Alternatives

TO THE HIGH COST OF LITIGATION

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Back to School on Dispute Management

Traditional Standing Neutrals: How Contracting Parties Can Avoid Conflicts With Early Help and Involvement

BY KATE VITASEK

Typically, third-party neutrals are associated with dispute resolution through mediation or arbitration. In the 1970s, organizations in the construction industry began using a panel of third-party neutrals, referred to as a Dispute Review Board, or DRB, in a more proactive manner where the neutral embeds into the contracting parties' continuing governance as a way to help prevent disputes.

Over the years, the concept of using neutrals with the focus on dispute prevention has evolved and is now often referred to more broadly as a "Standing Neutral," with the first use of the term Standing Neutral appearing in a CPR publication. James Groton, Preventing and Resolving Construction Disputes (CPR Legal Program Construction Disputes Committee, 1991) [the CPR Institute publishes this newsletter]; see also, "Special Supplement: Preventing and Resolving Construction Disputes," 9 *Alternatives* 182 (December 1991) (available at https://bit.ly/3Ettxzx).

Today, Standing Neutrals are often single individuals rather than a panel, and the focus continues to broaden and become even more preventive in nature.

So just what is a Standing Neutral?

A Standing Neutral is an innovative and promising improvement on traditional alternative dispute resolution techniques. A Standing Neutral process uses a highly qualified and respected expert—a pre-selected, or "standing," neutral who helps parties resolve issues throughout the life of a relationship.

A well-structured Standing Neutral program engages the neutral early on, where the neutral is embedded into the contracting parties' governance structure with the goal to facilitate proactive and constructive dialogues that aim to provide continuous alignment. The parties prevent issues altogether.

Today, there are two approaches for using a Standing Neutral as a dispute prevention mechanism: a *Traditional Standing Neutral* and a *Modern Standing Neutral* approach. The primary difference between a Modern Standing Neutral and a Traditional Standing Neutral is how they work with contracting parties.

A Traditional Standing Neutral is typically limited to helping the contracting parties work through problems and conflicts before they become a dispute. A Modern Standing Neutral typically provides more proactive support services that help keep the party's interests aligned well before problems or misalignments occur.

This column delves more deeply into the why's and how's of Standing Neutrals, with the focus on the Traditional Standing Neutral. Next month's column will share how

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ADR Brief

The Evolving Role of AI in Arbitration: How Institutions are Shaping Policy

BY KAYLEE VAMPOLA

Artificial intelligence's business-and-industry transformation effects have hit international arbitration processes.

As AI tools become increasingly integrated into dispute resolution frameworks, arbitral institutions are developing policies to regulate their use, ensuring fairness, transparency, and ethical considerations on their use in the process. See Maxim Osadchiy & Erika Santini, "Are Arbitral Institutions Using Artificial Intelligence? The State of Play in Adopting AI," *Kluwer Arbitration Blog* (May 8, 2024) (available at https://bit.ly/4j0SVM2).

Leading arbitral institutions world-wide are adopting AI policies and even governing frameworks, setting new standards for arbitration in the digital age. They are adding AI features. AI has introduced significant efficiencies in the arbitral process, including document review, legal research, predicative analysis, and even decision-making support for arbitrators (see Osadchiy & Santini, above).

The alternative dispute resolution profession's adoption of AI also raises concerns regarding transparency, bias, data security, and the potential erosion of human oversight. See Osadchiy & Santini, above. Arbitrators and institutions also are being forced to deal with AI use in claims and evidence, with organizations issuing internal alerts for so-called deepfakes.

Start-ups focusing on AI and arbitration are on the scene, even going as far as creating an AI digital arbitrator that is available for purchase as a way to reduce costs and increase efficiency in the process. See Jack Kieffaber, Kimo Gandall, & Kenny McLaren, "We Built Judge. AI. And You Should Buy It," (Jan. 28, 2025) (noting that the authors "all have financial interests in [the company discussed and] [a]s the title would suggest. … are making no effort to obfuscate this fact.") (available at https://bit.ly/4lkxsPy).

Recognizing these challenges, arbitral institutions have begun crafting AI-specific policies to balance innovation with procedural fairness.

SVAMC: Adopting International AI Best Practices

The most notable early attempt at ADR AI best practices came from the Silicon Valley Arbitration & Mediation Center, or SVAMC, a Palo Alto, Calif., nonprofit focusing on global technology businesses that promotes efficient technology dispute resolution by advocating for arbitration and mediation. It began the movement of arbitral institutions addressing AI's role with the release of its "Guidelines on the Use of AI in Arbitration" (April 30, 2024) (available at https://bit.ly/3FW4k0Z).

The guidelines are intended to align with global AI governance frameworks and practice to provide users with a universal policy relating to AI use. They include several key

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Editor: **Russ Bleemer**

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ADR Legislation

The U.K. Arbitration Act 2025: A Few High- and Low-Lights, And Examples of Glorified Legislative Plumbing

BY ADAM SAMUEL

The U.K. Arbitration Act 2025 (available at https://bit.ly/4iFPEkf) is not going to save or dramatically change arbitration in England, Wales or Northern Ireland.

It contains two provisions of intellectual significance, although of limited practical application. Otherwise, it contains some updating to show that the United Kingdom has noticed what everyone else has noticed. Much of it consists of tweaks to parts of the Arbitration Act 1996 that most people agree do not work as well as they should. Many of the affected rules contain peculiarities of English arbitration law. So, a study of the changes concerned throws some light on them.

The Reform Process

In 2016, perhaps inspired by a rather odd speech of the then-Lord Chief Justice, the U.K. government suggested a 20-years-on review of its arbitration law (Lord Thomas of Cwmgiedd, "Developing Commercial Law Through the Courts: Rebalancing the Relationship between the Courts and Arbitration," Bailii Lecture 2016, (March 9, 2016) (available at https://bit.ly/3SgSxgs). Lord Thomas suggested that the restrictions on the right of appeal in section 69 of the 1996 Act had dried up the quality of commercial cases going through the courts.

The Lord Chief Justice's remarks about merits view disappeared in a typically English haze. Practitioners in international institutional cases know that agreement to arbitrate under such rules excludes any appeals. Otherwise, the parties or their lawyers know that they can exclude section 69 by agreement, contract into a court appeal on a legal question (unlike the U.S. position in *Hall Street Associates LLC v. Mattel Inc.*, 552 U.S. 576 (2008) (available at https://bit.ly/4iIdAn5),) or chance their arm on the strange lottery of the leave to appeal process. This depends on whether the judge thinks a probable error is obvious or whether a probable error concerns a matter of general commercial importance.

So, amidst this range of options and casual complacency, real amendment of section 69 was left for another day.

The overall consensus was that the 1996 Act worked reasonably well. Despite this, the Government asked its Law Commission to report back on the subject. Its 2022 Consultation (available at https://bit.ly/42CWHWc) in Chapter 9 presented both sides of the section 69 argument and proposed leaving it untouched.

Otherwise, the Consultation Paper has been superseded by a subsequent consultation, a Final Report and the legislation itself. Two provisions rejected by the 2022 paper have found their way into the new law, one of which is the crucial overruling of the U.K. Supreme Court decision in *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait),* [2021] UKSC 48 (available at https://bit.ly/3ScESXQ), on the effect of a choice of law to govern the contract on the law applicable to the arbitration clause.

Some of the other discussion looks a little off the pace generally in the light of the changes actually made in the 2025 Act. The second Consultation Paper covered just three topics: the *Kabab-Ji* problem, whether a challenge to an arbitrator's jurisdiction should be by way of an appeal rather than setting aside, and an effort to invalidate discriminatory provisions concerning non-faith-based arbitrator requirements. The first two made it into the Act, although in the second case slightly modified. The Law Commission's Final Report abandoned the third idea as being in the "too difficult" category.

As we launch into the 2025 Act's changes, one receives a thudding reminder of the politics behind the 1996 Act's creation. The government at the time offered the group that privately funded this huge piece of legislation the services of a retired Parliamentary draftsman. She produced some magnificent gobbledegook in the style of most English legislation, rather than a text to encourage foreign users of English arbitration to read the document.

The team threw it away and engaged their own drafting team of future Supreme Court Judge Mark Saville and barrister Toby Landau. Unfortunately, nobody did the same with the 2025 effort. Instead, none of the Law Commission staff who worked on the bill have any arbitration experience as practitioners. Partly as a consequence, the drafting of the new legislation cannot be described as user-friendly.

Navigation and Transition

The 2025 Act amends the 1996 legislation. So, generally, the approach taken here is to follow the sequence of the existing law to see where it has changed.

Almost all of the 1996 Act applies to England, Wales and Northern Ireland. Scottish arbitration law is unaffected by the 2025 legislation and is governed by the Arbitration (Scotland) Act 2010. For simplicity reasons, one usually refers to the 1996 Act as the "English" one.

The transitional provisions appear in section 17(4)(a) of the 2025 Act. Any of the changes brought about by sections 1-14 of the new legislation will not apply to

- arbitration proceedings begun before the relevant 2025 Act section comes into force ("pre-commencement arbitral proceedings");

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ADR Legislation

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- court proceedings relating to or an award made in pre-commencement arbitral proceedings; or
- any other court proceedings begun before the relevant section came into force.

It is easy to mock these rules. But anyone who lived through the mess created by the Swiss LDIP transitional provisions in 1989 will know how difficult it is to draft these types of provisions.

