ferz, a Professor of Alternative Dispute Resolution at the Institute of Legal Foundations, Faculty of Law, in Graz (Austria) (see https://bit.ly/41gbC6E). With his focus on expertise in administrative law, sociology of law, and mediation, he is interested in how parties can use prelitigation procedures in a more efficient and targeted way. Thus, his preferred research interests are negotiation, mediation, and conflict resolution in civil matters and public law.

Ferz is also head of the interdepartmental Centre for Social Competence at the University of Graz, at which students are taught critical skills in this area, enabling them to deal with social challenges and areas of conflict in a constructive way.

The Rebooting Mediation project, a large-scale study directed by De Palo for DTC, aims to provide policymakers with scientific, data-driven evidence to guide policy recommendations for achieving Access to Justice goal (16) of the United Nation's Sustainable Development Goals (see https://sdgs.un.org/goals/goal16). In *Worldly Perspectives*, the authors are presenting a summary of a forthcoming country report that has resulted from the Rebooting Mediation project study of individual nations' ADR efforts.

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introduced for divorce matters in the Marriage Registry Act 1999.

But the Civil Law Mediation Act (CLMA) in 2003 was the major step in broadening mediation's reach in Austria, providing for the use of mediation in civil law disputes. Bundesgesetz über Mediation in Zivilrechtssachen (Zivilrechts-Mediations-Gesetz – ZivMediatG), BGBl I 29/2003; siehe auch AB 47 Blg XXII. GP; siehe auch Wanderer, Recht und Mediation in Wanderer (Hrsg), Mediation. Konfliktlösung in Familien, bei Erbschaften, in Nachbarschaft und Schule, im Datenschutz, in der Wirtschaft, im öffentlichen Bereich sowie im Strafrecht (Tatausgleich)2 (2023) 10 ff.

The CLMA provided for the registration, qualifications, and training of mediators, as well as various obligations of mediators and the legal consequences of engaging in mediation. The Code of Civil Procedure and the Code of Criminal Procedure were concurrently amended to support CLMA provisions as needed.

The CLMA has important limits: It only covers mediation for the types of conflicts within the province of the regular civil courts. Furthermore, it does not restrict the ability to mediate to the mediators registered through its provisions, leaving the field open to non-registered mediators as well.

In 2011, the legislature enacted the EU-Mediation Act (see Bundesgesetz über bestimmte Aspekte der grenzüberschreitenden Mediation in Zivil- und Handelssachen in der Europäischen Union (EU-Mediations-Gesetz – EU-MediatG), BGBl I 21/2011; siehe auch AB 1125 Blg XXIV. GP), designed to implement and slightly adapt, in some instances, the provisions of the EU Mediation Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters in Austria (available at https://eur-lex.europa.eu/eli/dir/2008/52/oj/eng).

The EU-Mediation Act did not amend or replace the CLMA, but instead was intended to complement the CLMA by applying the Directive's principles of mediation to cross-border disputes in civil and commercial matters. The Explanatory Report for the Act noted that it was to be implemented "only to the absolutely necessary extent to maintain the high Austrian standard." ErläutRV 1055 Blg XXIV GP 3.

Other specialized laws, in a few instances, include mandatory mediation aspects. The Genetic Engineering Law (see Bundesgesetz, mit dem Arbeiten mit gentechnisch veränderten Organismen, das Freisetzen und Inverkehrbringen von gentechnisch veränderten Organismen und die Anwendung von Genanalyse und Gentherapie am Menschen geregelt werden (Gentechnikgesetz – GTG), BGBl 510/1994 idF BGBl I 8/2022) and the Neighborhood Law (available at Bundesgesetz, mit dem das allgemeine bürgerliche Gesetzbuch und das Konsumentenschutzgesetz geändert werden (Zivilrechts-Änderungsgesetz 2004 – ZivRÄG 2004), BGBl 91/2003) include mandates to attempt to reach agreements either before a conciliation board or in mediation.

The Apprenticeship Law mandates mediation for the termination of an apprentice relationship. Vgl ua Winkler, Eine neue Möglichkeit der vorzeitigen Auflösung von Lehrverhältnissen, ZAS 2008, 244ff; praktische Hinweise etwa unter https://bit.ly/4bfbhG5 [10/2024].

