Alternatives
TO THE HIGH COST OF LITIGATION
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Court Decisions/Part 1 of 2

Two New Jurisdiction Traps: Arbitration Amounts In Controversy, and New York Convention Application

BY PHILIP J. LOREE JR.

Federal Arbitration Act subject-matter jurisdiction is replete with traps for the unwary, a number of which can be traced to the U.S. Supreme Court's decision in *Badgerow v. Walters*, 596 U.S. 1, 9-11 (2022). [See author Philip J. Loree Jr.'s Arbitration Law Forum posts here, here, here, & here.] Two such subject matter jurisdiction traps, each based on recent U.S. Circuit Courts of Appeals decisions, are worth a closer look.

The first concerns the amount of controversy requirement for establishing diversity jurisdiction over petitions or applications to confirm, vacate, or modify FAA-governed arbitration awards. It is illustrated by the Ninth Circuit's recent decision in *Tesla Motors Inc. v. Balan*, 134 F.4th 558 (9th Cir. 2025). There the Court held that the 28 U.S.C. § 1332(a) diversity-jurisdiction amount in controversy for a zero-sum arbitration award was zero—Tesla, the opinion states, "went to the district court to confirm a zero-dollar award dismissing Balan's libel claims. On its face, a petition to confirm a zero-dollar award cannot support the amount in controversy requirement." 134 F.4th at 561.

The Ninth Circuit concluded that determining the amount in controversy based on the amount demanded in the underlying arbitration would violate *Badgerow*'s rule against finding jurisdictional facts by "looking through" to the underlying arbitration proceeding. See *Tesla*, 134 F.4th at 559, 560-61.

Badgerow did not deal directly with the issue of amount-in-controversy for purposes of diversity jurisdiction, and even after *Badgerow*, one might, depending on the facts, argue that the "value" of a zero-dollar award could, from perspective of one or both parties, exceed $75,000, exclusive of costs and interest. 28 U.S.C. § 1332(a); see, generally, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 347 (1977) ("In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation."); *Maine Cmty. Health Options v. Albertsons Cos.*, 993 F.3d 720, 723-24 (9th Cir. 2021); *Washington National Ins. Co. v. Obex Grp. LLC*, 958 F.3d 126, 135 (2d Cir. 2020); *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 897-98 (10th Cir. 2006); *Dixon v. Edwards*, 290 F.3d 699, 710-11 (4th Cir. 2002).

But the Ninth Circuit saw things differently, and its conclusion has strong support in U.S. Supreme Court precedent, as well as logic.

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The author is principal of the Loree Law Firm, a New York solo practitioner who focuses on arbitration and associated litigation. He writes a blog about arbitration issues, the *Arbitration Law Forum*, at https://loreelawfirm.com/blog, and is a regular contributor to analysis on the YouTube channel hosted by the CPR Institute, which publishes this newsletter, available at www.youtube.com/@CPRInstituteOnline/videos.

CPR News

From the CPR Annual Meeting: Moving More Prevention Into Corporate Culture

BY JOAN STEARNS JOHNSEN

The CPR Institute is increasingly focused on Dispute Prevention—not simply resolving disputes after they arise but preventing them before conflicts escalate.

Prevention involves the design and use of processes and skills with the intention of maintaining trust, improving communication, and nurturing important business relationships. The costs of unmanaged friction are higher than ever.

CPR is a leader in broader recognition of the value of relationship management as an essential strategic priority. Against this backdrop, CPR's 2025 Annual Meeting provided an opportunity to bring the community together to examine how we can accelerate the acceptance and integration of Prevention practices more widely into corporate culture.

At the Annual Meeting, held in Miami in February, one of the panels was a brainstorming session exploring how to move Prevention from an aspirational concept to a practical, widely adopted approach—one embraced widely by executives, in-house counsel and outside counsel. This panel focused on how to take best advantage of the sophistication and experience of our community to identify options for accomplishing this. The panel's title was "Prevention: From Theory to Practice."

This is intuitive within the CPR community, where these objectives and the concept of Prevention are already embraced—and where CPR's mission is managing conflict and lessening litigation to enable more business purpose.

Our challenge is raising awareness of these processes beyond this relatively small group. A quote often attributed to 19th century German philosopher Arthur Schopenhauer is quite apt. "All truth

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#CPRAM26: Hold the Date!

