Alternatives
TO THE HIGH COST OF LITIGATION
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ADR Technology

# More Artificial Intelligence: A Simulation Shows How AI Applications Can Provide Mediation Strategy

BY GIUSEPPE DE PALO

At a December New York event, "AI's Double-Edged Role in Dispute Resolution," hosted by ADR provider JAMS Inc., ADR scholars and practitioners explored how artificial intelligence might influence mediation, particularly in disputes involving AI itself.

The exercise centered on a simulated international mediation between AI Horizon, a Luxembourg-based company, and Quantum Cognition, a Silicon Valley startup. In the hypothetical scenario, Horizon commissioned Quantum to develop a "large language model" that could handle multiple languages, comply with several legal AI regimes, and ultimately enhance Horizon's international brand presence.

But after the requested model was delivered, Horizon refused to pay an $8 million invoice to Quantum, citing reputational and regulatory risks due to AI "hallucinations." In response, Quantum defended its work, arguing that the issues stemmed from Horizon's cost constraints and the use of open-source data.

The initial positions of both parties were highly polarized, with Horizon demanding $95 million in damages and Quantum refusing liability.

The mediation process highlighted the apparently irreplaceable role of human mediators in handling emotional and cultural complexities. The mediator facilitated private caucuses to uncover deeper interests of both parties—Horizon prioritized reputation and compliance to Chinese cultural norms, while Quantum sought financial fairness and liability limitation.

Over time, strategic interventions, such as reality testing and de-escalation, helped shift the discussion from rigid demands to problem-solving approaches.

AI was also introduced into the mediation, with two different AI tools—Chat and Claude—offering differing predictions throughout the process, ranging from a potential settlement to a likely impasse.

The detailed script of the mediation was fed into two AI platforms ahead of the event, which is described in the accompanying page 84 box—but in small, sequential pieces. This method allowed the AI to generate responses and predictions at each stage without having access to the full storyline or the final outcome.

At the end of the AI-based mediation, Chat concluded that Quantum achieved a better outcome by securing payment, avoiding liability, and offering only a carefully crafted apology, while Horizon took on the greater financial and operational burdens.

Claude reached a similar conclusion, emphasizing that Quantum received full payment with limited liability exposure, while Horizon made more concessions.

The key difference between the two AI perspectives is minimal—both recognized Quantum's stronger position and suggested

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**Giuseppe De Palo is a mediator in JAMS Inc.'s New York office, and the president of the Dialogue Through Conflict Foundation. He co-authors *Alternatives*' Worldly Perspectives column, which will return next month. This article was prepared with the assistance of Batsheva Guez, a Spring 2025 intern at the CPR Institute, which publishes *Alternatives*; she is an LLM student at the Benjamin N. Cardozo School of Law at Yeshiva University in New York.**

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CPR

# CPR News

## Chicago Attorney-Educator Receives CPR's Annual Groton Dispute Prevention Award

Venable partner Kenneth M. Roberts has been presented with the International Institute for Conflict Prevention and Resolution—CPR Institute 2024 James P. Groton Award for Outstanding Leadership in Dispute Prevention.

Roberts received the award at a dinner at the CPR Institute's Annual Meeting in Miami on Feb. 6.

The James P. Groton Award for Outstanding Leadership in Dispute Prevention recognizes a person or organization who has contributed significantly to the development and/or practice of dispute prevention. CPR established the award in the name of Atlanta lawyer James P. Groton, an early pioneer in and advocate for dispute prevention, who was recognized for his lifetime achievements in March 2022.

Roberts is based in Chicago, and chairs Venable's Construction Law Group. He has also sat on and chaired dispute resolution boards involving projects ranging up to $2 billion. He has authored the standard forms for service and commercial contracts used by numerous companies.

He is a longtime teacher and lecturer on ADR, mediation, and dispute review boards at Chicago's Northwestern University Pritzker School of Law. Roberts told the CPR audience in accepting the award that he would be returning to Loyola University Chicago Law School, where he served as a guest lecturer from 2005-2012, to begin teaching a new course on dispute review boards this year.

This month, he takes over as president of the Dispute Resolution Board Foundation, a 29-year-old Charlotte, N.C.-based nonprofit group dedicated to promoting dispute prevention and resolution worldwide using dispute boards.

*Kenneth M. Roberts*

Serena Lee, CPR President and CEO, in statement noted that CPR was "pleased to recognize Ken's many accomplishments in resolving business conflicts before they grow into full-blown disputes," adding, "Because of his efforts, untold numbers of large projects were able to reach completion on time and under budget."

Roberts, in his February acceptance speech after receiving the award from CPR Vice President for Education and Advocacy Ellen Waldman, discussed his dispute resolution and prevention history in his legal practice. He noted that the work grew with ties to a variety of individuals long active in the CPR Institute when Roberts was an associate and later a partner at Chicago's Schiff Hardin, where he worked for more than three decades.

Roberts thanked CPR, and discussed his experiences. He said he worked on a utility client matter that resolved a litigation which had been blocked out for a 10-week trial. The managing partner, recounted Roberts, asked, "Can you do what you did at the end at the front part of a project?

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Alternatives

CPR

*Editor:*
**Russ Bleemer**

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Theory Meets Practice

# The Art of Mediation Representation: Helping Clients Make Good Decisions

BY JOHN LANDE

These days, attorneys regularly represent clients in mediation. Attorneys are not potted plants in this complex process, and they need guidance about how to best serve their clients.

Dwight Golann captured the nature of mediation representation in his book, Sharing A Mediator's Power: Effective Advocacy in Settlement (American Bar Association 2013). He describes how savvy attorneys recognize the potential to "share"–and actually take advantage of–mediators' powers:

> Advocates can use mediation to pursue either competitive or cooperative strategies. An advocate can make an extreme opening offer, for instance, knowing the neutral will work to "scrape the defendant off the ceiling." Or a defendant can ask a mediator to explore creative options, such as repairing a ruptured relationship. Lawyers can also pursue a dual strategy, making money offers while asking the neutral to explore business issues.

Golann highlights numerous techniques for attorneys, including "shaping" the mediation, focusing discussion, exchanging information, addressing emotions, influencing bargaining, implementing cooperative approaches, managing competitive tactics, narrowing legal disagreements, and breaking impasses.

## Attorneys as Quasi-Mediators

Attorneys representing clients in mediation perform two related functions. They counsel clients and represent them in communicating with the mediators and the other side. Attorneys serve as intermediaries, explaining to clients the perspectives of mediators and counterparts while helping clients refine their negotiation strategies. Attorneys also communicate with counterparts and mediators on behalf of their clients.

Thus, they are "quasi-mediators." They tailor their techniques to fit their clients' preferences and to respond to the other side's approach. If the other side acts badly or takes unreasonable positions, these attorneys vigorously advocate their clients' interests. But whenever appropriate, they look for opportunities to cooperate and reach reasonable agreements. John Lande, "How Can You Turn Adversarial Attorneys into Quasi-Mediators?" 43 *Alternatives* 3 (January 2025).

The accompanying page 73 box, "Attorneys' Tasks in Mediation," lists numerous tasks that attorneys often perform before, during, and after mediation sessions. Naturally, attorneys don't perform all these tasks or perform them consistently well in every case

The box summarizes key elements from the Real Practice Systems checklists for attorneys representing clients in mediation. John Lande, "Real Practice Systems Project Menu of Checklists for Attorneys in Mediation" (Sept. 24, 2024) University of Missouri School of Law Legal Studies Research Paper No. 2024-30 (available at https://bit.ly/3Cc00Jq). It parallels the menus for mediators. John Lande "The Real Practice Systems Project: A Menu of Mediation Checklists" 42 *Alternatives* 61 (April 2024).

There is a great deal of overlap between the two sets of checklists. Both focus on analyzing clients' disputes and helping them make decisions, though attorneys perform more of these activities before mediation sessions than mediators do.

Both mediators and attorneys are required to help clients make decisions about disputes and to defer to the clients' decisions about whether to settle and on what terms.

In both roles, practitioners should carefully listen to others. They should try to understand clients' interests, especially intangible interests and possible goals in addition to affecting the amount of lump sum payments. They should pay attention to clients' actual priorities and should not assume that clients' top priority is to maximize their financial outcome.