In other specialized laws, mediation plays a significant role, as with the Disability Equality Package, which provides for mediation as an optional but state-supported means of conflict resolution. Bundesgesetz über die Gleichstellung von Menschen mit Behinderungen (Bundes-Behindertengleichstellungsgesetz – BGStG), BGBl 82/2005 idF BGBl I 32/2018; Ferz/Adler, Mediation im Bundes-Behindertengleichstellungsgesetz und im Behinderteneinstellungsgesetz, in Prettenthaler-Ziegerhofer (Hrsg), Menschen mit Behinderung. Leben wie andere auch? (2006) 329ff; siehe auch https://bit.ly/3Xm8YeB [10/2024].

As of early 2013, under section 107 of the Act on Non-Contentious Proceedings, in proceedings to determine the best interests of a child in custody or personal contact matters, judges are authorized to order participation in an initial meeting about mediation. Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG), BGBl 111/2003 idF BGBl I 91/2024; siehe auch AB 2087 Blg XXIV. GP. But since that legislation, the legislature has enacted no further initiatives on mediation.

Time to Recalibrate

This month's Worldly Perspectives jurisdiction: Austria.

The ADR status: A solid base, but disappointing use.

The prospects: Further regulation to encourage mediation could be a path.

Mediators, Registered And Unregistered

Mediators in Austria may be registered under the CLMA, as discussed below. But other, non-registered mediators are active in Austria as well.

Non-registered mediators may be subject to the standards of particular trades governed by the Trade Act that allow mediation without CLMA registration or that can be read to allow such mediation. For example, activities listed for the profession of Life and Social Counseling include mediation, and mediation is an activity for which training may be available in this area.

While the Trade Act standards for the profession of Management Consultancy (which includes business organization) in this regard are less explicit regarding mediation, the process is allowed as long as it involves consultancy for a company rather than an individual.

Notaries, lawyers, accountants, and tax advisers are subject to different regulations but also are not required to be registered under the CLMA. In general, they may act as mediators if they do so in compliance with the standards of their respective professions. Notaries and lawyers are required to acquire training in mediation in order to act as mediators.

Key CLMA Provisions

The CLMA establishes the legal framework for civil mediations in Austria and includes various measures designed to set a high-quality standard, including an Advisory Council to oversee CLMA-governed matters. The Federal Minister of Justice maintains the list of CLMA-registered mediators.

The Mediators' List: To be listed as a mediator under the CLMA, the applicant must be professionally qualified, be at least 28 years old (ensuring a certain level of life experience), be trustworthy, and have taken out professional liability insurance that complies with the CLMA's requirements. Initial registration is for five years, with subsequent renewals available for 10-year periods.

Qualifying training must be completed at institutions registered under the CLMA and must cover both theoretical (200-300 training units) and practical (100-200 training units) parts, although specifics may vary according to expertise. Further training is required every five years.

As noted below, in some instances the rules concerning mediation may differ for registered and non-registered mediators. For example, in the case of a "mixed" cross-border mediation involving both a CLMA-registered mediator and a non-registered EU mediator, the CLMA standards apply concerning the effect of a statute of limitation.

Confidentiality: CLMA mediators must maintain confidentiality concerning facts entrusted to them during a mediation. Any documents prepared or given to them during the proceedings must also be kept confidential.

Assistants and trainees involved in mediation also must abide by the confidentiality requirements. Violation of the requirements can result not only in removal from the list of mediators, but also is punishable criminally under the CLMA unless the information revelation can be justified by a public or legitimate personal interest.

Mediators not registered under the CLMA may also be subject to confidentiality requirements. Those acting according to a professional law are governed by that law. Parties engaging in cross-border mediations are governed by the EU-Mediation Act confidentiality restrictions unless they are CLMA registered, in which case they are governed by CLMA confidentiality provisions. Notably, only CLMA-registered mediators have the right to refuse to give evidence in criminal proceedings.

Enforceability of Mediation Settlements: Under Austrian Code of Civil Procedure section 433a, if the parties have achieved a written settlement through mediation of a civil matter, the parties may obtain a court settlement from a district court. Gesetz vom 27. Mai 1896, über das Executions- und Sicherungsverfahren (Exekutionsordnung – EO), RGBl 79/1896 idF BGBl I 136/2023. Section 433a does not distinguish between mediations conducted by registered and non-registered mediators, or national and cross-border mediations.

Non-civil matters are not covered by section 433a. Nor will courts enforce an agreement that violates Austrian law or legal values or that would be otherwise unenforceable.