The CPR Institute's 2026 Annual Meeting will be held Feb. 11-13. at the Loews Coronado Bay Resort in Coronado, Calif.

The theme is "Navigating Changing Currents: Business ADR in a Global Economy."

The meeting will convene ADR thought leaders on hot topic issues, new developments, and practical tools and strategies in commercial arbitration, mediation, dispute management, and dispute prevention.

For updates on the program and reservations, go to CPR's website at www.cpradr.org/events/cpr-annual-meeting-2026.

Alternatives

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ADR Processes

Consistency in Dispute Resolution: How Regulation Emerges from Government and Tribunals

BY ADAM SAMUEL

The overlap between dispute resolution and regulation lies at the heart of judging, arbitrating and much else besides. It affects the interaction between individual decision-makers and those to whom more general regulatory powers have been entrusted.

Sometimes, it generates distrust between them. Losers in the dispute process often complain that the dispute resolver has been acting as a regulator and so usurping the role of that entity. At the same time, the traditional view of confidentiality and privacy and the minimal reporting of arbitration or other similar awards has created concerns about the lack of accountability of tribunals, called upon to decide issues of world importance.

Changes and disturbances in the area of investment-state dispute resolution have highlighted some of these concerns and led to a more open environment. The publication of decisions, now well-established in some areas, increases the extent of regulation by adjudication rather than traditional policy analysis.

Is consistent adjudication and predictability of outcomes a benefit that makes up for the power shift from adjudicator to regulator involved?

Practical Examples

In the United Kingdom over the past year, the government in trying to promote a lighter-hand regulation has threatened to reform the Financial Ombudsman Service. (It is not all that good but it is so much better than any other country's consumer financial services dispute resolution scheme. See Adam Samuel, "Government Agencies, In Search of Disputes," 40 *Alternatives* 74 (May 2022) (available on *Westlaw*)).

U.K. Finance, a trade body covering, among other things, personal lending, has been in the ear of the Chancellor of the Exchequer (Treasury Secretary), accusing the Ombudsman of engaging in regulation, not dispute resolution. Its members currently face serious compensation bills for hiding excessive volumes of commission and curious discretionary arrangements allowing intermediaries to claim more remuneration by increasing customers' interest charges.

Somewhat ironically, the U.K. Supreme Court, not the Ombudsman, recently confirmed the extent of the first problem. The High Court dismissed an application for judicial review against the Ombudsman pro-consumer ruling on the second problem, agreeing that the firms had broken the relevant rules applicable at the time.

Where an authority seeks to discipline an individual or entity, there is a dispute. This can presumably be submitted to arbitration or the usual variety of procedures. Yet, the Federal Supreme Court of Switzerland—has consistently decided that such a case is not an arbitration. Only an agreed appeal from the conclusion reached has that status. This reduces any dissatisfied party's ability to challenge the operation of the first instance process.

As previous articles in this column have shown, a functionally compulsory tribunal, whether arbitral, regulatory or state-run, operates differently from a conventional arbitration in Europe and the United States. See, e.g., Adam Samuel "A Note from the U.K." columns, "On Court Review of the Arbitrator's Decision: A Look at the United States from Europe," 38 *Alternatives* 37 (March 2020); "U.S. Class Actions v. U.K. Mass Claims," 37 *Alternatives* 153 (November 2019) (both articles available on *Westlaw*). In Europe, a dispute resolution arrangement to which one party is effectively compelled to agree will always come within the oversight of Article 6 of the European Convention on Human Rights in much the same way as the U.S. Constitution's Eighth Amendment. The difference is that under Article 6, trial by jury is replaced by the right to a public hearing with a published decision. The hearing right depends, though, on whether such an occasion could reveal anything useful.

Dispute Resolver As Regulator

In one sense, all adjudicative dispute resolvers regulate.

The outcomes affect the way in which individuals who learn of the ruling behave going forward. They have an impact on future cases involving those people and their organizations. The arguments deployed in the ruling can be re-used in other cases. So, while one decision does not bind subsequent decision makers, it can have an effect.

This, though, increases exponentially when a disputes body publishes reasoned decisions and commentaries on its decisions. Externally, parties know when they do a World Intellectual Property Organization domain name case that the panel will follow the lines set out in the Jurisprudential Overview. This author, along with the panelists that have effectively contributed to it through their decisions over the years, are in fact regulating cybersquatting.