The Governing Law

The original Law Commission Consultation Paper from 2022 lists under "Chapter 11: Other stakeholder suggestions not short-listed for review" what may be the most interesting change brought about by the 2025 Act.

Section 1(2) inserts into the 1996 Act a new section 6A, essentially designed to reverse the effect of the Supreme Court decision in *Kabab-Ji*. Now, the law applicable to arbitration agreements is that expressly agreed on as applying "to the arbitration agreement" or, where there is no such agreement, the law of the seat.

Section 6A(2) explains that an agreement to apply a particular law to an agreement containing the arbitration clause is not an express agreement to apply that law to the arbitration agreement. These were exactly the facts in *Kabab-Ji*, where the English courts found that English law which applied to the rest of the agreement equally covered the arbitration clause, and the French courts disagreed. Section 6A(2) prefers the French answer.

There is a curious exception to this for arbitration agreements deriving from standing offers to arbitrate contained in treaties or legislation of countries or territories outside the United Kingdom.

Before leaving this subject, one should note the real problem here. French law has long enabled someone not named as a party in the contract to become one by its performance of the one or other party's contractual obligations. See *Dow Chemical c/ Isover-Saint-Gobain CA Paris*, (Oct. 21, 1983) (available at https://bit.ly/4iZXFRn), *Sté Alcaltel Business Systems c/ Sté Amkor Technology*, Rev. arb. 2007. 247.)

In the two U.K. Supreme Court cases where this has become an issue between England and France, *Dallah v. Government of Pakistan*, [2010] UKSC 46 (available at https://bit.ly/4jA8AST) and *Kabab-Ji*, the French answer has seemed easily the fairer solution. In *Dallah*, the Pakistan government controlled the contractual party and then declined to renew its existence, continuing to conduct its business through its Ministry of Religion.

In *Kabab-Ji*, the original contracting party moved the operation of a franchise to a sister company with whom the franchiser dealt happily for a number of years before alleging that it was not a party to the arbitration clause.

While courts in Germany, England and Singapore have all rejected the French approach to this problem, the Swiss have applied article 178(2) of the LDIP to make French law govern the arbitration clause: ATF 129 III 727(2003) (available at https://bit.ly/3G6Rckr). That provision makes substantively valid any agreement that complies with the law chosen by the parties, the law governing the substance of the dispute, the proper law of the main contract, or Swiss law.

Cleaning Up The Act

The revise: U.K. Arbitration Act 2025.

The new text: Some updating, some intellectual significance, and some peculiarities of English arbitration law.

The result: The 1996 edifice is reinforced. It's not a radical re-write.

Extraterritorial Application

Section 2(2) of the 1996 Act lists the provisions of that Act that state which rules will apply if the seat is outside England, Wales and Northern Ireland. Section 6A joins that short list as 2(2)(za) because it relates to a section earlier in the Act than those listed in section 2(2)(a) and (b) of the new act. It would have been more user-friendly for the 2025 re-write to just re-letter them. Sections 43 (securing witnesses' attendance) and 44 (court powers used to support an arbitration) both apply to an arbitration outside the United Kingdom, courtesy of section 2.

The Arbitrator's Disclosure Duty

Section 2(2) of the 2025 Act introduces a new section 23A into the 1996 legislation. It restates the obvious practice, derived largely from the IBA Guidelines on Conflicts of Interest in International Arbitration (May 25, 2024, revision), by imposing an active duty of disclosure on any anyone approached with a view to becoming an arbitrator or anyone already serving in that capacity.

The key term here is "any relevant circumstances" which the arbitrator knows or becomes aware of or ought reasonably to have done so. Those circumstances are those that "might reasonably give rise to justifiable doubts as to the individual's impartiality in relation to the proceedings, or potential proceedings, concerned."

This sets in stone in Section 2(2) what the U.K. Supreme Court said on this subject in *Halliburton Co. v. Chubb Bermuda Insurance Ltd.*, [2020] UKSC 48 at paras 76-81 (available at https://bit.ly/4kirVIf). There, the arbitrator failed to disclose subsequent appointments made by the same company.

An amendment to Schedule 1 has added to the list of provisions that parties cannot exclude by agreement the new section 23A on the arbitrator duty to disclose.

Costs; Arbitrator Removal

Section 3(2) of the 2025 Act inserts a new subsection (5A) into section 24 on the court's power to remove an arbitrator. Historically, arbitrators who participated in such proceedings were at risk of being ordered to pay costs if they were removed. The standard advice to them incorporated in a now-superseded Chartered Institute of Arbitrators guideline (Practice Guideline 8: Guidelines for Arbitrators who Receive Notice of Arbitration

Applications to the Court) was to correct factual errors but not participate for that reason and to avoid any appearance of bias.

Now, the court will only be allowed to make a costs order against arbitrators if their act or omission in relation to the proceedings was in bad faith.

The need to stay out of contentious matters between the parties probably still means that the old guidelines should be observed. So this will probably not change very much in practice.

Arbitrator Resignations

Section 25 of the 1996 Act deals with arbitrator resignations. There are three mechanical changes introduced by section 4(2) of the 2025 Act. First, the parties can no longer make agreements about the liability of the arbitrator on the occasion of a resignation.

Second, either party and not just the arbitrator can apply to court for an order for the payment or reimbursement of any fees or expenses.

Finally, the court can no longer give the arbitrator relief from any liability under section 25.

Section 29 of the 1996 Act tackles arbitrator immunity. This creates liability where a resignation was unreasonable, subject to any agreement between the parties and any orders for the payment or reimbursement of fees and expenses incurred or received under section 25.

Court Rulings On Jurisdiction

Section 32 has always been anomalous and remains so after the 2025 Act. The court can determine a jurisdictional point with the consent of the other party (or parties) or the arbitral tribunal. The effect of the new Act is to remove the court's ability to decide not to resolve a matter where the applicant has the required party or tribunal consent. It also prevents the court from dealing with a jurisdictional matter already determined by the tribunal.

Summary Judgment

The new section 39A introduces the notion of summary judgment into arbitration legislation.

Where the parties have not agreed otherwise, summary awards can be made in relation to the claim or a particular issue arising where the tribunal considers that a party has "no real prospect of succeeding on a claim or issue or its defence."

This power has always existed but been used very rarely, typically by bifurcating the proceedings in such a way that a particular ruling in an award could finish the case. The Law Commission hopes that its change will encourage more tribunals to use summary proceedings. The danger is that parties will make summary applications to complicate and delay the resolution of cases. Tribunal control here will be vital.

Emergency Arbitrators

The new section 41A covers the fashionable subject of emergency arbitrators where the rules agreed to by the parties provide for such an arbitrator who has then been appointed. Where without a good reason, a party has failed to comply with orders or directions from such a nominee, the emergency arbitrator can make a peremptory order, laying down a time for compliance with the original order.

Peremptory Orders

Peremptory orders are a curiously English animal. Section 41(5) of the 1996 Act explains that where a party fails to comply with tribunal orders or directions "without showing sufficient cause," arbitrators can make a peremptory order which repeats the earlier requirement but this time contains a time-limit for compliance.

Section 41(6) enables the tribunal to dismiss the claim where a claimant has failed to comply with a security-for-costs order. Subsection (7) deals with other non-compliance with other peremptory orders, entitling the arbitrators to

- direct that the defaulting party cannot rely on allegations or material covered by the order,
- draw any adverse inferences from the party's behavior,
- proceed to an award on the basis of materials correctly supplied; or
- order the miscreant to pay costs of the arbitration "incurred in consequence of the non-compliance."

Section 42 covers the unusual subject of the court's enforcement of arbitral peremptory orders. The 2025 Act just brings it into line with the rest of its own changes. So, unless the parties agree otherwise, courts can order a party to comply with a peremptory order made not only by the arbitral panel but also now an emergency arbitrator.

Applications can be made by the actual or emergency arbitrators or a party with the tribunal or emergency arbitrator's permission or by any of them if the parties have agreed in advance to the process's availability. Applicants have to exhaust any available arbitration process regarding the non-compliance with the peremptory order.

Court Powers

Section 9 of the 2025 Act carries out more plumbing repairs to the Act's section 44. This details the court's powers to support an arbitration in the absence of agreement to the contrary. The court will only intervene where a tribunal cannot make the necessary order.

There is an important clarification in the new version of section 44(1) that the court can make orders about the matters listed "whether in relation to a party or any other person" to the same degree that it can in relation to ordinary court proceedings. This enables the judiciary to bind third parties in these situations.

The listed items include taking and preserving evidence and other largely conservatory orders. This makes it easier for courts to use their powers over third parties to support arbitrations where needed in urgent cases.

Where the problem is not time-sensitive, the court can only act on the application of a party made with the tribunal or emergency arbitrators' permission or consent from the other parties. The only material change here is the (new sub-section (4A)'s) insistence on serving the other parties, the tribunal, or any emergency arbitrator. The court cannot intervene unless the tribunal, emergency arbitrator or institution or person given the power by the parties cannot do the job effectively. The order lapses once any of those entities has the power.

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Preliminary Points of Law

Section 14 of the 2025 Act alters the rarely used section 45 relating to court rulings on preliminary points of law. These cannot happen without the consent of all the parties or the tribunal's permission. The 2025 Act removes a further pair of conditions that required the court to consider that the ruling would substantially save costs and the application had been made punctually. The application no longer has to deal with these issues.