Both mediators and attorneys sometimes find that it's hard to gain clients' trust, communicate in terms that they can understand, manage their expectations, break bad news, and cope with difficult behaviors. Thus, practitioners in both roles cope with similar challenges and use many of the same techniques, albeit from different perspectives.

The key distinction between the attorney and mediator checklists is in the different ethical obligations that shape each role. This distinction reflects the attorneys' role as client representatives in contrast to mediators, who serve as neutrals assisting all parties.

## Pre-Mediation Session Procedures

Preparation before mediation sessions can make a major difference in mediation processes and outcomes. Empirical research has shown that attorneys and parties often are not well prepared before mediation sessions. John Lande, "The Critical Importance of Pre-Session Preparation in Mediation" (Dec. 19, 2022) University of Missouri School of Law Legal Studies Research Paper No. 2022-15 (available at https://bit.ly/3V4Taf5).

When parties have attorneys, mediations in the United States generally occur after

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## Theory Meets Practice

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parties retain the attorneys. This period gives attorneys and clients the opportunity to prepare effectively together.

Ideally, attorneys and clients explore the client's interests and potential strategies before selecting a mediator. Attorneys should help their clients decide whether to use mediation or another dispute resolution process (if they have a choice), learn information obtained from their counterparts, understand the applicable law, determine how the mediation process would work in their case, identify and prioritize their goals in mediation, anticipate their counterparts' perspectives and tactics, consider the likely outcomes if the parties do not reach agreement, and plan possible mediation strategies.

Although mediators sometimes offer evaluative input during mediation sessions, parties generally need the comprehensive guidance that only their attorneys can provide. This includes assessments of the strengths and weaknesses of their case, predictions of court outcomes, and development of negotiation offers.

Mediators can add value based on their neutral perspective and what they learn in private conversations with the other side, but this is no substitute for good legal advice from clients' attorneys.

Attorneys' counseling of their clients is especially important in helping them become knowledgeable, confident, and assertive so they can make good decisions in their cases.

Clients may find mediation sessions to be very stressful and thus have a hard time making decisions. For one thing, they are in a conflict that they haven't been able to resolve. They are engaged with the other side, which may be represented by a hostile attorney who (they may believe) misrepresents the facts and makes unreasonable demands.

Clients may need to make a series of difficult decisions in a short time during mediation sessions. Moreover, mediation sessions sometimes last well into the evening, and clients may suffer from decision fatigue. They may be concerned about the time and money they have already invested in mediation and the prospect of additional costs in continued litigation. For all these reasons, clients can benefit from careful preparation.

The American Bar Association Section of Dispute Resolution prepared a guide, Preparing for Complex Civil Mediation (2012) (available at https://bit.ly/41P6yXc), which provides useful information about mediation and a list of questions to ask clients.

### Client Delivery

**The process:** Attorneys provide two complementary services, counseling and representation, in communicating with mediators and the other side.

**The purpose:** Counseling helps clients with knowledge, confidence, and assertiveness so that they can make informed decisions in their cases.

**The advocate's role:** Attorneys should help clients understand all perspectives, enlist the mediators' help, and encourage the other side to adjust its positions.

Based on pre-session conversations between attorneys and clients, counterpart attorneys may talk with each other about the mediation process and decide to use particular mediators.

## Techniques During Sessions

Attorneys may be adversarial and/or cooperative during mediation sessions. Some attorneys default to an adversarial approach, using their courtroom habits in mediation. They may act uncooperatively to demonstrate to their clients that they are vigorously advocating for them.

Fortunately, many attorneys are cooperative during mediation sessions, recognizing that this is the best way to advance their clients' interests. They serve as counselors to their clients, not just advocates. They help their clients realistically understand the other side's perspectives, enlist the mediators' help, and encourage the other side to adjust their positions.

Mediators can help both sides communicate more productively with each other than they could do directly. For example, attorneys can use mediators to:

- Explain the other party's perceptions and reasons for their positions.
- Identify information that might change both sides' perspectives.
- Arrange a "hot tub" for opposing parties' experts to talk with each other.
- Look for opportunities to create value.
- Identify stakeholders who might influence the other side.
- Break issues into small pieces that can be negotiated separately.
- Consider "package agreements" combining multiple elements.

Attorneys can focus on the other side's risks and intangible costs, rather than merely trading unpersuasive claims about likely trial outcomes. Through private conversations with the mediator, they can try to induce the other side to make concessions by identifying those risks and costs.

By focusing on all the elements of both parties' bottom lines–not only the expected court outcomes–attorneys and mediators can help parties advance their highest priority interests. John Lande, "What's the Matter with BATNA? It's Misleading and Doesn't Help Advance Parties' Important Interests," 43 *Alternatives* 39 (March 2025).

## Teaching Mediation Representation

Unfortunately, U.S. law schools generally don't prepare students to represent clients in mediation. About 90% of the mediation curriculum focuses on neutral mediation services. Only a tiny proportion of instruction is devoted to teaching students how to represent clients. John Lande, "Law Schools Should Substantially Increase Instruction in Mediation Representation" (Oct. 2, 2024) University of Missouri School of Law Legal Studies Research Paper No. 2024-32 (available at https://bit.ly/3CVktCt).

**Attorneys' Tasks in Mediation**

| Tasks | Actions |
|---|---|
| Evaluate Cases | * Interview clients<br>* Collect information and conduct legal research<br>* Analyze strengths and weaknesses of legal case<br>* Estimate likely court outcome<br>* Begin planning strategy to achieve client's goals |
| Counsel Clients | * Explain mediation process<br>* Review case evaluation with client<br>* Analyze client's tangible and intangible interests<br>* Discuss possible outcomes in mediation and trial |
| Initiate Mediation | * Decision—by court or parties—to mediate<br>* Identify desired mediator characteristics<br>* Coordinate with counterpart to select mediator |
| Prepare for Mediation Session | * Talk with mediator (and possibly other side)<br>* Send mediation memo<br>* Exchange additional information with other side<br>* Describe planned arguments to mediator<br>* Suggest how mediator can help<br>* Identify potential problems in mediation process<br>* Plan technology use |
| Plan Advocacy | * Anticipate interactions in mediation session<br>* Identify information to obtain and disclose<br>* Consider how mediator can help<br>* Consider possible agreements<br>* Consider strategies to achieve client's goals<br>* Plan mediation session with client |
| Use Tactics During Mediation Sessions | * Be cooperative and/or adversarial<br>* Request and/or disclose information<br>* Take positions and respond to other side<br>* Seek mediator's advice and help<br>* Suggest caucuses or joint sessions<br>* Discuss outcome if there is no agreement<br>* Try to reach agreement |
| Follow up with Agreement | * Draft agreement and related documents<br>* Possibly include dispute resolution provision<br>* Monitor implementation of agreement |
| Follow up without Agreement | * Proceed with litigation<br>* Possibly negotiate directly with other side<br>* Possibly resume mediation |

Law professors teaching dispute resolution generally treat neutral and representation perspectives as if they were diametrically opposed. In reality, they are more like two sides of the same coin because practitioners in both roles use many of the same skills trying to promote agreement.

New graduates represent clients in mediation much more frequently than they mediate. Attorneys typically develop substantial mediation practices only after gaining considerable experience representing clients in mediation. So mediation faculty should teach students what to do when their legal clients need their help in mediation.

Law students *desperately* need more training in client counseling, which is a major part of mediation representation. A study of new lawyers found that they generally are "woefully unprepared" to work with clients. John Lande, "Study Finds That Law Schools Fail to Prepare Students to Work with Clients and Negotiate," *Indisputably.org* (Nov. 4, 2020) (available at https://bit.ly/4l3gMMC).

It found that new lawyers often lack the ability to see the "big picture" in client matters. They need more training in three sets of abilities to work effectively with clients, including the abilities to:

- Gain a client's trust, gather relevant facts, and identify the client's goals.
- Communicate regularly with clients, convey information and options in terms that a client can understand, and help the client choose a strategy.
- Manage client expectations, break bad news, and cope with difficult clients.

All of these skills are essential for good representation in mediation.