That should be regarded as a good thing. It saves complainants from filing inappropriate cases and parties generally from framing their arguments and behaving inappropriately.

It is a short step from this form of publication to the way a U.K. Ombudsman scheme works. The Ombudsman (it is a female and

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ADR Processes

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male term alike) is part of an organization, employing thousands of staff. More junior staff investigate cases and express views to parties about sensible solutions (in a form of evaluative mediation or early neutral evaluation).

If a settlement does not emerge or the complaint is not dropped, the Ombudsman reaches a decision. The institutional nature of such a process allows staff to share knowledge and insight. Investigators basically tell the parties how they think an Ombudsman will decide cases.

On top of that, these types of schemes traditionally publish commentaries on their cases to enable parties to know how the organization concerned will view their cases. By statute, the biggest U.K. scheme, the Financial Ombudsman Service, has to publish its decisions, which it does by anonymizing the complainant although not the firm.

In fact, the very transparency and shared insights of an Ombudsman arrangement, as opposed to private arbitration, allows those subject to such schemes to know the rules to which they will be subjected and how their tribunal will respond to particular situations. Leaving everyone in the dark except the parties makes the panel a dispute resolver. It also makes it useless. Telling everyone what to expect so that they can avoid future disputes means that the organization has usurped the role of regulator.

I first encountered the Ombudsman-as-regulator argument while working in a voluntary scheme: the Insurance Ombudsman Bureau, which at the time produced an annual report whose examples were largely selected at the whim of the Chief Ombudsman. As the investigator, I was faced with a completely novel point, as courts frequently are about the extent to which a "general agency agreement" gave an intermediary the power to bind its principal, an insurer, to promises of guaranteed returns on the life assurance product concerned.

The curiosity of this case was that the scheme member applied for judicial review (a purely public law remedy in the U.K.) when its membership was entirely voluntary. As an Ombudsman scheme, we had to determine a new point of contract construction while our Terms of Reference allowed us to reach "fair and reasonable" decisions.

As it happened, the Ombudsman decision, which turned out unsurprisingly not to be judicially reviewable (*R.* v. *Insurance Ombudsman Bureau ex parte Aegon Life Assurance Ltd.*, [1995] LRLR 101), then affected some other cases that had been brought on similar facts against the same company. (This was reported in the press at the time.)

Resolution in Full

The examination: Dispute resolving's public component.

The details: Outcomes have consequences. The results—settlements or decisions—create inherent patterns.

The surprising effect: How ADR processes in and even out of government act as regulation. Maybe not at settlement, but over the long haul, it's undeniable.

The court challenge may also have affected subsequent regulatory perceptions of the traditional insurance view, namely that intermediaries act for the customer, not the provider, notwithstanding commission payments passing between insurer and broker. It may even have leaked into the recent Supreme Court case of *Hopcraft v. Close Brothers*, [2025] UKSC 33 (Aug. 1, 2025) (available at http://bit.ly/3VnCAXo) (disallowing financing customers' claims against lenders).

The point is that almost all adjudication when it becomes remotely public regulates. If one throws in a further element, either a new point of law or the application of a non-legal standard such as "fairness," the situation becomes more acute. Every issue-specific ruling becomes a building block in identifying the way in which particular types of fact patterns will be interpreted going forward.

People commonly make the mistake of assuming that the law has in-built certainty. Even in precedent-based countries like England and the United States, vast areas exist where no ruling case exists or where the application of a rule is a matter of judgment. With consumer law and other fields where litigation does not occur often and when it does, rarely reaches the highest courts, the Ombudsman Scheme with its 250,000 cases yearly probably generates more certainty than the courts.

How should this all relate to the bodies publicly entrusted with regulating all this? Often overstretched and inherently under-resourced (to regulate banks properly would cost such a large levy on the industry that our banking systems would lose profitability), they may be relieved to have someone else doing the job. The adjudicatory body or Ombudsman sees cases far more regularly firsthand and often appreciates the subtleties of people's behavior.

Panels Creating Awareness

For example, a Court of Arbitration for Sport panelist may find it easier to become aware of the oppressive role of coaches and their connected sports federations than the federation itself or other sports regulators. (In some cases, the relationship between the coach and the federation blinds the latter to a problem.)