Costs Orders: Jurisdiction Declined

At this point, we jump to awards of costs and section 61 of the 1996 Act. Section 6 of the 2025 effort contains an important statement that the tribunal can make an order allocating the arbitration costs between the parties even where either the tribunal or a court has concluded that it either has no jurisdiction or has exceeded it.

This clears up a logical conundrum that exists, particularly where the court or tribunal concludes that no arbitral proceedings should ever have taken place. True to form, though, section 6 also does some housecleaning by moving all the "subject to any agreement of the parties" into a new subsection (3).

Reviewing Jurisdictional Rulings

The most troubling change brought about by the 2025 Act concerns an amendment to section 67, which relates to jurisdictional challenges to awards or final awards. It was flagged in the 2022 Consultation Paper but should still never have happened.

Section 10 of the 2025 Act begins uncontroversially by fixing a technical problem with the 1996 Act, namely that the court has currently no power to remit the award when upholding a jurisdictional challenge. This is now the preferred solution unless it would be inappropriate, notably if the tribunal never had jurisdiction in the first place.

Things turn sour with the tortuously drafted subsections (3B) and (3C). Rules of court can provide "within subsection (3C)" for a case where the application is made by a party that participated in the proceedings and concerns a challenge to the tribunal's ruling on jurisdiction.

Subsection (3C) allows the rules to conclude that although the court can decide "otherwise in the interests of justice," a jurisdictional objection cannot be raised and evidence to support it cannot be presented which the applicant did or should have known about during the arbitration and did not raise or use.

The big point is that a Rule of Court can prescribe that evidence heard by the tribunal (which may not have had jurisdiction to hear it) cannot be re-presented to the court. It is simply wrong for a court not to consider the possibility that the presentation of evidence to a tribunal with no legal power should somehow bind it.

In defense of those drafting this provision, there is always an exception where "the interests of justice" require it. The court should always have a transcript of the relevant evidence from which it can draw its own potentially different conclusions as to what happened.

So, this is not quite the same as the Swiss law position where the court will not hear arguments to reverse the tribunal's factual conclusions on an application to set aside an award. *Westinghouse and others v. Nat'l Power Corp. of the* Philippines, ATF 119 II 380, ICC Case No. 6401 (1993) (available at https://bit.ly/42YLw9i.)

The problem arises very rarely. It remains to be seen, though, how a court will handle a transcript where a tribunal potentially without jurisdiction has intervened in a cross-examination or asked its own questions in a way that has affected the factual conclusions it has reached.

Time Limits and Other Plumbing

After the excitement of section 67, the 2025 Act changes return to their "plumbing function" with some tidying up of section 70(3).

The section concerns time-limits for bringing applications or appeals. The time period is 28 days from the applicable date. The date of the award is the obvious one here. But where there has been any "arbitral process of appeal or review," time runs from the date of notification of the result.

Section 57 has always provided for material corrections or additional awards to cope with arithmetical errors and clerical mistakes. The "applicable date" in that situation is 28 days from the date of a material correction or additional award. Changes only become "material" if they concern anything material to a setting-aside proceeding under sections 67 and 68 (jurisdiction and procedure) or an appeal on a question of law under section 69.

As the new section 70(9) points out, references to anything done under section 57 includes anything done or agreed to by the parties. Section 57(1) allows them to agree on the tribunal's powers to correct errors or make additional awards. This is obviously important in institutional cases.

Thankfully, the amendments to the two definitional sections can be ignored, cross-referencing as they do references to emergency arbitrators to the relevant new section of the 1996 Act (section 41A).

Domestic v. International

The new 2025 Arbitration Act drops the final curtain on the "domestic/international" distinction in English law.

We finish our exploration of the main sections of the 2025 Act with a decision never to bring into force sections 85-88 of the 1996 Act. This is more a conclusion of a saga than an amendment as such. These sections represent what little was left in 1996 of any distinction between domestic and international arbitration in England, Wales, and Northern Ireland.

When the United Kingdom ratified the New York Convention in 1975, it inserted its own scope of application provision into Article II of the Convention. This limited the compulsory referral to arbitration of cases brought to court in breach of agreements to arbitrate to international cases.

The delegates to the New York Arbitration Conference basically forgot to deal with the scope of application of Article II, in their haste to replace the Geneva Protocol on Arbitration Clauses of 1923 with the new Article.

The Swiss have always read from the

reference in Article I to "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and … awards not considered as domestic awards in the State where their recognition and enforcement are sought." Switzerland applies the Convention only where the seat is outside Switzerland.

Unlike Switzerland, England retained until 1996 provision for the courts to refuse to refer parties to arbitration in domestic cases where they saw fit. The Consumer Arbitration Agreements Act 1988 extended a presumption of non-enforceability to consumer cases but only in domestic arbitration.

This was four years before the European Union declared all consumer agreements to be presumptively unfair and unenforceable against such parties. Awkwardly, the English Court of Appeal declared the 1988 Act to breach EU law by discriminating against German investors. *Philip Alexander Securities & Futures Ltd. v. Bamberger,* [1996] 7 WLUK 237 | [1996] C.L.C. 1757 (available at https://bit.ly/4d1CUmH).

Scared by this, the government never brought the provisions relating to domestic cases into force. Now, the EU protections appear in section 63 and Schedule 2, paragraph 20 of the U.K. Consumer Rights Act.

What this all means is that England, Wales, and Northern Ireland have joined countries like the Netherlands in having the same law for domestic and international arbitration. If it is good enough for one, it is probably fine for the other. These countries have rejected the notion of there being specific problems with international cases.

* * *

Nobody should describe the 2025 Act as groundbreaking except perhaps with its embrace of the French Cour de cassation's views on the law applicable to arbitration agreements. The Law Commission and now the Act's messing around with the integrity of the jurisdictional challenge process will make little practical difference but offends conceptual sensitivities in this area.

Much of the rest is reinforcement of the 1996 Act edifice. The result is probably the wordiest Arbitration Act in the developed world.

The U.K. Parliament is following something of a trend against radical legislative rewrites. In recent years, Switzerland and Belgium have both made incremental changes to their laws relating to arbitration. Germany has also proposed something on the same lines.

There is, though, a major difference between these countries and the USA. They all completely rewrote their legislation in the great boom period for this type of activity between 1975 and 1998. That, of course, is not true of the United States.

Worldly Perspectives

Lithuania's Solid Mediation Building Blocks

BY GIUSEPPE DE PALO & MARY B. TREVOR

Lithuania's courts brought mediation to the country in 2005, when a pilot project for court mediation, inspired by the Quebec City courts in Canada, was launched. Agnė, Tvaronavičienė, Natalija Kaminskienė, Dana Rone, & Rea Uudeküll, "Mediation in the Baltic States: Developments and Challenges of implementation," 4 (16) *Access to Justice in Eastern Europe* 68 (2022) (available at https://bit.ly/3GwzXhQ).

The project evolved into a country-wide court mediation institute, and, by 2014, court mediation was applied in all Lithuanian courts, governed by rules enabling judges to be court mediators. Agnė Tvaronavičienė, Natalija Kaminskienė, Irena Žemaitaitytė & Maria Cudowska, "Towards More Sustainable Dispute Resolution in Courts: Empirical Study on Challenges of the Court-connected Mediation in Lithuania," 8(3) *Entrepreneurship and Sustainability Issues* 633 (2021) (available at https://bit.ly/44fnR6D).

Mediation, however, was not widely used outside the courts. While the 2008 Law on Conciliation Mediation (Law of the Republic of Lithuania on Conciliation 2008, No.

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Acknowledgments

This month's column was prepared in collaboration with Dr. Agnė Tvaronavičienė and Indrė Kasiulaitė. Agnė Tvaronavičienė is a professor at the Law School and Head of Mediation at Sustainable Conflict Resolution Laboratory of Mykolas Romeris University in Vilnius (Lithuania) (see https://bit.ly/4cZ33CT), and a certified mediator with London's Centre for Effective Dispute Resolution. With her focus on the application of alternative dispute resolution, currently she is researching the institutionalization of, and different models for, mediation, as well as other issues related to efficient mediation use in national and international contexts. Indrė Kasiulaitė is a chairman of the Lithuanian Chamber of Mediators, Lecturer at Mykolas Romeris University and a member of MRU Mediation and Sustainable Dispute Resolution Laboratory. Her research focuses on promoting mediation through legal and procedural measures.

Worldly Perspectives

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X-1702 (available at https://bit.ly/4iCaLUo)) was enacted to transpose the European Union Mediation Directive, the transposed law was not modified to facilitate its use in the Lithuanian legal system.

For about a decade, therefore, mediation use beyond the courts remained limited to isolated private initiatives.

But in 2015, the government designated mediation as a strategic justice policy focus. The Decision of the Minister of Justice of the Republic of Lithuania in Regard of Adoption of the Concept on Mediation Development in Lithuania, TAR (2015), 13939. Substantial amendments to the Law on Conciliation Mediation followed in 2017, including a name change to "Law on Mediation" (referred to below as Mediation Law) as of 2019. The Law on Mediation of the Republic of Lithuania, TAR (2017), 12053.

These changes introduced institutional roles in mediation oversight, set qualification standards for mediators, established an official List of Mediators of the Republic of Lithuania, and mandated pre–court mediation in family disputes as of Jan. 1, 2020.