Faculty teaching mediation don't have to choose between teaching students how to mediate or how to represent clients in mediation. They can incorporate both in a single course. This would enrich students' learning by highlighting the similarities and differences in perspectives and roles of neutrals and representatives. See John Lande, "Model Mediation Course Syllabus with Teaching Notes" (Nov. 6, 2024) University of Missouri School of Law Legal Studies Research Paper No. 2024-36 (available at https://bit.ly/4l4mtKb).

Texts are available to teach mediation representation, which also provide valuable guidance about performing in a neutral role. See box at end, "For Further Reading." The Aspen books are law school textbooks. The books published by the American Bar Association are written for practitioners, though they also are suitable as course texts.

* * *

Representation in mediation remains a neglected stepchild in the mediation field. We generally focus much more on the neutral's role. Obviously, mediators play an invaluable role in handling disputes, especially when parties and attorneys have difficulty negotiating without mediators.

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## Theory Meets Practice

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Attorneys representing clients in mediation can play a critically important role, substantially influencing both process and outcome. Counseling and preparing clients before mediation sessions are very important to help them make good decisions during the sessions.

Too many attorneys are not well trained to represent clients in mediation. Law schools, particularly mediation instructors, should do a better job of preparing students for this important role, which many will undertake soon after graduation. Professional associations should regularly provide continuing education about mediation representation.

## For Further Reading


- Harold I. Abramson, Mediation Representation: Advocating as a Problem-Solver (Aspen Publishing, 3rd ed. 2013).
- Dwight Golann, Sharing A Mediator's Power: Effective Advocacy in Settlement (American Bar Association, 2013).
- Dwight Golann & Jay Folberg, Mediation: The Role of Advocate and Neutral (Aspen Publishing, 4th ed. 2021).
- G. Nicholas Herman, Advocacy in Negotiation and Mediation: A Practical Approach (Aspen Publishing, 2021).
- Michaela Keet, Heather Heavin, & John Lande, Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions (American Bar Association, 2020).
- Bennett G. Picker & Conna Weiner, Commercial Mediation Practice Guide: A Practical Handbook for Lawyers and their Business Clients (American Bar Association, 3rd ed. 2023).
- Spencer M. Punnett, Representing Clients in Mediation (American Bar Association, 2013).
- Jennifer K. Robbennolt & Jean R. Sternlight, Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making (American Bar Association, 2nd ed. 2021).


## Back to School on Dispute Management

# Alliance Contracting: Shared Risks, Shared Opportunities

BY KATE VITASEK

As business environments have grown more complex with greater interdependencies—e.g., outsourcing deals, strategic alliances, and complex public works initiatives—contracting professionals are seeking ways to devise alternative contracting models to better align the parties' interests around the objectives of the contract.

Performance-based agreements, Integrated Project Delivery (IPD), alliance contracting, a Vested sourcing-business model, and public-private partnerships (PPPs) have all emerged as credible alternative contracting models. [The author is Vested's designer; the website explaining the initiative and the model can be found at www.vestedway.com/what-is-vested.]

While each model differs in its approach and effectiveness, all of the models seek to promote collaboration and align interests among trading partners with the goal to shift behaviors to those promoting collaboration and away from actions targeted to maximizing each parties' own short-term benefit.

This month's *Back to School on Dispute Management* column focuses on alliance contracting.

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

## Managers v. Contracting

The first order of business is understanding the difference between simply having an "alliance manager" and "alliance contracting."

There is a trend to create alliance manager roles for strategic partnerships where the stakes are high. Alliance managers work for their company with the goal of providing a leadership role to supporting a partnership's success. Often an alliance manager is dedicated to one (or at the most) a small number of strategic partnerships.

Alliancing contracting–unlike simply having an alliance manager–goes much deeper. It is an alternative delivery model that aims to achieve project goals through collaboration and teamwork. The alliance concept is embedded into the actual contracting approach–and sometimes the actual contract.

The concept of alliance contracting, or simply alliancing, originated in the United Kingdom in the early 1990s to improve the delivery method of complex construction projects such as offshore oil and gas rigs. Alliance contracting also became popular in the Australian construction industry starting in the 1990s, with the Australian government even issuing National Alliance Contracting Guidelines. National Alliance Contracting Guidelines, "Guide to Alliance Contracting,"

Australia Government Dept. of Infrastructure and Regional Development (September 2015) (available at https://bit.ly/3R9dzwZ).

Up to that point, contracting models had become increasingly adversarial—and overwhelmed by claims and disputes—and parties in the construction industry were looking for a different model.

While alliance contracting can be used on any type of contract, it is most often associated with complex construction projects. In an alliance contract in the construction industry, designers, constructors, clients, and suppliers work in an integrated team under an alliance contract using a legal framework consisting of an owner and one or more non-owner participants (NOPs) to deliver capital works projects. These parties operate as a single entity, collectively sharing project risks. They work together in good faith and focus on doing what's best for the project instead of making self-guided decisions.

In this model, concerns or missed targets are *collectively shared*—and not the fault of any individual participant. Jim Ross, "Alliance Contracting: lessons from the Australian experience," (available at https://bit.ly/4kQusu3). Specific risks are not allocated to specific individual participants. Rather, they are shared and owned together.

The mindset for alliance contracting? "Your success is my success, your failure is my failure." Id.

## Contracts, Rethought

Alliance contracting works differently than traditional buyer-seller models, especially in regard to operating in an integrated manner, risk sharing, the relationship between parties, and decision making.

When parties enter into an alliance contract, they focus on common behaviors and common goals—and not independent goals and risk allocation. This is different from most traditional contracting where there is a clear buyer-seller dynamic.

In traditional contracting, the buyer describes its requirements and the seller offers a solution and price. Both parties could win or lose based on outcomes and risks. But given adversarial motives and a "What's in it for me?" mindset, traditional contracting can often turn adversarial, with either side trying to diminish its own risk exposure at the other party's expense.

Alliance contracting, on the other hand, focuses on collective risk sharing between the parties. Risk and opportunity are carried evenly between them. The traditional buyer-seller model is flipped upside down, and in its place is a collaborative partnership guided by shared knowledge and experience. The parties can work together in good faith.

## Guiding Relationships

**The dispute prevention subject:** Alliance contracts.

**The approach:** The contracting parties' interwoven efforts are built into the agreement.

**The potential:** Embedding the integrative efforts can work for any business venture.

The participants are drawn to making "best-for-project" decisions rather than being guided by self-interest. The parties could also enter a "no disputes" commitment which limits their ability to pursue adversarial behaviors such as legal avenues, except in limited circumstances.

Alliance contracting can be a smart contracting option due, in large part, to the collective assumption of risks, best-for-project decision-making, establishing a no-fault-no blame culture, and a joint management structure. See "Guide to Alliance Contracting," above.

Partners can feel more empowered to take risks without a focus on individual blame. Everything in alliance contracting is focused on the collective. And on solutions. And sharing.

## Common Principles

Alliance arrangements have three common principles:

1. All alliances are agreements between two or more separate firms that involve continuing resource contributions from each to create joint value (including technology, staff, customers, brands, capital, and equipment).
2. All alliances are considered to be an "incomplete contract," a phrase from the economics of law that refers to an agreement in which the terms cannot be completely specified and agreed to at the outset.
3. All alliances share joint decision-making to manage the business and share the value.

## Important Steps

After an entity decides to use alliance contracting, there are certain steps that can help to ensure project success:

*1. Selecting the right partners*

The selection of project partners is a crucial, critical phase—a make-or-break moment in the project development process. And it emphasizes not only price, but non-price attributes such as team capability, experience and cultural fit.

*2. Developing the framework*

The commercial framework is *the key mechanism* of an alliance contract. It aligns the owner and NOPs, defines their performance targets and goals. See "Guide to Alliance Contracting" and "Alliance Contracting: lessons from the Australian experience," above.

A generic framework should contain project costs and fees, risk or reward amount, reimbursable costs and other parameters. A Project Alliance Agreement (PAA) sets out the legal terms of the alliance.

*3. Project Implementation*

After the project is agreed upon and a deal is reached, the project delivery phase kicks off, with the alliance operating as an integrated, collaborative team consisting of personnel from all participating organizations.

Key decisions are made by an Alliance Leadership Team—collaboratively and on a best-for-project basis. A major component of the arrangement is effective governance, both internal and external. Risks and rewards are shared, and information is freely and consistently shared between the alliance participants.