Awareness of difficulties with the cycling EPO doping test may have first been publicized during the unsuccessful Scott Hamilton challenge to a ban. A biology professor, David Housman, was critical of the science behind it. While the CAS panel correctly concluded that Hamilton had doped, it did note the concerns expressed about the laboratory. This was perhaps the first clear indication that led to Lance Armstrong owning up to the same offense even though had never failed the same test.

Regulators with vast ambits like the U.K.'s Financial Conduct Authority cannot concentrate on everything at once. They can benefit from a signal about cases coming through a disputes body. In an ideal world, one would like the regulator and the Ombudsman or disputes scheme to work together.

In practice, the U.K. experience has shown that the two tend to bicker, forming negative views of each other. Sometimes, though, they almost goad each other on and in that respect can be mutually helpful. In two of the biggest scandals of modern financial services, misselling of mortgage savings plans and payment

protection insurance, one side has definitely spotted and addressed the problem more effectively first (the regulator for the mortgage problem and the Ombudsman for the second). An inability by the regulator to act has led, particularly with payment protection insurance, to an extraordinary boom in new disputes.

The most recent problem has an almost comical aspect to it. In 2021, the Financial Conduct Authority concluded that the practice of allowing brokers to increase their commission by raising the interest on car loans allied to an absence of disclosure of this was unfair to consumers. It publicly banned the practice while observing that many firms were breaking existing rules in the process.

The regulator seems, though, not to have realized that its comments would lead to an avalanche of complaints against providers of automobile finance which threatened last year to overwhelm the Financial Ombudsman Service. When an Ombudsman issued a detailed ruling on two of these cases (upheld on a judicial review application although that ruling is under appeal at the time of writing), the regulator had to call a halt. It is now considering a compensation scheme in order to cope with the mess.

To blame the Ombudsman for usurping the regulator's role in that situation is almost silly. Perhaps unsurprisingly, that has not held back the relevant trade bodies or the Treasury. In the Government minister's Forward to HM Treasury, Review of the Financial Ombudsman Service of July 2025, she suggested that her proposals would ensure that FOS was "no longer acting as a quasi-regulator". (The consultation report is available at https://bit.ly/3JAdi5Q.)

This is juridically illiterate. The Review accepts the views of a number of trade bodies whose members face huge compensation bills that "there is not always coherence between the regulatory approach set by the [Financial Conduct Authority] as the financial conduct regulator and the approach used by the [Financial Ombudsman Service] to settle complaints." Oddly enough, through the 24 years of the marriage between the two bodies (including a name change in 2013), there has only been one partial example of this and it may not even be one.

In that situation, the regulator warned pension providers of the need to take care over accepting non-standard investments into their products or platforms. The FOS concluded that it represented a failure to exercise due skill, care and diligence not to investigate the underlying investments.

The English Court of Appeal then ruled that such transactions involved a breach of the Financial Services and Markets Act for which the effective remedy was almost indistinguishable from the Ombudsman's. The regulator would probably not have banned this behavior but the courts and the disputes' body effectively did.

Veering Toward Silly

The U.K. government's proposals end up veering toward the silly. To satisfy an industry that often blindly denies that it has broken rules, it wants to require the Ombudsman to find that a firm has acted fairly and reasonably when the organization has "complied with relevant FCA rules." This leaves it open to FOS to conclude that no such rules exist.

The government also proposes that the Ombudsman scheme will have to consult the regulator on the meaning of its rules in the event of any ambiguity. This will force the regulator to answer, which in itself is not a bad idea. It is hard to see, however, how this will help cases to be decided efficiently. There are no historical examples of where rule interpretation differences have actually occurred. The rows usually involve how to apply the rules in practice and how to streamline rulings and dispute management.

The oddest part of the U.K. government's paper is the way in which it wants the Ombudsman to publish more materials about how it deals with complaints. It already has a monthly bulletin going back to 2001 and a variety of technical papers on its website. It could usefully upgrade the latter. But the more it does that, the more it will become a regulator!

Other areas of dispute resolution have the same issues. One hears criticism of the Court of Arbitration for Sport for creating the law through its published decisions. This represents almost exactly the same problem except that there is a huge hole where a world sporting regulator ought to be.

National sporting federations play their part. Many of the most unpleasant cases, however, can involve situations where the federation has been found wanting, notably where World Anti-Doping Agency steps into institute doping cases.