This decade has seen rapidly increasing institutionalization of mediation in Lithuania. The 2022 *Ex Post Study* addressing the impact of mandatory family mediation found that it has not only significantly increased use of mediation for family disputes, but has also fostered a culture of peaceful dispute resolution, contributed to reduced court workloads, and helped to decrease litigation-related costs for disputants and the judiciary. See "The Ex Post evaluation report on the impact of the current legal framework for mandatory mediation in family disputes," STRATA (2022) (available at https://bit.ly/3RE7b1e).

Continuing legal and regulatory developments in mediation law have improved mandatory mediation provisions and granted self-governance to mediators, who are overseen by the Lithuanian Chamber of Mediators (LCM's home page is available at https://bit.ly/4iCvQOI), established in 2017. (Articles 3-11, 15, 17, 20-23, 26, and 28-29 of the Mediation Law have been amended, and the law has been supplemented by Article 3^1 (2024), TAR, 11245.) Mediators have gained recognition as a respected profession with strong and continuing state support.

Civil Mediation Framework

Overview: Civil mediation is governed by the Mediation Law (The Law on Mediation of the Republic of Lithuania, TAR (2021), 3462 (available at https://bit.ly/4lXrdSg)), the Code of Civil Procedure (CCP; Code of Civil Procedure of the Republic of Lithuania, Official Gazette (2002), 36–1340), and other national and international regulations, including applicable EU standards.

This framework shapes the processes and principles of mediation, the qualification and development of mediators, the institutional roles, and mediators' responsibilities. Court mediation is regulated by the CCP and by rules adopted by the Council of Judges. See, e.g., Decision of the Council of Judges on the Adoption of the Rules on Judicial Mediation, TAR, (2018) 19675; Decision of the Council of Judges on the Rules of Procedure for Granting and Revoking the Status of a Court Mediator for Individuals, TAR, (2014) 13705. The LCM also influences the conduct of mediation activities. As a result of these laws and bodies, mediation is becoming increasingly trusted by the public.

Confidentiality and Privilege: The Mediation Law and CCP provisions govern confidentiality. Under the Mediation Law's Article 17, the parties to the dispute, mediators, and administrators of mediation services must keep confidential all information relating to mediations and related matters.

The parties may mutually agree to other confidentiality or disclosure restrictions. But the mediator and the mediation administrator are strictly bound by the confidentiality obligation. Article 177(5) of the CCP provides that information obtained during mediation cannot be used as evidence in civil proceedings, and its Article 189(2)(5) provides that mediators cannot be questioned about information learned during mediation.

The two exceptions are consistent with those in EU Mediation Directive Article 7. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5 (2008) (available at https://bit.ly/42WCXf6). Information required to approve or implement a settlement agreement reached in the course of mediation may be disclosed.

Also, information whose non-disclosure would be contrary to the public interest, specifically, information needed in real time to safeguard the interests of a child, to prevent a risk of damage to the health or life of a natural person, or to prevent the commission of criminal offenses, may be disclosed. Article 17 of Mediation Law as recently amended.

Enforcement: Under the CCP, for in-court mediation, if parties reach an amicable settlement, it should be confirmed by the judge hearing the civil case, giving it appealable res judicata effect.

For out-of-court mediation, the settlement agreement can be submitted to the court for confirmation at the joint request of the disputing parties or at the request of one party having the other's written consent. Before confirming, the court will assess whether the settlement provisions comply with applicable law. Court approval, if received, grants the settlement res judicata effect.

Statute of Limitations: Mediation Law Article 18, consistent with the EU Mediation Directive, suspends prescription periods when mediation begins. The process begins when one party directly—or via a mediator or mediation administrator—sends a written proposal for mediation. If the mediation ends without a settlement, the prescription period resumes, with the remaining period extended in line with

Ready for More

This month's *Worldly Perspectives* jurisdiction: Lithuania.

The state of practice: Recent history has seen a rebuilt justice system with "a strategic justice policy focus."

Patterns repeated: The general civil/commercial mediation practice appears to be growing. Lithuania is building upon the more ADR-familiar family mediation practices.

the Civil Code. The law thus protects mediating parties from the expiration of limitation or prescription periods during mediation.

Duration and statutory fees: Neither the Mediation Law nor the CCP addresses the duration of the mediation process. Parties to a private mediation agreement setting a time limit for the termination of mediation may only go to court or arbitration after that time expires.

With in-court mediation, when the parties opt for mediation or the judge orders them to do it, the judge adjourns the hearing and schedules the next hearing. The mediation must be completed before that date unless the mediator requests an extension. The state pays the mediator for four hours of court mediation during that time, and the mediator can request funding for up to four more hours. One hour each for preparation and completion may also be granted. If a mediator-judge acts as mediator, the process is free of charge for the litigant without any formal time restrictions.

Routes to Mediation

Statutory measures: The only civil disputes subject to mandatory mediation are family disputes. In all other out-of-court cases, mediation is voluntary, and there are no provisions requiring disputing parties to attend preliminary mediation information sessions. But as an incentive, a party will only have to pay 75% of the ordinary stamp duty if it can provide the court with written evidence of a good-faith attempt to resolve the dispute through mediation.

Judicial referral: Although relatively small in volume, court mediation use is at least stable every year, with a solid 21% annual growth in 2024. A Summary of Judicial Mediation Practice in Courts, Lithuanian Courts (2024) (available at https://bit.ly/4iJy66T).

The CCP requires presiding judges, once familiar with a case, to propose that the parties reach mutual agreement (conciliation) and to offer the parties the opportunity to try court mediation. If peaceful settlement appears highly likely, the judge may mandate court mediation use. The number of referrals annually to court mediation has increased during this decade to 945 in 2024, from 516 in 2020.

Contractual agreement: The Mediation Law allows parties to agree in writing, either before or after a dispute has arisen, to engage in mediation. The issue at hand must be one that applicable law permits to be settled through a mediation. No case has yet addressed this area.

Ad Hoc agreement: Lithuania's culture of peaceful dispute resolution is still developing. As a result, the decision to engage in mediation often depends on parties' awareness of its benefits and, frequently, on their advocates' recommendations. The Code of Ethics for Advocates prohibits encouraging frivolous litigation and imposes on advocates an obligation to inform clients about alternative dispute resolution methods. Code of Ethics of the Lithuanian Bar Association, TAR, 2016-04-22, No. 10280.

There is no specific sanction for non-compliance with this particular provision, but the Code of Conduct for Advocates provides for a range of sanctions as appropriate for advocates failing to comply with their duties. Law on the Bar Association of the Republic of Lithuania, Valstybės žinios, 2004-04-06, No. 50-1632, Article 52(1).

Ensuring Quality Mediation Services

When the updated version of the Mediation Law entered into force in 2019, Lithuania shifted from a market-regulated model to an institutionalized system. Mediation services in civil disputes may only be provided by people registered in the List of Mediators, which now includes 679 people. List of Mediators of the Republic of Lithuania (available at https://bit.ly/4iClG0g) (as of April 27, 2025). Most have a legal background, but the list also includes professionals with psychological, educational, social work, and other backgrounds.

To be included in the list, a person must have a good reputation, have completed 48 hours of basic mediation training (as of Jan. 1, increased from previous 40-hour requirement) and have passed a challenging qualification exam. Mediators on the list must continue to improve their qualifications and provide evidence that they have completed at least 24 hours of additional training on mediation-related topics within the past three years (as of Jan. 1—previously, 20 hours of continuing mediation training were required every five years.)

The list was established in preparation for mandatory mediation in family disputes being required as of Jan. 1, 2020. To ensure an adequate supply of mediators, and to deter possible resistance from legal professionals to mandatory mediation (which had happened in Italy and some other EU countries), certain professionals with relevant credentials and experience were granted exemptions.

As yet, Lithuania has no mediator specialization, although that may change as mediators gain experience in various types of disputes.

Mediators may also be subject to disciplinary sanctions and civil liability. On average, the Commission for the Evaluation of Mediation Performance addresses 10 complaints per year.

Mediation Statistics

Size of the market: No valid and comprehensive data for the mediation market exist other than for state-funded family dispute mandatory mediation. (Report available at https://bit.ly/4iAGvJx.) No official statistics cover out-of-court mediations, which are confidential and private.

This lack of data makes it difficult to assess the real impact of this mediation on the general dispute resolution system. Starting this year, however, mediators will be required to provide annual reports for the LCM, including data about number of mediations per year and dispute category.

The Council of the Judges, the Lithuanian judiciary's executive body, annually publishes court-connected mediation statistics. See Judicial Mediation Practice Summary, above. After a decade of stability in mediation referrals, significant growth was noticed in 2023 and 2024: from 574 cases in 2021 and 597 in 2022, to 740 cases in 2023 and 945 in 2024. Family mediation cases (414) made up nearly half of the 2024 numbers.

Mode of mediation: As in other countries, online mediation has become widely used since the Covid-19 pandemic, and the Mediation Law (Art. 15, para 1) clearly permits this approach. A slim plurality of mediators still prefer onsite meetings (39%), but others (37%) are using both onsite and online formats, depending on the situation. A few—15%—rely exclusively on the online format.

Settlement rates: As with numbers of mediations, there is no data on settlement rates in out-of-court mediations since they are confidential and private. Only settlement rates for mandatory mediation in family disputes are known (see 2023 report at https://bit.

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ly/4iHOWmu), as annually published by the Council of Judges. See Judicial Mediation Practice Summary, above. The success rate is quite high–46% in 2023 and 48% in 2024.