*4. Project closeout*

After the project's goals are achieved, the alliance stays in place and the owner and the NOPs attend to any defects until such defects are corrected. At the end of the project, there

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## Dispute Management

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is a reconciliation of actual costs to determine the final financial outcome. The owner can prepare value assessments to gauge whether the alliance has been successful in delivering the project in accordance with the project's stated goals and outcomes.

## Timing and Suitability

Is alliance contracting the right model for you?

A series of threshold issues must be met in order for alliance contracting to be an appropriate option. Id. They include project value and resourcing.

Alliance contracting is typically not appropriate for simpler, lower-cost procurement projects due to high initial start-up costs. Additionally, alliancing requires a substantial contribution of internal resources, including executives, who can help manage the task at hand, represent the entity's interests, and contribute to the parties' collective interests.

Other factors to consider in determining whether alliance contracting is the best option include unclear project risks, the costs associated with transferring risks, an expedited timeline, and the hope that a collective approach will produce a better project outcome. Id.

As the Australian government noted in its alliance contracting guidelines,

> For some projects, the Owner's risk profile may be greater than a designer/contractor would normally accept under a traditional contract. For example, the project may be particularly unique or rare, which means that certain risks may be unknown and stakeholder management becomes more complex. Under these circumstances, the Owner would have to pay a premium to transfer certain risks to the designer/contractor under a traditional contract. Therefore, an Owner may find it attractive to undertake to deliver such projects through alternative delivery models such as managing contractor, early contractor involvement, and alliance contracts.

Id at 42.

## Structure and Mechanics

Once parties have identified and chosen each other through the partner assessment process noted in No. 2 above, they need to focus on the business relationship's structure and mechanics. Paramount among their concerns from a dispute prevention standpoint will be selecting a business relationship model that aligns the economic interests of the business partners and promotes a collaborative approach to conducting the business.

The structure contracting parties use as the foundation for their relationship plays a significant role in helping the parties manage their interaction and any resulting conflicts. Research shows that relying on market dynamics and traditional transactional contracts is inadequate for more complex relationships (e.g., outsourcing agreements, franchise agreements, distribution agreements), where the parties are interdependent and confront high switching costs.

This is because traditional transactional contracts provide very little in the way of mitigating structural or other kinds of conflicts, as they generally proceed from one party seeking to maximize its interest at the expense of the other.

As business environments have grown more complex with greater interdependencies (e.g., outsourcing deals, strategic alliances, and complex public works initiatives), contracting professionals have devised alternative contracting models to better align the parties' interests around contracts' objectives.

Alternative contracting models like alliance contracting often use a shared risk and incentive pool to align interests. Others also require contracting parties to waive or limit claims against each other while allowing only certain claims, like claims for intellectual property violations or willful default, to be preserved.

In so doing, these alternative contracting models help reduce disputes. Case in point is research on large urban infrastructure projects using a particular type of alternative contracting model, called an IPD (Integrated Project Delivery) model. The research shows a correlation with reduced disputes due to improved organization and leadership, and strengthened planning aimed at managing and mitigating risk.

## Case Study

The following presents an alliance contracting case study, on the Hamer Hall Redevelopment. This account relies on excerpts from the report; the full case study write-up is available at https://bit.ly/4iLepfe.

Hamer Hall had seen better days. The concert hall, home of the Melbourne Symphony Orchestra, was opened in 1980 but faced wear and tear over the ensuing decades.

As one study of the project noted, "The interiors were worn and dated, the patron access and circulation was poor, the toilet amenities were insufficient and the acoustics in the Auditorium was not at a sufficient standard for the stature of such a venue. The theatre technology also needed significant updating as did the comfort levels of the patrons." Id.

The building, with its eight distinct levels and avocado-like shape, would require significant renovations, and the state government originally assigned $128.5 million. But how best to go about the renovation process, especially as risks and challenges and costs piled up—and the potential for long delays?

A project alliance was formed between a series of entities: Arts Victoria (the client), Arts Centre Melbourne (client/proprietor), Major Projects Victoria (client project manager), Baulderstone (builder), and Ashton Raggatt McDougal (architects).

To kick off the alliance, the parties established a Project Alliance Agreement, or PAA, that committed to a collaborative "best for project" approach to ensure that decisions were made collectively, and that opportunities and risks were shared between the parties. Id.

The PAA established not only project and team responsibilities, but how the alliance would achieve the objectives, or Key Result Areas (KRAs). Many of the objectives happened to be outcome-related, such as architectural quality and world-class acoustics.

Given that this was a concert hall, the project goals weren't just about making the hall look nicer again, but creating a space that exceeded performers' and conductors' expectations. The alliance partners pursued this goal, in part by installing fold-away brass reflector panels above the stage, replacing fixed plastic sound domes.

"The design of the reflector panels are ingenious as they are like a series of large 'gull-wings' that can be raised up and down on

computerised winches and fold away to create different acoustic effects in the auditorium," Baulderstone, the builder, wrote in a study about the project.

The seats were even tested for their acoustic and listening properties, and an acoustic spray was introduced to the auditorium's concrete wall elements. The project addressed the building's foyers, circulation and other critical upgrades.

The alliance aimed to improve the building's ecological sustainability—something that would fully reveal itself in the months and years after the project was completed.

Timing was a big focus—and the alliance partners focused on meeting their contractual reopening goal, even amid weather uncertainties, design issues, and extra funding needs.

Teamwork was needed throughout, especially when a problem was recognized only two months ahead of opening date. An existing large, suspended concrete slab was found to be too high, and "couldn't provide the correct falls for water shedding and disabled access," the report said. Id.

"There were functional battery rooms below and the removal and recasting would have meant a two-month delay to the opening. A solution to mill the concrete and epoxy additional tension bars eliminated the delay and minimised cost exposure," Baulderstone wrote.

In the end, Hamer Hall was completed on time, two years after it had begun, in July 2012. A four-day opening celebration—including a gala opening event with KD Lang—attracted 50,000 people. Id.

* * *

Organizations such as the Victoria government, which funded the Hamer Hall renovation, are proving that alliancing has the power to bring together different parties and help them get on the same page.

While the Victoria government did not track the impact on dispute prevention quantitively, it is reasonable to suggest that happy clients and happy contractors lead to fewer disputes. The official response from the Office of the Victorian Government Architect stated: "As a test case for alliance, [the Hamer Hall Redevelopment project] delivered value-for-money and exceptional outcomes."

## The Master Mediator

# Mediation as an Equitable Process: Impartiality & Neutrality

BY ROBERT A. CREO

*In the first part of this article—Robert Creo, "Due Process in Mediation: Equity and Fairness," 43* Alternatives *17 (February 2025) (available on Westlaw)—the* Master Mediator *columnist noted that human nature and just systems of jurisprudence are both hard-wired for fairness and equity. The article emphasized that 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. This second part discusses the long-running tensions between evaluative and facilitative mediation, and mediator style.*

* * *

Impartial—unable to perceive any promise of personal advantage from espousing either side of a controversy.

*— U.S. writer/journalist Ambrose Bierce*

* * *

I'll begin with a disclaimer: My views are formed, and primarily applicable to commercial, tort and other civil litigation where all parties are represented by counsel.

So: Around 2007, the International Academy of Mediators (at https://iamed.org) recruited experienced mediators to form a professional community focused on enhancing mediation theory and skills.

In a presentation on the topic of mediator impartiality, I commented that from the

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***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.robert-creo.com. He can be reached at racreo@gmail.com.**

### The Theme

*Master Mediator* columnist Robert A. Creo is revisiting and reconsidering fundamental assumptions and practices of mediation and mediators. 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.

## The Master Mediator

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moment of first contact with any participant, the mediator is continually assessing, evaluating, and forming theories, opinions, and strategies to implement action to resolve the conflict.

John Leo Wagner, a San Juan Capistrano, Calif., mediator attending his first IAM meeting, said afterwards that he was pleased to hear that perspective rather than platitudes about neutrality and impartiality. He said he believed the profession's dirty little secret was the myth that impartiality and neutrality dictated never formulating an opinion or acting based upon your own evaluation of the facts, law, personalities and other dynamics.