Any institution that publishes its decisions and so helps parties understand the rules runs exactly the same risk. A natural and desirable wish for coherence in decision-making creates a risk that arbitrators or panelists have to tow the line or risk never being re-appointed. When that happens, the regulator is often a broadly unaccountable group of people in an organization who wish they were doing the tribunal's job. One has to accept these risks or at least define the bodies who interfere in these ways.

ADR and Regulation, Colliding

CAS came into existence for a number of reasons. One was a concern about a sporting body acting as both prosecutor and jury over cases. The idea of federations building an appeal to CAS into the system made very good sense. WADA's right of appeal to CAS in doping cases, effectively an appeal by the prosecution, enhances things further.

The arbitrator in these type of cases is a regulator in two senses. First, obviously, they are punishing wrongdoers, rather than resolving the disputes in the traditional sense. Second, they are laying down standards across the spectrum of events affected by them. That is fine, although it requires a curious mix of panelists to handle these types of problems.

Dispute Bodies And Remedies

A fine, a ban or suspension from competition or an activity are not the usual dispute resolution remedies. Nor is the self-executing way in which a domain name dispute operates so that an order for transfer of an offending address occurs without any effort on the part of the complainant.

Even in more mainstream areas, the handler of an individual case may be operating in a heavily regulated environment but with an authority ill-resourced to intervene.

The traditional U.S. answer was punitive damages. The United Kingdom, like much

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ADR Processes

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of Europe, has proved highly resistant to that approach. (Punitive damages exist in English law but are much smaller and limited in range.) This raises questions about whether arbitrators should use punitive remedies more when a stronger party has clearly abused its position or deliberately flouted rulebook provisions for pure profit motives.

* * *

The U.K. model of financial services conduct of business regulation has long been multi-pronged.

Regulators impose rules, investigate businesses and take various actions against them; consumers can access free of charge and personal risk a complaints body with reasonably high maximum award limits. Authorities can then respond to mass complaints and compliance issues by imposing compensation schemes.

Everyone here is a regulator, participating in what can be a bit of a hit-and-miss effort to protect consumers. Arguing that an arbitrator, panelist or Ombudsman has become a regulator is a statement of the obvious with which people need to become reasonably comfortable.

The same situation exists in plenty of other dispute resolution arenas. Labor arbitrators, most dramatically in the area of baseball and the reserve clause, receive their appointments because they can bridge the gap between private dispute resolution and the much bigger issues.

Dispute resolution is and will always be a much more a public matter than textbooks suggest.

Worldly Perspectives

Portugal's Mediation Infrastructure Looks to Build Demand and Use

BY GIUSEPPE DE PALO & MARY B. TREVOR

Starting in 2001, Portugal has established clear and well-organized structures for both public system and private mediations. This report will focus on private mediations, which deal with civil and commercial disputes, but will reference public system mediations where relevant.

Before 2001, the 1989 Portuguese Constitution, Article 202(4), allowed "non-adjudicative means and mechanisms for dispute resolution." Still, legislation concerning mediation, with the exception of creating a regional Family Mediation Office, was scattered, and its practical application insignificant.

De Palo is a mediator in JAMS Inc.'s New York office, and the president of the Dialogue Through Conflict Foundation. Trevor is an emerita professor at Mitchell Hamline School of Law in St. Paul, Minn., and a scientific adviser to DTC. The Rebooting Mediation Project is a major focus of these *Worldly Perspectives* columns. It is a large-scale study directed by De Palo for DTC that aims to provide policymakers with scientific, data-driven evidence to guide policy recommendations for achieving the Access to Justice goal (16) of the United Nation's Sustainable Development Goals (see https://sdgs.un.org/goals/goal16). This month's column was prepared in collaboration with Cátia Marques Cebola and Ana Maria Maia Gonçalves; see the accompanying Background and Acknowledgments box.

From 2001-2013, Portugal implemented the four main public mediation systems, including, in 2001, the Justice of the Peace Courts (JP Courts). These small claims courts, overseen by the Directorate-General for Justice Policy (DGPJ) within the Ministry of Justice, hear civil disputes valued at less than €15,000. Proceedings incorporate a pre-mediation session, freely waivable by the parties.