Costs: There are no statutory fees for mediation. Mediators are free to reach an agreement with the disputing parties covering all service fees. In practice, rates depend significantly on the case value, the dispute's area, and the mediator's experience. There are no official statistics as yet.

Number of mediators: It is unknown how many on the List of Mediators are active (or seek activity) in the civil and commercial mediation market. Most mediators in Lithuania practice in the family disputes area due to the mandate. On the other hand, a great number of mediators advertise themselves as ready to serve in other civil and commercial cases.

Strengths and Challenges

Mediation in Lithuania has made substantial progress in the past decade. Currently, it has a well-organized institutional management model and an accreditation system, and mandatory family mediation is showing promising results.

Over that time, the attitude of lawyers, too, has dramatically changed. Research data in 2015 showed that a majority of attorneys strongly believed they could achieve settlements without a mediator's help. Natalija Kaminskienė, Agnė Tvaronavičienė, Gražina Čiuladienė, & Inga Žalėnienė, "Research on Attitude of Lithuanian Lawyers to Peaceful Dispute Resolution and Mediation," 8(1) *Societal Studies* (2017) (available at https://bit.ly/44LY5qN).

By 2022, the Ex Post Study discussed above revealed that attorneys are feeling increasingly positive about mediation and are seeing more benefits to this process than disadvantages.

But voluntary mediation use is still limited. Part of the "problem" may be that, as compared to other EU countries, the Lithuanian court system operates quickly and inexpensively, providing limited incentive to seek an alternative. See 2024 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM (2024) 950 (available at https://bit.ly/4iAK9mH).

Another part of the problem may simply be the relative novelty of mediation and the need for more time and experience to make all potential role players, including mediators themselves, familiar with the process.

In this regard, while Lithuanian respondents to the recent Rebooting Mediation Project [from the Dialogue Through Conflict Foundation; see the authors' credits on page 93)] indicated general awareness of mediation and family dispute mandatory mediation, there was considerable variation in the knowledge of mediation rule specifics and level of use.

Respondents to the Rebooting Mediation Project expressed varying views on measures that might help expedite Lithuania mediation development. But increased use of financial incentives and mandate-related options were popular, with mandates varying from prelitigation information sessions to mandating mediation in certain types of categories.

* * *

Although mediation in Lithuania is still evolving, it has developed rapidly in recent years. Following the restoration of independence in 1990 and the rebuilding of its judicial system, Lithuania has now put much of the infrastructure, government support, and self-regulation needed for mediation firmly in place. These foundations position the country well for further progress.

Dispute Management

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organizations are expanding on the concept to create more modern approaches for using a Standing Neutral.

Dose of Reality

Standing Neutrals have had a remarkable record of success. The Dispute Review Board Foundation (see www.drb.org) found in most cases that the mere availability of the DRB results in the parties minimizing their conflicts and never needing to look to the Standing Neutral to make any recommendations or decisions.

In the small minority of cases where the Standing Neutral makes a recommendation, the parties accept 95% of the recommendations without resorting to mediation, arbitration, or litigation. Dispute Board Manual, DRBF (available at www.drb.org/dispute-board-manual).

One reason Standing Neutrals are so successful is that team members often lean on their neutral as a "coach," "mutual friend," or "neutral facilitator" who helps contracting parties in various capacities. For example, when organizations have difficulty resolving a problem or conflict, they can tap into their standing neutral to help them facilitate their negotiations and prevent it from becoming a formal dispute. Kate Vitasek, James P. Groton and Daniel Bumblauskas, Unpacking the Standing Neutral: A Cost Effective and Common-Sense Approach for Preventing Conflict, Faculty Publications, UNI Scholarworks 1-70 (2019) (available at https://bit.ly/4akCgiM) (discussing the dispute management continuum). Indeed, depending on how the parties choose to deploy the role, the neutrals themselves can identify potential areas of conflict and address them proactively.

A second reason for their success is that a Standing Neutral provides a helpful dose of reality to the parties and encourages them to be more objective in their dealings with each other. When differences of opinion arise, the parties' continuous access to the Standing

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

Figure 1: Nine Design Principles and Options of a Standing Neutral Program

Design Principles	Options for Your Standing Neutral Program			
Timing of Involvement	Pre-Contract Signing (e.g., Deal Architect)		Post-Contract Signing	
Number of Neutrals	One		Three	
Skills Required	Deep Subject Matter Expert/ Industry Experience	Facilitation/Soft Skills	Project Management	Legal/Lawyer
Level of Involvement	Continuous—Standing Neutral (embedded as part of continuing governance)		Ad hoc—Standby Neutral (only when called upon)	
Depth of Engagement	All levels of governance	Mid-levels of governance		Only the highest levels of governance
Role/Authority	Advice only	Makes formal recommendation (non-binding)	Facilitates resolution by the parties	Offers binding decision
Fact-Finding Latitude	May only receive information and evidence provided	May investigate personally		Ability to hire outside experts
Types of Support	**Pre-Contract Support:** *Deal Facilitator **Post-Contract Support:** *Transition Support *Risk Management *Performance Metrics/Performance Management Alignment *Project Management Support *Onboarding Support/Training *Strategic Reviews *Relationship Health Monitoring **Dispute Management:** *Issue Resolution *Facilitate Resolution *Offer Binding Decisions			
Reference in Contract	Formal: Reference in contract (may be an appendix or schedule)		Informal: Not referenced in contract	

Neutral lets them quickly use the neutral as an objective sounding board, obtaining a recommended course of action that is minimally disruptive to the business relationship.

How It Works

The basic concept of a Standing Neutral works the same whether using a Traditional or Modern version. When designing a Standing Neutral process, it is important to understand three critical success factors.

Early Mutual Selection—The parties jointly select the Standing Neutral early in the relationship. This allows the Standing Neutral to be embedded in the continuing governance mechanisms. The parties mutually agree and designate a single neutral or a board of three neutrals. The parties jointly select their Standing Neutral, where each has high confidence in the neutral's integrity and expertise. A Standing Neutral is typically an expert in the parties' industry (e.g., construction, facilities management, IT services).

Continuous Involvement—Following the Standing Neutrals' selection, the parties brief the Standing Neutral on the relationship and provide the necessary documents. The Standing Neutral is then formally embedded into the parties' continuing governance (e.g., attending monthly operation reviews and/or more strategic quarterly business reviews).

In some cases, and where the contracting parties may want to minimize the costs of deploying a Standing Neutral, they may choose to limit the role to only being involved on an ad-hoc basis. In this case, the Standing Neutral acts more like a "Standby" Neutral.

Prompt Action—A key objective of a Standing Neutral process is to preserve cooperative relationships between the contracting parties. While the role of Modern and Traditional Standing Neutrals vary, both aim to "keep the peace."

A good Standing Neutral process emphasizes "real-time" involvement—especially if there is a potential problem or conflict brewing. When a Standby Neutral is not integrated into the parties' governance as part of regular review meetings, they are expected to be available on relatively short notice to consult with the parties and discuss issues while misalignment and problems are still new and where the parties' positions have likely not hardened.

Selection and Orientation

At the outset of their relationship, parties select one person or a three-person panel with whom they have trust and confidence to serve as their facilitator—the Standing Neutral—throughout their relationship. A single Standing Neutral should always be entirely independent.

In cases where there is a multi-member Standing Neutral panel, there are several ways to choose the panel. Often, each party nominates one member, and the two nominated neutrals will select a third member; in such cases, it is typically required that every panel member be acceptable to both parties and that all panel members be independent and impartial, with no special allegiance to the nominating party.

As part of the selection process, the parties formalize an agreement with the Standing Neutral, including determining the Standing Neutral's responsibilities and authority. As shown in Figure 1 above, there are nine design principles contracting parties should follow when designing their Standing Neutral Program.

After selecting the Standing Neutral, the parties brief the Standing Neutral regarding the nature, scope and purpose of the relationship. As part of the briefing, the Standing Neutral is usually equipped with a basic set of contract materials and supporting documents to get ramped up and help the neutral

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Dispute Management

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properly serve the parties throughout their relationships.

The parties equally absorb the cost and expenses of the Standing Neutral.

The Traditional Concept

The Traditional Standing Neutral concept—different from the Modern Standing Neutral—was first used in the construction industry in 1975. Contracting parties to a difficult tunneling project conceived the idea of enlisting the help of three impartial geological engineers to help them solve difficult rock and soil technical and pricing problems. A. A. Mathews, Robert J. Smith, Paul E. Sperry and Robert M. Matyas, Construction Dispute Review Board Manual, 10 (Matyas, 1st ed. 1996).

The vision was that a trusted three-party panel of independent expert advisers (that is the Dispute Review Board, or DRB) would be immediately available to help resolve disputes arising between them during their contractual relationship.

By far, the most common form of a Traditional Standing Neutral is a DRB, which is found in the construction industry. The CPR Institute defines a DRB in the construction industry as follows:

> A party-appointed panel chaired by a trained neutral, which generally is formed at the start of a construction project and meets regularly (usually at the site) to follow work progress and to provide guidance to the parties. Once the DRB is in place, is informed about the project, and follows its progress, it is able to guide the parties to a mutual resolution of differences before they become disputes. In the event that the DRB is called upon to hear a ripened dispute, it can make either recommendations, awards that are binding for a period of time, awards that are binding but appealable, or final and binding decisions, depending on the agreement of the parties involved in the project. DRBs have been successfully used in complex construction projects.