Notarization of a mediation agreement may also be possible pursuant to section 54 of the Notarial Code. Wagner/Knechtel, Notariatsordnung6 § 54 NO Rz 1. In such a case, the obligor under the agreement must have agreed to immediate enforcement of the notarial deed that results.

Statute of Limitations: For CLMA-registered mediators, the court in question will suspend the running of the statute of limitations during the mediation. The running will resume, as applicable, once the mediation has ended.

With the exception of family law matters, if the parties' dispute involves claims that will not be addressed in the mediation, the parties must sign a written agreement to the effect that the suspension applies to the non-mediated claims as well. In cross-border conflicts that do not involve CLMA-registered mediators, the applicable EU-Mediation Act provision is similar but a bit more nuanced.

Mediation Duration and Fees: The CLMA does not prescribe a duration or timeframe for the mediation process, although if the dispute involves any parallel proceedings, they may affect the speed of the process. Nor does the CLMA prescribe mediator fees.

Means of Recourse

Under the Code of Civil Procedure and the Act on Non-Contentious Proceedings, civil judges are authorized to refer matters for consensual resolution of their conflict, which can include mediation. In addition, the Act on Non-Contentious Proceedings states that the court may suspend its proceedings for a maximum of six months for this purpose.

As noted earlier, certain statutes may require the parties to seek amicable settlement, which may include mediation or conciliation.

Although there are no laws governing the use of mediation clauses in contracts, either optional or mandatory, such clauses are in use in Austria. In general, the parties to a dispute may simultaneously pursue the matter in court and seek to reach settlement. The exclusionary

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The Return

The *Worldly Perspectives* column by Giuseppe De Palo and Mary Trevor returned to *Alternatives* last month with a focus on England and Wales. The column's mission is the same as the original version, which appeared in these pages from October 2009 through January 2013: to advance understanding of how conflict resolution is practiced in countries around the globe. (The original columns are available on Lexis and Westlaw.) The authors, whose credits appear at the top of this article on page 63, seek to advance the mission of the nonprofit Dialogue Through Conflict Foundation, which seeks broader global use of ADR techniques to address conflict, under United Nations Sustainable Goal 16 on peace, justice, and strong institutions. The column previously focused on Europe and included some nations in the Middle East and Africa; now, the authors plan to cover the world more widely. As part of the foundation's Sustainable Conflict Global Initiative, this material will serve as a resource for policymakers and scholars, providing empirical evidence on policies that effectively increase mediation use. By fostering global dialogue and integrating diverse perspectives, the efforts seek to strengthen institutional frameworks and promote long-term conflict prevention, aligning with international sustainability goals. The column is scheduled to appear monthly.

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effect of mandatory mediation clauses, however, is currently unclear.

In two recent cases, the Austrian Supreme Court of Justice (Oberster Gerichtshof) (OGH), the top appellate court for civil and criminal cases, addressed contractual mediation clauses. One, addressing mandatory mediation clauses in part, left their status a bit unclear. OGH 22.6.2022, 3 Ob 98/22s iFamZ 2022/192, 258.

The other, addressing the minimum requirements for an enforceable contractual provision on dispute resolution, has been criticized for requiring too many specifics to be included in the provision. OGH 25.9.2023, 6 Ob 229/22b SWK 2024, 930 (Reich-Rohrwig); see Frauenberger-Pfeiler, ecolex 2024/5, 382 (383 ff).

ADR Alternatives

In Austria, parties seeking an alternative dispute resolution process have options other than CLMA mediation.

Conciliation, a mediation-like process in which the conciliator can suggest solutions, is a popular option that some regulations direct the parties to rather than to mediation.

In addition, section 433 of the Austrian Code of Civil Procedure provides for a "pretoric" settlement. Pursuant to this procedure, any party contemplating a legal action may apply to the district court in the district where the opponent lives for court assistance in attempting to settle the dispute. See Tetiana Tsuvina and Sascha Ferz, "The Recognition and Enforcement of Agreements Resulting from Mediation: Austrian and Ukrainian Perspectives," 4(16) *Access to Justice in Eastern Europe* 32 (Nov. 22, 2022) (available at https://bit.ly/41fRXUt).

Also, as discussed above, mediators in a variety of professions, not registered under the CLMA, may conduct mediations.

Perceptions of Mediators

Mediator responses to the Rebooting Mediation Project study broadly reflected the reality of the different approaches to mediator regulation and practice in Austria. (Details on the project are available at https://bit.ly/4kwcxZJ.)