## Mediation Mythology

There is a false duality between facilitative and evaluative mediation tools, which continues to confound the profession by promoting a disjunctive—rather than conjunctive—orthodoxy in the literature and, unfortunately, the professional ethical codes.

A recent illustration of this dichotomy is found on Harvard's Program on Negotiation blog. It states:

> *Facilitative Mediation*
> In facilitative mediation or traditional mediation, a professional mediator attempts to facilitate negotiation between the parties in conflict. Rather than making recommendations or imposing a decision, the mediator encourages disputants to reach their own voluntary solution by exploring each other's deeper interests. In facilitative mediation, mediators tend to keep their own views regarding the conflict hidden.
>
> …
>
> *Evaluative Mediation*
> Standing in direct contrast to facilitative mediation is evaluative mediation, a type of mediation in which mediators are more likely to make recommendations and suggestions and to express opinions. Instead of focusing primarily on the underlying interests of the parties involved, evaluative mediators may be more likely to help parties assess the legal merits of their arguments and make fairness determinations. Evaluative mediation is most often used in court-mandated mediation, and evaluative mediators are often attorneys who have legal expertise in the area of the dispute.

Katie Shonk, "Types of Mediation: Choose the Type Best Suited to Your Conflict," Harvard Law School Program on Negotiation, *Daily Blog*, (Feb. 6) (available at https://bit.ly/4j5iX02).

## The Scope of Impartiality & Neutrality

**The mandate:** Heralding mediation as an alternative and equitable process.

**The reality:** Evaluation is inherent and implicit during mediation.

**The evolution:** Grasping the implications of the erosion of a pure facilitation concept in mediating civil litigation.

The reality is that experienced mediators use both facilitative and evaluative styles and tools during any session or interaction. My contention over the years has been that mediators operate along a passive-active spectrum using mediator sense to determine what to do next, mostly involving what questions to ask and how to optimize interaction with the participants to build trust and rapport.

As articulated by Northwestern University Pritzker School of Law Prof. Len Riskin, these may be characterized as being facilitative, "elicitative," directive, or evaluative. The status of mediation inherently involved implicit assessment and evaluation of what is occurring with the participants to determine what is going to be said or done next. This involves both macro and micro goals and deliberate courses of conduct. See, e.g., Robert A. Creo, "Fair and Balanced Is in the Eyes Of the Mediation Parties. Not Yours." 39 *Alternatives* 48 (March 2021), and Robert A. Creo, "A Brief Stroll on the Roundabout of Authenticity, Confidentiality & Impartiality," 34 *Alternatives* 57 (April 2016) (both articles are available on Westlaw).

## Mediator Ethics

The Model Standards of Conduct for Mediators (2005) (available at https://bit.ly/3av1L4l), promulgated by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution, address impartiality. Standard II states:

> A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
> B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
>  1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
>  2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
>  3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

These standards are subject to modification by state law or court mediation procedures.

Some states elaborate on the impartiality, for example, the Florida Mediator Ethical Standards: Rules for Certified and Court-Appointed Mediators (Jan. 1, 2025) (available at https://bit.ly/4iGffu1) Rule 10.330, which states

> (a) **Generally.** A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual. …

Two 2021 *Alternatives* articles provide a detailed treatment on addressing the impartiality and neutrality codes in several states. In addition to the obvious prohibition of the mediator having a financial, personal stake or other direct conflict of interest, these state codes, official comments, and formal opinions, focus on two restrictions.

The first is a distinction between providing legal information which is acceptable and the prohibition of rendering legal advice. Second, the codes conclude that mediators overstep bounds by engaging in coercive tactics involving undue pressure on the parties. See John M. Barkett, "A Mediator's Dilemma: Evaluating Without Compromising Self-Determination or Impartiality," 39 *Alternatives* 17 (February 2021), and John M. Barkett, "A Florida Focus on a Key Practice Issue: Mediator Evaluation that Preserves Self-Determination and Impartiality," 39 *Alternatives* 43 (March 2021).

## The Essence

Providing feedback and an objective analysis of a position with the consent of the recipient counsel and client is the essence of self-determination.

There is a medical facility where I mediated numerous malpractice cases over the years with the same law firms and risk managers. One case involved a physician who would not consent to settle despite the advice of his counsel. He had gone to trial successfully to defend a prior claim, so was confident of prevailing in this dissimilar claim.

After many hours with him in caucus, my assessment was that the jury would not buy his story and could find him untrustworthy and dislike him. His lawyers asked if I wanted to take a break with them in the snack bar without their client present.

Being hit over the head with this clear signal, I expressed my own views of the sympathy for the plaintiffs, the clear breach of protocols by the physician and how the jury might react. I interpreted their silence as acquiescence and avoidance of undercutting their client to zealously advance his directives.

In short, we agreed that I would express these concerns to the physician directly in a caucus attended by his lead lawyer. After my unreviewed presentation, the physician looked at his counsel to ask her if she disagreed with any of my narrative. Counsel simply said, "I do not disagree with the impartial mediator." The case quickly settled with the physician privately thanking me, after the term sheet was signed, for my candor.

> By its core dynamics, none of this can be purely facilitative or neutral or nothing much would be accomplished.

Evaluation is not synonymous with coercion. I espouse the view that parties represented by counsel may decide to use a mediator to expressly evaluate various elements of the litigated case consistent with the ethical obligations of impartiality and neutrality. My confidence in the ability of counsel for the parties to resist undue pressure or other intimidating tactics in a voluntary process, or mandated court mediation where no substantive reports are generated to the court, is extremely high. The popularity of former judges as mediators is a testament to the marketplace seeking the value-added of experienced jurists.

## Inherent and Implicit

Reframing and generating options are evaluative functions. The process of choosing words which the mediator believes will identify interests or otherwise be productive requires reflection and a conscious decision-making process.

Mediators formulate, and reformulate, macro and micro strategies and goals throughout the course of the day. A mediator would add little value to negotiations if the role was limited to ferrying communication between the parties.

Mediators reframe statements made by the parties with the best practice to obtain consent of the participant on how the communication will be delivered to the recipient. Effective mediators are not robots repeating verbatim messages in a monotone.

Mediators continually make procedural choices, such as:

- When and where to caucus or to not caucus.
- Sidebars with counsel only.
- Ordering of questions.
- Choosing what participants to ask which questions.
- When to talk or remain silent.
- Small talking to build rapport or trust.

All of these choices are deliberate and arise from mediator sense developed by experience. This is an evolution based upon each and every experience as a mediator, plus continued education and study of conflict resolution processes. By its core dynamics, none of this can be purely facilitative or neutral or nothing much would be accomplished.

My views, framed as core mediator values, have not changed much over the past few decades, and are well-documented in these *Master Mediator* columns, available currently on Westlaw. From another article I wrote for a 2004 Penn State law review:

> As a mediator, my impartiality is constant in that I have not come to direct the parties to any preconceived or assigned outcomes. I am open, but not attached to, any specific outcome, including an impasse. I am not, however, neutral as to the process or my assessment of agendas, ethics, and values of the participants, arguments and positions advanced by counsel, or a host of other dynamics present in any mediation. I attempt to be fully aware of all of these, process them accurately, and respond with a "macro" strategy or goal and a series of "micro" actions or moves to test, revise, and implement my hypothesis. I doubt that any successful mediator accepts what is offered by the participants in a purely impartial manner, which gives equal balance and respect to every idea and voice. Successful mediators are adept at ferrying out the falsehoods, the extreme positions, the impure agendas, and other challenges to traditional concepts of impartiality. Mediators negotiate process

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## The Master Mediator

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and substance with the participants. As a mediator, I am non-partisan and neutral in that I have no financial or direct stake in the dispute.

Robert A. Creo, "Mediation 2004: The Art and the Artist," 108 *Penn State L. Rev.* 1017, 1044 (2004) (available at https://bit.ly/40lN5xV).

Mediators assess, analyze, and decide—i.e., evaluate—many of the following on a continual basis during the process.