See https://drs.cpradr.org/services/other-services.

Thus, DRBs play a dual role: providing guidance to the parties to help them avoid problems but also offering early and effective dispute resolution if needed. The focus on dispute prevention helps the parties maintain a constructive process to maintain their working relationship while trying to resolve differences

Third-Party Prevention

The technique: Standing Neutrals.

The history: An individual was hired at the outset to stand by and be ready for dispute resolution, characteristically to keep construction projects on track.

The current application: Far more than just construction, and an emerging even-better use, dispute prevention.

Having a neutral involved early emphasizes the preservation of the parties' relationship trust. And when the parties have a claim, a DRB hearing is often more informal and less adversarial than an arbitration hearing or litigation, with openness and candor encouraged. For example,

- Typically the parties submit short, concise position papers and relevant documents. No discovery is permitted, although the DRB members have the right to request information necessary to resolve the dispute.
- The businesspeople involved make presentations and typically lawyers do not play a role apart from addressing legal issues. In addition, cross-examination is not allowed.
- Unlike arbitration or litigation, a DRB does not issue a decision, verdict, or award. Instead, the DRB provides written findings and non-binding recommendations that include an analysis to support its conclusions.
- The parties typically use recommendations to negotiate a final resolution of the dispute. In some cases, the parties agree that recommendations become final and binding if not rejected promptly. In addition, DRB findings and recommendations are generally admissible in a subsequent court or arbitration proceeding.

Sarah B. Biser, Deborah Bovarnick Mastin & Robert A. Rubin, "Duels, Litigation, Arbitration, or Dispute Review Boards: The Better Choice in Complex Construction Projects," American Bar Association (March 2016) (available at https://bit.ly/3YbEcWh).

Today's DRBs have become a proven concept and the success has led to the creation of the Dispute Review Board Foundation in 1996–a nonprofit organization that promotes the use of the dispute board process and serves as an educational resource and information exchange for owners, contractors and dispute board members. See www.drb.org/history.

Over the years, the DRB concept has evolved. Today, the Dispute Review Board Foundation outlines three types of Standing Neutrals that act in the capacity of a dispute board:

1. *Dispute Board Panels*—For large and complex construction projects with multiple contracts or alternative delivery methods, the most cost-effective means of dispute avoidance and resolution may be to establish a DB panel. The panel should include experienced DB practitioners, from which individual DB members can be selected to work on specific contracts within the overall project. A DB panel member may act as a facilitator, mediator or adjudicator, as appropriate, when a dispute arises.
2. *One-Person Dispute Board*—A one-person DB is particularly suitable for smaller projects where the cost of a three-person DB cannot be justified. A one-person DB is only fully effective, however, when an independent person with all the needed qualifications and experience is available. In practice, the primary benefit of a one-person DB versus a three-person DB is cost savings.

3. *Dispute Resolution Adviser*—A DRA is similar to a one-person, standing DB set up at the commencement of the project. However, instead of the DRA having the power to provide a decision or recommendation on the dispute's merit, the DRA's role is primarily that of an independent and experienced consultant, identifying potential areas of dispute and ensuring issues are addressed by the parties as soon as possible. The DRA member's other primary role is to assist the parties in informally resolving any dispute. The DRA assists the parties by acting as a facilitator to achieve an amicable dispute settlement or structure a suitable formal dispute resolution mechanism.

Dispute Board Manual, DRBF (available at https://www.drb.org/dispute-board-manual).

Case Study

The Olympics represent a good example of using DRBs. Andrew Stephenson, "Dispute boards and the Olympic Games: A tried and tested method of dispute avoidance," Corrs Chambers Westgarth (March 2, 2023) (available at https://bit.ly/4itmmFq). In the 2012 London Olympics, due to the use of DRBs, the project was delivered on specification, ahead of time and within budget. Only two disputes required adjudication and no court actions commenced.

In 2016, the Rio Olympics—AKA Rio 2016—took the lessons learned and implemented DRBs for dispute avoidance and resolution across 35 contracts. The Brazilian government was responsible for the delivery of city bid commitments, which included the main venues and infrastructure. Rio 2016 was responsible for the actual delivery of the games, including the "overlay" contracts.

Because experience with DRBs was limited in Brazil at the time, Rio 2016 worked with the Dispute Review Board Foundation to develop a strategy for how it would use DRBs.

The DRBF created two dispute board panels. The first DB panel had members from whom each party could select one member, with the DB members selecting the DB chair. The DB chair was to be selected from the second DB panel.

The parties drafted bespoke DB rules based on agreed-upon principles which were consistent with local laws. These bespoke rules formed part of the contract between Rio 2016 and the individual contractors. Key features of the DB panels were:

- A separate DB was established for each contract, which could be permanent or ad hoc with one or three members. The preference was a permanent or standing DB with three members.
- Party-selected DB members were chosen from a list of trained and certified local members. The DB members were required to have undergone training under the Rio 2016 DRB Training Programme (run by the DRBF), be properly certified, and be fluent in Portuguese or Spanish. Either party had the right to reject a party-selected member, although grounds for rejection were limited in scope.
- DB chairs were also to be selected from the DB members list based on their familiarity with local law, geographic proximity to the Rio Olympics, previous DB experience and fluency in Portuguese or Spanish and English.
- Short timetables were in place to ensure that construction timelines were met. These timetables included appointing the DBs at the outset of the contract, setting up frequent DB site visits, and requiring rapid delivery of the DB's opinions and decisions.
- The DBs had the power to provide written advisory opinions when jointly requested. A formal referral of a dispute could be made to the DBs to obtain a binding decision. DB decisions were binding unless and until overturned in arbitration.
- A DB Program Manager provided operational assistance to help the parties in the initial establishment of the DBs and in the procedural operation of the DBs. This was important given the short timetables and to provide consistency across the 35 DBs.
- And: Remuneration rates for the DBs were fixed at a daily rate and a monthly retainer. The parties split the fees equally, which included administration charges and the DB Program Manager fee.

The use of DBs in the Rio 2016 was regarded as successful. Experts suggest the DBs' mere existence motivated the parties to resolve their issues as they arose—which upheld the concept that DBs contribute to dispute prevention simply by being present.

The use of DBs on the Rio Olympics also had a positive side benefit because it raised the profile of DBs in Brazil. It fueled a spike in DBs used in more public works contracts in Brazil.

* * *

The bottom line is that Standing Neutrals are an excellent way to shift the focus on dispute resolution, moving up the dispute management continuum (see chart at bottom of page 96) where a neutral is used in a more preventive approach.

> Standing Neutrals are an excellent option for any long-term relationship, such as a joint venture, longer-term outsourcing and franchise agreements, and complex construction projects.

And if you want proof DRBs work, just remember the statistics cited above from the Dispute Review Board Foundation. The DRBF research indicates that the mere availability of the DRB results in the parties minimizing their conflicts and never needing to look to the standing neutral to make any recommendations or decisions. Again: In the small minority of cases where the standing neutral makes a recommendation, the parties accept 95% of the recommendations without resorting to mediation, arbitration, or litigation.

With results like that it is no wonder leading organizations like World Bank require the inclusion of a DRB in major projects. If a DRB is good enough for the World Bank's most important projects, isn't it good enough for your organization's too?

* * *

Next month, Back to School on Dispute Management columnist Kate Vitasek will introduce the concept of a Modern Standard Neutral and show even more progressive approaches using Standing Neutrals as a dispute prevention mechanism.

International ADR / Part 2

Home-Court Enforcement: Confirming Investor-State Arbitration Awards in China

BY YONG ZHANG

In Part 1 last month, the author covered enforcing investor-state arbitration awards against foreign states in China. In this month's concluding Part 2, the focus is on enforcing investor-state arbitration awards against the Chinese government in Hong Kong and Mainland China.

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Recognition and Enforcement of Arbitral Awards Against Foreign States In Hong Kong

Under Article 2 of the Interpretation by the Standing Committee of the National People's Congress Regarding the First Paragraph of Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (2011) (available at https://bit.ly/4fLlbzV), China's central government has emphasized that the Hong Kong Special Administrative Region, including its courts, must apply or execute the state immunity rules or policies adopted by the central government. The Hong Kong SAR courts are therefore required to follow the state immunity policies set by the central government and may not adopt differing or conflicting rules.

In a notable case before the enactment of the Law of the People's Republic of China on Foreign State Immunity, or FSIL, on Sept. 1, 2023, in the case of *Democratic Republic of the Congo v. FG Hemisphere Associates LLC*, (2011) 14 HKCFAR 95, the applicant sought to enforce an International Chamber of Commerce arbitration award against the assets of the Congo located in Hong Kong. The Hong Kong Court of Final Appeal ruled in favor of the absolute immunity doctrine, dismissing the enforcement action on the grounds that the Congo's assets were protected by sovereign immunity.

This decision reflects the historical approach of the Hong Kong SAR, following the central government's absolute immunity principle for foreign states' assets. But since the FSIL's enactment, Hong Kong shall shift its position from absolute immunity to restricted immunity as well. Due to the strict FSIL standard, enforcing investment awards in Hong Kong may also be significantly challenging.

Principle of Reciprocity

According to FSIL Article 21, if a foreign state accords China and its property immunities that are less favorable than those provided for in the act, China will apply the principle of reciprocity. This means that if a foreign state grants China less favorable immunity standards, China will apply the same immunity standards to that state in return.