For example, survey results revealed variation among mediators, sometimes significant, in their knowledge about the laws governing mediation. A significant number of respondents, incorrectly, believed that confidentiality applied to all mediations with no exceptions. Estimates as to how long mediations take varied fairly widely among respondents.

Mediators gave mixed responses to a question about enforcement of mediation settlements that suggested that knowledge varies among different types of mediators, perhaps according to the area(s) in which they have mediation experience. In response to a question about the mediation's costs, an extensive set of responses were elicited, again perhaps reflective of the different types of mediation that respondents were familiar with.

A majority of respondents said they believed that current standards for mediation are acceptable.

The Current Assessment

The number of mediators in Austria is not known. The CLMA registry currently shows 1820 listings, but the number of non-registered mediators is a mystery.

There are no reliable data about how many mediations are conducted in Austria, and no comprehensive empirical study has been done yet. But there is one on the way.

Estimates among respondents to the Rebooting Mediation Project survey varied. A recent survey by the Austrian Ministry of Justice (2023) concluded that approximately a quarter of a million disputed civil cases, encompassing family and employment disputes, arise within the civil justice system annually. But likely only a fraction of these disputes make their way to mediation.

Rebooting survey responses suggested a perceived oversaturation of the market, with more than 70% of respondents agreeing with the statement, "The supply of mediation services in civil and commercial disputes is exceeding the demand for those services." Notably, the number of mediators in the CLMA registry has declined since 2012.

Respondents to the Rebooting survey, all the same, seemed to suggest that there should be a greater proportion of disputes going to mediation rather than to court. Their suggestions for how to increase the demand for mediation included providing incentives, such as court fee refunds or tax credits; making pre-litigation mediation information sessions mandatory; making mediation mandatory for certain types of cases; and requiring lawyers to inform clients about mediation. To raise awareness of mediation, respondent suggestions included offering mediation education programs in higher education facilities and implementing pilot programs.

> Austria has registered mediators under its mediation law, but it also has nonregistered mediators who often are subject to different rules, rights and obligations.

* * *

Early mediation initiatives in Austria were strong, but in some ways short-sighted.

The Civil Law Mediation Act was a reasonably self-contained but not exclusive system. From the very beginning, there has been difficulty distinguishing between registered mediators under the CLMA and non-registered mediators with different rights and obligations, and the addition of mediators for cross border mediations has not made things any clearer.

Furthermore, in addition to mediation, the parties have several procedural options open to them to promote consensus, such as making a claim for a decision of a conciliation body or reaching a special kind of out-of-court settlement almost free of charge under section 433 of the Code of Civil Procedure.

While increased understanding and awareness of mediation may help matters, perhaps regulatory approaches may need to consider a jumpstart.

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The IMC has guest/observers slots that may still be available to attend portions of the competition. At its discretion and subject to space limitations at Insper, the Organizing Committee will allow a select number of guests to attend IMC segments.

The tickets are $45 per person ($35 for CPR Institute members) and include access to a cocktail reception. The guest/observer tickets must be purchased in advance at CPR's website to allow attendees to be added to the Insper admittance list. The guest/observer ticket will provide admittance to portions of the competition including:

- to attend the opening ceremony (April 3);
- to observe the competition live rounds of mediation (each day, April 3-5, subject to room capacities), and
- to attend the closing ceremony and cocktail reception (April 5).

The last-minute, online-only guest and observer tickets may still be available at https://www.cpradr.org/products/2025-cpr-imc-guest-ticket.

Save the Date: CPR's Leadership Award Will Go to Verizon's Vandana Venkatesh

CPR's annual Corporate Leadership Award for outstanding conflict resolution practices will be presented to Verizon Communications Inc. and Vandana Venkatesh, Verizon's Executive Vice President and Chief Legal Officer, in New York City on Thursday, May 29.

The CPR Corporate Leadership Award, presented annually since 2004, honors companies and their principals that have demonstrated commitment and leadership in the alternative dispute resolution field, ,as well as continued support for ADR use.

Past honorees include Qualcomm Inc., Visa Inc., Amgen Inc., CVS Health Corp., General Motors Co., Microsoft Corp., and many other leading companies. For more information on the past words, see CPR's website at www.cpradr.org and search on "Corporate Leadership Award."

As Executive Vice President and Chief Legal Officer, Vandana Venkatesh has oversight for all legal and corporate security functions for Verizon. Before assuming this role in October 2022, she was Senior Vice President and Deputy General Counsel of Verizon Consumer Group, which serves more than 100 million consumers. She has been with Verizon for two decades.