- Expectations of the parties, including what causes them to shift.
- What to say and do to build trust, value of small talk.
- Structure of session; joint sessions, caucus, and sidebars.
- Emotions of individuals.
- Risk tolerances of both counsel and participants.
- Identity issues; how do they answer the query, "Who Am I?"
- Participant values, morality, spiritual and religious beliefs if they may affect choice.
- Empowerment of voice, recognition, and venting.
- Magnitude of aggrievement; feeling of victimization.
- Credibility of the story, and individuals, especially in response to difficult questions, including how they may be perceived in court or arbitration.
- Cognitive and decision-making processes of the team and participants, including the most respected decider on team.
- Pacing and timing.
- Staging, environment and physical space, including refreshments and breaks.
- Reaction, including body language, to the questions I ask and language used by me and the other participants.

Although many of the above may appropriately be categorized as procedural due process, regardless of the frame, mediators as noted are continuously evaluating on both macro and micro levels.

Mediating with understanding and compassion of the participants' interests stems from the human predilection to act in a fundamentally fair manner. The equitable grounding guides a mediator's choice of the moment to act in a facilitative, elucidative, directive or evaluative manner. Although mediators may have one core orientation, generally all four of these styles come into play during the sessions.

There have been many voices over the years acknowledging the central role of evaluative processes in mediation that do not impinge on a narrower, more accurate perspective on the scope of impartiality and neutrality, which includes evaluation and the neutral providing opinions or direction to participants.

One example in the literature is from a 2012 article contending that mediators should employ approaches that are more directional and evaluative, rather than purely facilitative. In support of its conclusions, the article relies on three surveys and interviews with end users of mediation. Kenneth F. Dunham, "Practical Considerations in Mediation Training: Should Mediators be Trained to Adapt to the Circumstances of Each Case?" 11 *Appalachian J.L.*185 (2012) (excerpt at https://bit.ly/4ce64yO).

There are, of course, other views. For example, Fordham University School of Law Prof. Jacqueline Nolan-Haley describes three dimensions of legal mediation's advance toward the arbitration zone: the aggressive behaviors of lawyers as mediation advocates, operating in a weak ethical regime that permits some forms of deception; the practice of mediation evaluation; and the use of hybrid processes blending mediation with arbitration. See Jacqueline Nolan-Haley, Mediation: The 'New Arbitration,'" 17 *Harvard Negotiation Law Rev.* 61 (Spring 2012) (available at https://bit.ly/3XCk13s).

In a prior 2004 article, however, Nolan-Haley examined Roscoe Pound's concerns with the decline of equity jurisprudence in the U.S. legal system, analyzing court-connected mediation with a particular emphasis on the historic parallels between equity and mediation. The article asserted that both equity and mediation offer a form of "individualized justice" unavailable in the official legal system, allowing room for mercy in an otherwise rigid, rule-bound justice system.

She argued that if court-connected mediation is to offer alternatives to traditional justice, it must return to its complementary, and mostly alternative, role to litigation and adjudication. See Jacqueline Nolan-Haley, "The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound," 6 *Cardozo J. Conflict Resol.* 57 (2004-2005) (available at https://bit.ly/4iNdwTZ).

* * *

Traditional and common notions of impartiality and neutrality should not restrict mediators acting to ensure both procedural due process and applying equity doctrines to guide parties to acceptable outcomes.

Participants are likely to reject inequitable settlements which are fundamentally unfair to their own interests. Mediators impartiality and neutrality are best served by being agnostic on whether a case settles in mediation. An informed consent on when and how to use directive or evaluative tools honors the core mediation value of party self-determination.

* * *

*The next* Master Mediator *column continues with the focus on how mediators use not just procedural due process but substantive equitable considerations to bring the parties to an acceptable resolution. Specifically, the next column, the third in this installment, will look at the role of evaluative and directive approaches on breaking impasse and substantive mediation equity and fairness. Stories and commentary from experienced mediators and academia will conclude the series in the fourth installment.*

### Additional Resources

- Kenneth F. Dunham, "Is Mediation the New Equity?" 31 American Journal of Trial Advocacy, No. 1 87 (2007).
- Bernard S. Mayer, Beyond Neutrality: Confronting the Crisis in Conflict Resolution (Jossey Bass 2004).
- Leonard L. Riskin, Mediator Orientations, Strategies and Techniques, 12 *Alternatives* 111 (September 1994).
- 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).

International ADR / Part 1

# The Enforcement of Investor-State Arbitration Awards In China: Challenges and Developments

BY YONG ZHANG

The enforcement of investor-state arbitration awards is a critical component of arbitration, representing its ultimate goal. This process, however, often faces challenges due to sovereign immunity.

With the enactment of the Law of the People's Republic of China on Foreign State Immunity, or FSIL, on Sept. 1, 2023, China has made a significant shift from the doctrine of absolute immunity to limited immunity.

This law, which took effect on Jan. 1, 2024, is China's first specialized legislation addressing the sovereign immunity of foreign states. This article aims to analyze the enforcement of investment arbitration awards in China from two perspectives, shaped by the FSIL.

In this month's Part 1, the focus is on an overview of enforcement against foreign states. Part 2 in the June *Alternatives* will continue with specifics on recognizing and enforcing arbitral awards against foreign states in Hong Kong and China, and conclude with enforcement against the Chinese government within China.

First, on enforcing investor-state arbitration awards against foreign states in China, some background is required. Before the recent FISL law, there was a doctrine of absolute immunity. Historically, China adhered to the doctrine of absolute immunity, wherein foreign states were exempt from being sued in Chinese courts or having their assets executed against without explicit consent.

This position was reinforced in national legal explanations—legislative interpretations of the law—such as the Explanation on the Draft Interpretation by the Standing Committee of the National People's Congress Concerning Article 13(1) and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

The explanation was authored by the Legislative Affairs Commission of the Standing Committee of the National People's Congress. It states that China adheres to the principle of state immunity, maintaining that courts shall not exercise jurisdiction over foreign states or their properties. This practice is widely recognized by the international community as China's stance on absolute immunity.

This position, however, conflicted with certain treaty obligations. For instance, under Article 54 (1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." (Available at https://bit.ly/3BIhVaz.)

China's adherence to absolute immunity meant that courts were required to refuse enforcement of ICSID awards against foreign states, violating the Convention's mandate to "recognize and enforce" awards. Until now, no investment arbitration award against a foreign state has been enforced in Mainland China, leaving uncertainty about whether China prioritizes its absolute immunity doctrine or fulfills its ICSID obligations in pre-FSIL Era.

## Post-FSIL Transition

With the FSIL law, there has been a transition to limited immunity. The FSIL introduces significant changes, particularly in jurisdictional and execution immunity, establishing a framework for enforcing investor-state arbitration awards in China.

FSIL Article 12 explicitly waives jurisdictional immunity for foreign states that agree to arbitration in investment disputes through international treaties or written agreements. This includes matters related to:

1. The validity of arbitration agreements,
2. Recognition and enforcement of arbitral awards, and
3. Annulment of arbitral awards.

For enforcing non-ICSID arbitration awards in China, parties can seek both recognition and enforcement in China, and challenge the validity or request the setting aside of the award, depending on the seat of arbitration.

## Awards Rendered Outside China

According to Article 304 of Civil Procedure Law of the People's Republic of China (2023 Amendment), or CPL, an arbitral award rendered outside the territory of China and possessing legal effect requires recognition and enforcement by Chinese courts under the following procedures:

> Parties may directly apply to the intermediate people's court in the location of the respondent's domicile or the location of their property. If the respondent's domicile or property is not within the territory of the People's Republic of China, the party may apply to the intermediate people's court located at the applicant's domicile or a place appropriately connected to the dispute. The people's court shall handle such matters in accordance with the international treaties concluded or acceded to by the People's Republic of China or based on the principle of reciprocity.

Despite the procedural framework, challenges persist in the recognition and enforcement of certain arbitral awards, particularly in the context of investor-state arbitration, due

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## International ADR

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to limitations within China's application of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, best known as the New York Convention.

China became a party to the Convention in 1986 with a "commercial reservation." Article 2 of the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China states that China applies the Convention only to disputes arising from contractual and non-contractual commercial legal relations under Chinese law and this does not include disputes between foreign investors and host governments. See, e.g., 1958 New York Convention Guide (available at https://bit.ly/4a5Ml2U).

This reservation explicitly excludes investor-state arbitration awards from the scope of the New York Convention. As a result, the Convention's typical grounds for refusal—such as incapacity of the parties, procedural irregularities, or violations of public policy—do not apply to investor-state arbitral awards in China.