But if a foreign state grants China more favorable treatment than what is provided under the FSIL, it seems that China will not necessarily improve its own treatment of that state. Instead, China will adhere to the standards set out under the FSIL, implying that the principle of reciprocity applies mainly when less favorable treatment is granted, but does not extend to automatically adopting more favorable standards.

Special Procedural Rule for the Recognition and Enforcement Against Foreign States in China

The People's Republic of China Civil Procedure Law Article 290 specifies the procedural steps for recognizing and enforcing foreign arbitration awards in China. According to this provision, if a foreign arbitration award needs to be recognized and enforced, the parties must apply directly to the Intermediate court in the jurisdiction where the person to be enforced resides or where their property is located.

Additionally, the Notice of the Supreme People's Court on the Relevant Issues concerning the People's Courts to Accept Civil Cases Involving Privilege and Immunity (No. 69 [2007]) (referred to below as the "2007 notice") sets out specific procedural requirements for civil cases in which entities enjoying privileges and immunities in China (such as foreign states) are defendants or third parties.

The notice stipulates that courts must first report the case to the higher people's court within the jurisdiction for review before deciding whether to accept the case. If the higher people's court agrees to accept the case, it must then report its opinion to the Supreme People's Court. Only after the Supreme Court agrees to accept the case can the intermediate court proceed with the case.

On March 26, to implement FSIL, the Supreme People's Court issued the *Notice on Procedural Matters Concerning Civil Cases Involving Foreign State Immunity* ("2025 notice"). This notice provides detailed procedural guidance for handling cases involving issues of foreign sovereign immunity. Specifically:

1. Plaintiffs are required to indicate in their complaint whether an exception to foreign sovereign immunity applies to the case.
2. The notice further limits the jurisdiction of courts eligible to hear cases involving foreign states. Generally, only intermediate courts in provincial capitals and certain specialized courts—such as maritime, financial, and intellectual property courts—are authorized to hear such cases.

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3. It specifies permissible methods of service and explicitly prohibits service by publication.
4. Foreign states are granted the right to raise jurisdictional objections, and their appearance in court solely for the purpose of contesting jurisdiction does not constitute acceptance of jurisdiction. Even if no objection is raised, courts are required to independently examine whether the foreign state enjoys sovereign immunity.
5. Courts may, through the Supreme People's Court, request the Ministry of Foreign Affairs to clarify factual issues related to state conduct.

It can be reasonably inferred that the 2025 notice supersedes any conflicting provisions in the 2007 notice, such as the reporting mechanism, since the newer notice establishes explicit rights and formal procedures for resolving jurisdictional matters.

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Enforcement Against The Government

Finally, this report focuses on the nuances of enforcing investor-state arbitration awards against the Chinese government in China.

It is evident that the FSIL cannot be applied to investment awards against the Chinese government when enforcing such awards within China, as the Chinese government is not considered a foreign sovereign under the FSIL. But the enforcement of such awards in China is crucial in practice, given that the Chinese government possesses significantly more assets within its territory than any third-state jurisdiction.

Currently, while China has been involved in a relatively small number of investment arbitration cases—fewer than 10—no arbitration awards have been rendered against the Chinese government, nor have any such awards been enforced within China.

Despite this, China's increasing prominence as a global destination for foreign investment makes it essential to understand the relevant provisions regarding the enforcement of investment awards in China.

Crown Immunity: Crown immunity is a legal doctrine designed to protect the sovereign from being sued within its own courts, based on the principle that "the king can do no wrong and cannot be sued in his own courts."

This doctrine, originating from U.K. common law, was adopted by its colonies, including Hong Kong. After the handover of sovereignty over Hong Kong to China on July 1, 1997, the continued applicability of crown immunity in Hong Kong has become a subject of legal discussion.

In *Intraline Resources Sdn. Bhd. v. Owners of the Ship or Vessel "Hua Tian Long,"* [2010] 3 HKLRD 611, the Hong Kong High Court ruled that the crown immunity doctrine remained intact within Hong Kong law. The court determined that the immunity had not been removed, and the privilege of immunity was transferred to the central government of China after the handover of sovereignty. As a result, the court dismissed the case because the defendant, as an entity of the Ministry of Communications of PRC, was entitled to immunity from suit in Hong Kong.

As discussed earlier, Hong Kong follows the state immunity policy as determined by China's central government. It remains unclear how the central government views crown immunity, however, and whether Mainland China would adopt the similar common law doctrine. Additionally, even if crown immunity exists, a state may still waive its immunity, as seen in certain international agreements.

Against China, In China

The legal question: How investor-state dispute settlement awards against the Chinese government might be enforceable in China itself.

The backdrop: As noted in Part 1 last month, last year's People's Republic of China Law on Foreign State Immunity is being developed.

Success rates? Not yet. No foreign investor-state award confirmations so far. But this article sets out a path as to how it will happen.

For instance, some Bilateral Investment Treaties concluded by China include provisions such as: "Each Contracting Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award." China-Barbados BIT Article 9(7) (1998)).

The interpretation of whether such language constitutes a waiver of immunity is unclear. But based on similar FSIL provisions—where Article 4 provides that a foreign state "shall not enjoy immunity" from jurisdiction in a proceeding before a court of the People's Republic of China in a specific matter or case if it has expressly submitted to the jurisdiction of the People's Republic of China courts with regard to the matter or case in, among other sources of dispute, an international treaty—it can be inferred that such a provision would likely amount to a waiver of immunity.

Execution Immunity: In addition to crown immunity, there are other legal considerations in China that protect government assets from enforcement. The Supreme Court has established a legal framework that restricts the enforcement of judgments and awards against state assets, particularly government fiscal funds.

Government Fiscal Funds Protection—The Supreme People's Court of China has expressed a strong preference for ensuring that government functions are not disrupted by enforcement actions. This includes protecting budgetary and extra-budgetary funds—both of which are considered state fiscal funds—and ensuring that such funds are not used to satisfy judgments or economic liabilities. This view is reflected in various judicial opinions and case rulings:

1. Under "The Reply of the Execution Office of the Supreme People's Court on Whether the Property of the Jinchang East District Management Committee in Gansu Province Can Be Enforced" (April 19, 2001) (available at https://bit.ly/3W4eYaY), the SPC ruled that both budgetary and extra-budgetary funds are strictly regulated by the state and cannot be used to settle joint economic liabilities. Furthermore, the SPC emphasized that enforcement measures should not be taken against government office spaces, vehicles, or other necessities in order to preserve the

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normal functioning of administrative units.

2. "Wang Huazuo & Peng Yonglu Contract Dispute Enforcement Review Decision" (2019), Supreme People's Court Enforcement Review No. 38: In this case, the SPC reiterated its position on the protection of fiscal funds. The court confirmed that state fiscal funds are strictly controlled and cannot be used for economic liabilities arising from judgments or disputes. It also clarified that fiscal funds in government accounts could only be used for specific projects as stipulated in official documents, not to pay debts from economic disputes

Despite these restrictions, the SPC's position does not imply that government assets are absolutely immune from execution. The SPC has provided mechanisms for enforcement in certain circumstances.

For example, in the enforcement review case mentioned in 2) above, the SPC provided a suggested approach for enforcement: "The Qinghai High Court should issue a judicial suggestion to the Jiuzhi County Government and the Jiuzhi County Development and Reform and Commerce Bureau, requiring them to prepare their own funds within a specified time limit, or to apply for and supplement special fiscal funds to fulfill the obligations determined by the judgment, thus safeguarding the legitimate rights and interests of the creditors in accordance with the law." Id.

While the exact method for how the government can prepare its own funds is not entirely clear, it is evident that the local government has the option to incorporate the debt into the next year's budget. The funds allocated under this budget can then be used for enforcement.

Similar ideas have been incorporated into the Enforcement Law (Draft). Article 103 of the draft law states: "If the enforcement basis determines that a government legal person must fulfill its debts, the government legal person must do so. If the debt has already been included in the budget, the funds allocated by the financial department in accordance with the budget can be used for execution. If the debt has not yet been included in the budget, the debtor and the financial department can be notified to include the debt in the budget for the current or subsequent year."

The Procedure for Enforcement Against Government Assets: The practical implications of enforcing awards against the Chinese government require a nuanced understanding of how government assets are managed in the context of China's fiscal and legal system. The enforcement of arbitral awards may be pursued via the State Council or its financial departments, which are responsible for formulating and implementing the national economic and social development plan and the state budget (as per Article 89 of the Chinese Constitution).

In cases where enforcement is necessary, it is more appropriate to name the State Council or a specific government department—typically the Financial Department—as the respondent. The Financial Department would then be tasked with including the debt in the current or next fiscal year's budget and ensuring the allocation of funds for enforcement.

* * *

While arbitration provides a valuable approach to resolving disputes between investors and host states, the recognition and enforcement of such awards may still face significant challenges, particularly due to sovereign immunity issues. Even though many countries, including China, have transitioned from an absolute immunity doctrine to a restricted immunity doctrine, which is more conducive to the enforcement of investment awards, significant gaps and challenges still need to be addressed.

This is no easy task, as it requires balancing various multifaceted considerations, including the enforceability of the award, the protection of sovereign integrity, and the maintenance of foreign relations.