Venkatesh is based at the wireless giant's New York headquarters. Her Verizon biography webpage is available at https://bit.ly/3XniT3z.

"Verizon's use of alternative dispute resolution processes demonstrates its adaptability in a dynamic and rapidly evolving legal landscape," said Serena K. Lee, CPR's President and chief executive officer, adding, "This flexibility and resilience undoubtedly allow its business leaders to fully focus on and achieve its core business purpose, thus resulting in Verizon's growth and current position as the largest wireless carrier in the U.S."

The IMC Competitors

As of press time, the following teams were slated to compete in the April 3-5 CPR International Mediation Competition that is being conducted at the Insper campus in São Paulo:

- American University Washington College of Law
- Cardozo Law School
- Fordham Law School
- Georgetown University Law Center
- São Paulo Law School of Fundação Getulio Vargas (FGV-SP)
- Jindal Global Law School (JGLS)
- National Law School of India University, Bangalore
- Pontifical Catholic University of Paraná (PUCPR)
- Pontifícia Universidade Católica do Rio de Janeiro (PUC- Rio)
- Sciences Po Paris Law School
- Tashkent State University of Law
- The West Bengal National University of Juridical Sciences
- Universidade de Brasília
- Universidade Federal do Rio Grande do Sul
- Universidade Presbiteriana Mackenzie
- University of Nairobi
- University of São Paulo (USP)

Attended by general counsel of Fortune 100 corporations, partners of leading law firms, and industry leaders, the Corporate Leadership Award Dinner is an important fundraiser for CPR Institute's programs, initiatives, and thought leadership in the areas of alternative dispute resolution, dispute prevention, and dispute management.

CPR's webpage for information and registration on the Thursday, May 29 event—returning this year to Guastavino's in Midtown Manhattan, black-tie optional—is available at www.cpradr.org/events/cpr-2025-corporate-leadership-award-dinner.

The webpage has a summary and details on becoming a donor. The donor list is updated at the event link. The categories include:

- Champion: $50,000, which includes a table for 12 with preferred seating, 12 invitations to a VIP reception, a double-page advertisement in the dinner program, and prominent recognition at the event and on the CPR website.
- Benefactor: $35,000, which includes a table for 10 with preferred seating, 10 invitations to a VIP reception, a full-page advertisement in the dinner program, and prominent recognition at the event and on the CPR website.
- Patron: $25,000, which includes a table for 10 with preferred seating, a half-page advertisement in the dinner program and recognition on the CPR website.

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- Sponsor: $2,500, with individual attendance including recognition in the dinner program and on the CPR website.

CPR's Stephanie Arcella is overseeing donation commitments. She can be reached at sarcella@cpradr.org. She will provide an invoice or accept credit card information, according to donor preference, and can provide further information.

An April 16 Online CPR Mediator Impartiality Seminar

CPR's Ellen Waldman, Vice President, Advocacy & Educational Outreach, will lead a continuing legal education session on the essentials surrounding staying impartial as a mediator.

Impartiality is an ethical cornerstone of mediation. Ethical codes require mediators to avoid bias or favoritism by word or action and to decline to serve when current or past relationships create incurable conflicts of interest.

The program, "The Neutral Zone: Maintaining Mediator Impartiality and Avoiding Conflicts of Interest," will be held online on Wednesday, April 16, at 12:00 p.m. to 1:00 p.m. Eastern.

In the workshop, Waldman will

- parse the text of both the Model Standards for the Conduct of Mediators and CPR's Model Rule for the Lawyer as Third-Party Neutral;
- dissect a well-publicized case where plaintiffs in a mass tort case challenged the mediator's conduct in light of a significant relationship with an employee at the defendant company; and
- examine recent amendments in state ethics codes seeking to distinguish waivable from non-waivable conflicts.

CPR expects to receive approval for one New York CLE credit for experienced attorneys in the Ethics category for the program. While a recording will be available after the event, CLE credit is only available to those that attend the live webinar.

The seminar cost is $49, and free for members of CPR's Panel of Distinguished Neutrals. For more information and registration, go to www.cpradr.org/events/the-neutral-zone-maintaining-mediator-impartiality-and-avoiding-conflicts-of-interest.

CPR—International Institute for Conflict Prevention & Resolution has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York. The online continuing legal education course is being considered for approval in accordance with the requirements of the New York State CLE Rules and Regulations for credits as indicated above.