Given the New York Convention's inapplicability, Chinese courts may adopt alternative approaches to establish grounds for reviewing and potentially refusing recognition and enforcement of investor-state arbitral awards:

> (1) *Application of Domestic Standards.* CPL Article 270 provides that in the absence of specific rules for foreign-related civil actions, general domestic provisions apply. This allows courts to invoke CPL Article 248, which governs refusal of enforcement for domestic arbitral awards. Grounds for refusal include: *a. Lack of an arbitration agreement*: The parties did not agree to arbitrate through an arbitration clause or subsequent written agreement; *b. Exceeding arbitral jurisdiction:* The award addresses matters beyond the scope of the arbitration agreement; *c. Procedural irregularities:* The composition of the arbitral tribunal or the arbitration process violates statutory procedures; *d. Reliance on falsified evidence:* The award is based on fraudulent or fabricated evidence; *e. Concealment of material evidence*: A party concealed evidence critical to the award's fairness; *f. Arbitrator misconduct:* Evidence of arbitrators' corruption, favoritism, or malfeasance; *g. Public policy violations:* Enforcement of the award would contravene the fundamental principles of public order in China.

The rationale behind this approach is rooted in the principle of territorial jurisdiction. Enforcement of an arbitral award is intrinsically tied to the attachment and execution of property located within the forum state. This grants the forum court and state the greatest interest in ensuring the enforcement process aligns with its domestic legal framework.

### Immunity in Transition

**The law:** Effective last year, the People's Republic of China Law on Foreign State Immunity is in development.

**The movement:** A traditional the-state-is-immune approach is giving way to limited immunity.

**The current status:** There's a framework for grounds for arbitration award confirmations in China. No foreign investor-state award confirmations yet. Soon? Part 2 next month addresses enforcement against the Chinese government within China.

Consequently, the forum court holds the right to apply its domestic standards for the recognition and enforcement of investor-state arbitral awards to safeguard its jurisdictional sovereignty and legal order.

> (2) *Application of the Reciprocity Doctrine.* Chinese courts may also rely on the principle of reciprocity when reviewing arbitral awards under CPL Article 304. Under this approach: a. *Seat of Arbitration:* Chinese courts may adopt the standards used in the jurisdiction where the arbitration was seated. This ensures consistency and mutual respect between jurisdictions; b. *Nationality of Investor:* Courts may consider how the investor's home country treats awards involving Chinese parties. If the investor's home country imposes stricter or more lenient standards on awards involving Chinese entities, Chinese courts could adopt a similar stance for reciprocity.

The application of domestic standards or the reciprocity doctrine by Chinese courts remains a matter of judicial discretion. These approaches, however, offer flexibility in the absence of clear international treaty obligations. They also reflect a balanced effort to align domestic practices with global arbitration norms while preserving national legal sovereignty.

### Awards Rendered In China

If a non-ICSID arbitration is seated in China, the competent Chinese court has the authority to review the arbitration agreement's validity and potentially set aside the award. But this raises several questions, particularly regarding the applicable standards.

As discussed above, the New York Convention is inapplicable to investment arbitral awards in China. In addition, according to Article 2 of the Arbitration Law of the People's Republic of China, it applies only to disputes between equal parties, which suggests that the standards for determining the validity of the agreement or the grounds for setting aside an award under the Arbitration Law may not be directly applicable. As a result, the specific standard that should be used to assess the validity of such agreements or to set aside the award remains uncertain.

### Enforcing ICSID Arbitral Awards

Regarding China enforcement of ICSID arbitration awards, ICSID Convention Article 54(1) (linked above) states:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment

> of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

This means that Chinese courts are obligated to enforce the pecuniary obligations imposed by the ICSID award, treating it as a final judgment of a domestic court. Importantly, under the ICSID arbitration mechanism, Chinese courts do not have the authority to review the validity of the arbitration agreement or annul the award.

But the interpretation of the phrase "as if it were a final judgment of a court in that state" has been the subject of debate.

In China, a final judgment can be subject to judicial review under the Civil Procedure Act. This raises the question of whether Chinese courts have the power to review or annul ICSID awards. In the author's view, the legislature's use of the term "final judgment" is intended to underscore the binding and final nature of the ICSID award, rather than to imply that domestic judicial remedies are available for the award, as they would be for a typical domestic judgment.

Additionally, ICSID Convention Article 53(1) explicitly states that "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." This further reinforces the principle that ICSID awards cannot be reviewed or appealed by domestic courts.

## Execution Immunity

As discussed previously, Chinese courts have the jurisdiction for recognition and enforcement of investor-state arbitral awards. When it comes to executing foreign state assets, however, investor-creditors may face significant barriers due to the concept of execution immunity.

This refers to the inability of the court to attach a foreign state's property unless specific conditions outlined in the law are met. Despite ICSID Convention Article 53(1), which emphasizes the recognition and enforcement of awards, Article 54(3) stipulates, "Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought." As a result, both ICSID and non-ICSID investment arbitral awards are subject to the domestic laws of the enforcing state, including any execution immunity provisions in effect.

First, under the Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures (available at https://bit.ly/4fL4mos), China grants immunity from judicial compulsory measures of preservation and execution to the properties of foreign central banks.

This immunity can only be waived if the foreign central banks or their governments expressly abandon it in writing or if the properties are specifically allocated for preservation and execution. The properties of a central bank that are protected under this law include cash, bills, bank deposits, securities, foreign exchange reserves, gold reserves, real estate, and other properties.

Second, FSIL Article 14 allows for the execution of a foreign state's assets in three specific circumstances: (1) the foreign state expressly waives immunity from judicial measures of constraint by an international treaty or written agreement submitted to the court; (2) the foreign state allocates or earmarks property specifically for the enforcement of the measures of constraint; (3) judicial measures of constraint are taken against the property of the foreign state located within China, if it is used for commercial activities and is related to the proceeding. FSIL Article 15 lists specific types of property that cannot be deemed as commercial property, thus limiting execution options.

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It is clear from the above provisions that enforcing an investment award in China could still face substantial challenges.

First, as for Article 14 (1), express waivers of immunity from judicial measure of constraints are rarely encountered in practice.

Second, regarding Article 14 (2), it can be difficult for the foreign state to allocate or earmark property for the enforcement of measures of constraint, especially when it is unwilling to voluntarily satisfy the pecuniary obligation under the award.

Third, Article 14(3) does not apply to the enforcement of investment awards for two reasons. For one thing, this section is primarily intended to enforce judgments or rulings from courts rather than arbitration awards.

For another, even if an ICSID investment award is considered analogous to a judgment under ICSID Convention Article 54(1), the property must be directly related to the proceedings. Since investment disputes typically involve issues occurring within the host state, that host state's property located in China is unlikely to be relevant to the dispute.

Consequently, the enforcement of investment awards in China remains highly challenging.

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*In Part 2 next month: enforcing investor-state arbitration awards against the Chinese government in China.*

## ADR Technology

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ways the mediator and parties could have improved their approach. Hence, both AI systems aligned in predicting a creative resolution involving financial contributions, technical improvements, and reputational safeguards.

On the other hand, in the human-conducted mediation, a key turning point emerged when the mediator proposed an insurance solution to cover reputational risks, allowing Horizon to protect its brand without forcing Quantum into full liability.

Additionally, Quantum agreed to a carefully framed apology while Horizon financed retraining efforts. The final settlement struck a balance—Horizon secured reputational protection, Quantum avoided excessive financial burdens, and both avoided costly arbitration.

This experimental exercise underscored that while AI could assist in mediation by rapidly analyzing legal and technical data, providing a systematic approach to exploring settlement options, predicting, assessing positions, and even proposing logical steps, human mediators excel

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in emotional intelligence, handling non-verbal cues and emotional outbursts effectively, cultural sensitivity, and creative problem-solving.

The scenario showed that AI alone struggles with capturing subtle human emotions and cultural nuances, which are crucial in mediation. Additionally, it often misses reputational and relational subtext, both of which are critical to achieving a lasting and mutually acceptable settlement.

The future likely lies in a hybrid model where AI enhances mediation, but human expertise remains indispensable for fostering trust and crafting innovative resolutions.