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provisions addressing specific rules on AI use. *See* Markus Altenkirch & Raika Hossback, "The New Guidelines on the Use of Artificial Intelligence in Arbitration: Background and Essential Aspects," *Global Arbitration News*, Baker Mackenzie blog (available at https://bit.ly/3FT0PIL).

First, arbitrators and parties must disclose when AI tools are used in case assessments for transparency. Second, AI models used should undergo regular audits to ensure fair decision-making and bias prevention.

Third, the AI systems handling case documents must comply with existing global data protection laws and confidentiality protections. Finally, arbitrators and practitioners should receive training on AI ethics and risk mitigation as a way to maintain integrity of AI use.

SVAMC's guidelines emphasize that while AI can assist the arbitration process, human oversight continues to remain essential to maintaining procedural integrity. Id.

JAMS: AI Rules and Ethical Safeguards

In June 2024, international ADR provider JAMS Inc., based in Irvine, Calif., introduced its "Artificial Intelligence Disputes Clause, Rules, and Protective Order" to regulate AI-related arbitration cases and issues (available at https://bit.ly/4i4nZZM).

Similar to the SVAMC approach, JAMS has provided a framework for users addressing the ethical use of AI and the role AI should play in arbitration. See Leslie King O'Neill, Pioneering Dispute Resolution: The New JAMS AI Rules, JAMS blog (Feb. 4, 2025) (available at https://bit.ly/4cF1lXb).

The JAMS rules recognize the innovative benefits of AI use and that implementing a set of rules ensures users continue to involve—and evolve—AI use in arbitration in an ethical manner.

The rules implemented strongly establish a few noteworthy provisions. Id. First, the rules allow parties to preemptively agree to arbitration for AI-related disputes. Second, arbitrators must remain fully responsible for their rulings, even

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when using AI tools to ensure that human oversight of AI use is maintained where necessary.

Similarly, the rules ensure that AI-generated legal research or analytics do not compromise the case integrity by ensuring accuracy through human oversight.

Finally, the rules encourage AI system audits to detect and prevent discriminatory patterns in legal analysis and mitigate bias due to AI use.

The JAMS approach seeks to ensure that AI does not replace human judgment but instead allows for the enhancement of arbitration efficiency and fairness. Id.

Global Developments: LCIA, SCC, and UNCITRAL

In addition to the SVAMC guidelines and JAMS domestic rules, other international arbitration providers have begun implementing AI use policy and tools, and monitoring the fast-moving developments.

For example, CPR Dispute Resolution Services LLC is offering artificial intelligence support for queries on its neutrals platform. The beta development provides assistance for building profiles and addressing practice issues.

CPR has incorporated a chatbot feature starting at the case intake process for neutrals' procedural questions. Similarly, CPR has launched a chat for questions once in the case management platform, which focuses on rules—for example, discovery issues. Enhancements, according to CPR DRS, are under development. [CPR DRS is owned by the CPR Institute, which publishes this newsletter, and produces events on conflict resolution which have included AI seminars. See https://drs.cpradr.org/.]

At the Swiss Arbitration Summit in January, AI in practice was one of the two major themes; the SVAMC Guidelines were referred to as a starting point for AI institutional policy. See Juliette Asso-Richard (and seven co-authors), "Swiss Arbitration Summit–Shaping the Future of Arbitration Together: Extension of Arbitration Clauses to Non-Signatories and AI in Practice," *Kluwer Arbitration Blog* (Jan. 17, 2025) (available at https://bit.ly/42zMxp0).

The American Arbitration Association and its international division, the International Centre for Dispute Resolution, in December 2023 launched AAAi Lab, "a web center supporting AAA users, arbitrators, in-house counsel and law firms with policy guidance, educational webinars and tools for embracing generative AI in alternative dispute resolution." See the AAA announcement at https://bit.ly/4clJi7S.

More recently, the AAAi announced a panelist search tool intended to enhance selection for arbitration and mediation cases, and an AI aide for ADR briefwriting. See, respectively, "AAA-ICDR Launches New AAAi Panelist Search to Enhance Panelist Selection with AI Technology," AAA-ICDR Press Release (Oct. 10, 2024) (available at https://bit.ly/4lo8Gya), and Bob Ambrogi, "Exclusive: American Arbitration Association Partners with Clearbrief to Offer AI-Powered Legal Writing Tools To Its Panelists and Parties," *LawSites* (Jan. 14, 2025) (available at https://bit.ly/42XtFPS).

Machine Work

The question: How and where does artificial intelligence fit in arbitration?

The answer: Everywhere. Whether we like it, love it, or not.

The state of integration: Providers are offering tools, rules and guidance. Everyone is developing something. And the courts aren't sitting still either.

See also Kendal Enz, Artificial Intelligence: A New Horizon in Arbitration and Mediation, *AAA-ICDR Blog* (Dec. 12, 2023) (available at https://bit.ly/4jlo7VR); the AAAi Lab contains a podcast and the organization's ClauseBuilder, at https://go.adr.org/aaai-lab-blog.html. The AAA announced the addition of AI to Clausebuilder a year ago. See press release at https://bit.ly/4iPMcnk.

Institutions providing users with some kind of direction, guidelines, policy, or rules on AI use within arbitration has become a common occurrence. The London Court of International Arbitration—the LCIA—five years ago updated its arbitration rules in a manner that should promote AI use while maintaining procedural fairness and transparency. See Jason Fry, "Updated LCIA Arbitration Rules Promote Use of Technology, Early Determination of Claims and Consolidation of Proceedings," Clifford Chance (Aug. 14, 2020) (available at https://bit.ly/42cqo09).

The Stockholm Chamber of Commerce has provided its "Guide to the use of artificial intelligence in cases administered under the SCC rules" (Oct. 16, 2024) (available at https://bit.ly/4ckZypT), which outlines AI's uses within arbitration. It provides a statement on managing AI's potential to maintain the ethical practice of the institution.

The United Nations Commission on International Trade Law, best known as UNCITRAL, has issued drafting guidelines on AI and smart contracts, addressing the intersection of AI-driven dispute resolution and international commercial law by acknowledging the benefits of AI use, while maintaining a clear intention to prevent unethical uses. See UNCITRAL, "Revised draft legal taxonomy–revised section on artificial intelligence and automation section [sic]," UNCITRAL 54th session, Vienna, 29 June–16 July 2021 (May 24, 2021) (available https://bit.ly/4i3ubRO); see also Karl Cauchi, UNCITRAL, AI and Smart Contracts: Understanding Their Link, GTG Legal website (Jul. 18, 2024) (available at https://bit.ly/4joHtJW).

AI Agreement and Procedural Order

Most recently—and perhaps destined to be most influential—the Chartered Institute of Arbitrators, a 110-year-old London membership nonprofit focusing on best practices, released AI guidance. Ciarb, "Guideline on the Use of AI in Arbitration" (March 2025) (available at https://bit.ly/3G1bOzH).

The 26-page document is "an expansive how-to on managing the benefits and risks of using AI within arbitration," the group says. It outlines the benefits and risks of AI use in arbitration; makes general recommendations on arbitration AI use; addresses arbitrators' powers "to give directions and make rulings"

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on AI arbitration use; addresses the use of AI in arbitration by the arbitrators themselves, and ends with two template forms, an Agreement on the Use of AI In Arbitration, and a Procedural Order on the Use of AI in Arbitration.

Courts, Too

U.S. courts aren't standing idly by.

The federal judiciary's rulemaking arm, the U.S. Judicial Conference, is a considering a committee recommendation for dealing with AI and expert witnesses that would supplement Federal Rules of Evidence Section 702 on expert witnesses, and presumably influence arbitrator procedural decisions.

The proposal, to be considered this month by a conference panel, would require that "AI and other machine-generated evidence offered at trial without an accompanying expert witness would be subjected to the same reliability standards as expert witnesses." Nate Raymond, "US judicial panel advances proposal to regulate AI-generated evidence," *Reuters* (May 2) (available at https://bit.ly/4jDlM9l). For information on the Judicial Conference committee deliberations on new AI-related evidence rules related to expert witnesses and deepfakes, see the conference's report, Advisory Committee on Evidence Rules (May 2, 2025) (available at https://bit.ly/3GUrLrN).

The institutions that are discussed above are paving the way for the development of a standardized approach to AI arbitration use; the point is to ensure consistency and ethical compliance across jurisdictions and internationally.

In the meantime, ADR practitioners will continue to wrestle with the use and effects—and legality—of using AI in their briefing, awards, and overall practice. See, e.g., Emily Sawicki, "Consumer Wants Steam Award Axed, Says Arbitrator Used AI," *Law360* (April 10, 2025) (available at https://bit.ly/3GF5vlT) (a consumer asks a federal court to vacate an antitrust arbitration award in favor of a big video gaming company alleging AI wrote the award).

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As AI continues to become more sophisticated, arbitral institutions must continue refining policies to address emerging risks.

Moving forward, an emphasis on increasing collaboration between arbitral institutions and government bodies to establish and harmonize rules governing AI use and ethics in dispute resolution likely will be essential to development.

AI's rapid advancement presents both opportunities and challenges for arbitration domestically and internationally. While institutions like SVAMC and others have led the path to AI ADR governance, continued vigilance is required to ensure AI serves as a tool for enhancing, rather than undermining, arbitration's core principles of fairness, efficiency, and impartiality.

As policy and guidance on AI use evolves, arbitral institutions worldwide will play a critical role in shaping the future of dispute resolution in the digital era.