## I. Pieces of advice for mediator

This insightful experience has led to a set of key takeaways for human mediators—practical recommendations that could enhance their ability to guide parties toward more effective and mutually beneficial resolutions.

The mediation process could have been more effective had the mediator addressed emotional underpinnings sooner. By acknowledging and exploring the underlying frustrations, cultural sensitivities, and reputational fears at the outset, the mediator might have diffused tension and built trust between the parties before their positions hardened.

Additionally, had the mediator reality-tested earlier the claims and clarified the technical limitations of AI performance standards, it might have prompted both sides to move beyond posturing and engage in meaningful negotiations, rather than having unrealistic expectations.

Another crucial enhancement to the mediator's role would have been to emphasize shared interests from the start rather than allowing the conversation to be dominated by conflicting positions.

## Modeling Settlement

**The inquiry:** Investigating how artificial intelligence might enhance mediation processes and results.

**The methodology:** A panel discussed what happened after mediation facts were gradually put into two AI tools to see what they would produce.

**The results:** The humans would have resolved the case with an insurance proposal. The bots, however, each produced a different and perhaps results-boosting add-on. A blend is the best bet.

Indeed, the mediator could have guided the initial discussions toward common objectives—such as developing a viable AI solution, mitigating reputational risks, and avoiding protracted litigation—to foster a more collaborative tone between the parties.

Furthermore, by introducing creative solutions, like specialized insurance, culturally sensitive apologies or even structured retraining programs at an earlier stage, the mediator could have expedited the negotiation process.

If these ideas had been explored in the initial private caucuses, both parties might have been more open to flexible settlement options sooner.

Finally, the mediator could have minimized flare-ups had he managed the procedural steps with a more strategic approach by conducting a brief private meeting to acknowledge emotional triggers or address unrealistic demands before returning to joint discussions.

## II. Strategic negotiation advice for better outcomes

To improve their negotiation outcomes, both Horizon and Quantum could have implemented more strategic approaches throughout the process.

Primarily, Horizon could have leveraged the regulatory risk to strengthen its position by emphasizing the shared risk with Quantum, given that their products operate in the European Union and China. By highlighting that both Horizon and Quantum's products are subject to scrutiny by regulatory authorities, Horizon could have encouraged Quantum to take on more responsibility for retraining costs or performance standards. This would have made Quantum more inclined to cooperate in addressing Horizon's concerns.

Additionally, Horizon could have deferred its financial commitments until after seeing measurable results. Insisting on a performance-based payment structure would have allowed Horizon to tie payments for retraining and data hosting to specific milestones, such as improvements in the large language model's stability. This approach would have minimized Horizon's financial exposure, ensuring that payments were only made for tangible progress.

Finally, Horizon could have pursued a longer-term partnership instead of simply covering retraining and hosting costs. For instance, by negotiating discounted rates or securing a future support contract, Horizon could have guaranteed continued technical improvements while establishing a mutually beneficial relationship. This approach would have provided better financial terms and ensured continued collaboration with Quantum.

As for Quantum, while it successfully avoided liability and additional financial

## More Credits

This article builds on a simulation originally produced for a Dec. 11, 2024, event held at JAMS in New York, "AI's Double-Edged Role in Dispute Resolution: When the Machine Tries to Solve the Dispute It Created," as well as a blog post describing the proceedings published on the JAMS blog by author Giuseppe De Palo. The blog post is available at https://bit.ly/44cmaGS. Neutrals participating in the live simulation and discussion included Steven M. Bauer, James C. Francis IV, Christine Kang, Victoria Pochtar, and Michael D. Young, whose biographies can be found linked at the event page, here: https://bit.ly/4i0R48B. Another participant, David S. Bloch, a shareholder in the San Francisco office of Greenberg Traurig, co-authored the script for the mediation simulation and co-presented on how artificial intelligence would have mediated the case, as described in the accompanying article.

burdens, it could have improved its position by adopting several strategies.

First, Quantum could have addressed Horizon's reputational concerns earlier. By proposing tailored solutions like retraining or issuing a statement of empathy, Quantum could have demonstrated good faith and avoided the need for an apology as a settlement condition. Acknowledging the challenges Horizon faced due to AI hallucinations and offering proactive support for retraining would have fostered trust and collaboration.

Second, introducing insurance coverage earlier could have been advantageous for Quantum. By proposing shared insurance options, Quantum could have shown a willingness to share the risk of reputational damage, which might have softened Horizon's stance on demanding guarantees. This would have made Horizon more open to accepting some risk without fully assigning liability.

Quantum could have used this opportunity to renegotiate hosting fees due to rising energy costs. A reasonable increase would have secured a more profitable long-term agreement while maintaining high performance, with the adjustment framed as a necessary response to operational cost increases.

Another strategy would have been for Quantum to require Horizon to acknowledge its role in the cost constraints that affected the AI's performance. By explicitly stating that Horizon's decision to use open-source data contributed to the hallucinations, Quantum could have clarified the root cause of the issue and reduced its reputational risks moving forward.

Finally, Quantum could have tied the apology to Horizon's commitment to future collaborations or projects. By securing a guarantee of future engagements, Quantum could have been more open to issuing a statement of regret, making the reputational concession more strategic. This would have transformed the apology into a tool for securing long-term business relationships.

## III. Strategies' combination

While both Horizon and Quantum could have used various strategic options to strengthen their positions, the effectiveness of these approaches depend not only on their selection but also on how they interacted.

Indeed, some strategies, if pursued simultaneously, would have canceled each other out. For instance, had Horizon insisted on deferring payments until performance milestones were met, while Quantum simultaneously pushed for increased hosting fees and upfront commitments, the two positions would have clashed, likely leading to a deadlock or a compromise such as partial upfront payments with conditions attached.

Similarly, Horizon's attempt to use regulatory risks as leverage might have been countered by Quantum shifting the blame onto Horizon's cost constraints, leading to a debate over liability rather than progress toward resolution.

Still, some strategies could have complemented each other and led to more constructive outcomes. Quantum's offer to share insurance costs, for example, would have directly addressed Horizon's reputational concerns while limiting financial exposure for both sides.

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Likewise, a long-term partnership agreement, where Horizon funded retraining and hosting costs in exchange for more favorable service terms, could have turned a dispute into an opportunity for future collaboration.

Ultimately, beyond the specific strategies each party deployed, the outcome of such a mediation lies within the execution of such strategies. Indeed, the party that controls the framing of the key issues—such as whether the matter would be about shared responsibility or regulatory exposure—will have the advantage.

Additionally, a party that uses emotional intelligence and shows empathy toward the other side can lead to creating better settlement terms by easing the other side's demands. Similarly, proactively proposing practical solutions is often seen as a collaborative approach rather than an adversarial one, which helps build credibility.

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Overall, the seminar experience highlights the relevance of blending human qualities with technological tools in mediation.

As the event teaches, AI can and should be used as the valuable tool that it is for human mediators to learn from. But even though AI can undoubtedly aid mediators by quickly analyzing legal and technical data, predicting outcomes, and offering structured settlement options, it is not, at least for now, a replacement for human mediators that bring irreplaceable qualities, such as emotions and creativity in problem-solving.

Finally it should be noted that the success of a mediation relies on the ability to adjust strategies according to the other party's actions, ensuring that those strategies align and enhance one another, rather than canceling each other out.

# CPR News

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With little hesitancy, Roberts said he replied, "That would be easy."

The matter, he explained, launched his dispute prevention-oriented law career, working with six of the firm's utilities clients. He said he spent days in the field with engineers, procurement officers, and some of the nation's top mediators.

Roberts told the awards dinner audience that the work was a path to about $60 billion of utility company projects completed with no litigation. The processes ran on "the idea of getting as close to the problem and not being afraid of controversy but embracing it and working the issues," he said, adding that the goal was to "make problems smaller, not bigger."

He also urged careful mediation strategy, and attributed failures to neutrals. "You have got to do due diligence as to who you use as a mediator," he said, but adding, "I'm stunned by the lack of due diligence in interviewing people for such an important job."

Roberts urged mediators to investigate "the third leg of the stool" of disputes, the political implications, which often accompany the legal and business issues. He concluded noting and thanking his personal mentors.