The DGPJ also oversees the public Labour Mediation System, established in 2006 to address employment-related disputes, and the public Penal Mediation System, established on a pilot basis in 2007. Family mediation also was restructured to become a country-wide public system in 2007.

On another front, in 2009 Portugal transposed the EU Mediation Directive (available at http://bit.ly/4mfDyk3), by amending the Code of Civil Procedure (CPC; sections referred to in this article can be found at https://bit.ly/3HAwQq9) to add four short-lived articles.

In 2013, these articles were repealed (Law No. 41/2013, of 26 June), and the JP Courts legislation updated as needed (Law No. 54/2013 of 31 July), when the current Mediation Law (Law No. 29/2013 of 19 April, available at https://bit.ly/45uLzMu), was approved. It addressed public mediation and expressly regulated private mediation for the first time.

Chapter I covers the law's purpose and definitions; Chapter II covers general principles applicable to all types of mediation; Chapter III covers procedural rules for private civil and commercial mediation; Chapter IV covers the rules for mediators; and Chapter V addresses public system mediation. Orders accompanying the law addressed developing a list of private conflict mediators and certifying training entities that offer conflict mediation courses.

Civil and Commercial Legal Framework

General Legal Framework: Under the Mediation Law, mediation may be conducted by either private or public mediators. Civil and commercial disputes can be handled either by a private mediator under Chapter III of the Mediation Law, or by the public mediation system of the JP Courts under Chapter V.

According to Article 11(1), the primary criterion for determining whether a dispute may be mediated is whether it involves matters of economic value. Under Article 11(2), where the interests are non-economic, mediation is only available if "the parties may settle the legal matter at issue."

Confidentiality: In Portugal, the Mediation's Law's provisions concerning confidentiality are mandatory and may not be derogated even by express agreement between the parties.

Article 5 requires mediators to keep information acquired during a mediation confidential and prohibits use of such information for the mediator's (or anyone's) benefit. Article 5(2) further prohibits the mediator from sharing information disclosed in caucus sessions with the other party absent the disclosing party's consent, and Article 28 provides that the mediator cannot be a witness, expert, or representative in any case related, even indirectly, to a matter he or she mediated.

Article 5 provides exceptions that arise when disclosure is needed to enforce the mediated agreement or to safeguard the interests of a child or the physical or psychological integrity of any person.

While Article 5 does not explicitly state the parties' confidentiality obligation, the Mediation Law effectively binds them as well: paragraph 4 of Article 5 prohibits the use of mediation-acquired information in court or arbitration proceedings, and Article 16 requires the parties to sign a mediation protocol, which not only shows their consent to mediation but also must expressly obligate the parties to respect the duty of confidentiality.

Iberian ADR

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

The state of practice: Structure is strong, use is not.

The state of the prospects: Make mediation mandatory?

Enforceability: In Portugal, pursuant to the Mediation Law, a mediated agreement in civil and commercial matters—excluding most family-related disputes—may become enforceable in one of two main ways. If the requirements of the law's Article 9(1) are met—which include an issue that can be mediated, parties with legal capacity, no requirement of judicial approval, no violation of public policy, and use of a mediator duly registered in the official list of mediators maintained by the Ministry of Justice—the mediated agreement constitutes an enforceable extrajudicial title under CPC Article 703(1)(d). It may be enforced immediately in the event of non-compliance by either party.

Alternatively, the parties may seek judicial approval under Article 14. Both parties must jointly request this option. If approved, the agreement has the same legal value as a court judgment (CPC, Article 705), thereby limiting the grounds on which the enforcement of such agreement may be opposed. Mediation Law Article 14(3) establishes the criteria for approval, which overlap significantly with those for Article 9.

Overall, a compliant mediated agreement has enforceable effect under Article 9, but even so, the parties may choose other options, including seeking judicial approval or asking a notary or a lawyer to grant it enforceability. Responses to the *Rebooting* study, however, indicated some misunderstanding of this area. (For information on the *Rebooting Mediation Project*, see the authors' credit on page 146 opposite and the Background and Acknowledgment box at left.)

Statute of limitations: Under Mediation Law Article 13(2), initiating mediation suspends limitation and proscription periods as of the precise date on which the Article 16 mediation protocol is signed.

Under Article 13(3), the suspension ends when the mediation ends, either due to a party's refusal to continue or the mediator's decision to end the process. Article 13(6) requires private mediators to certify the termination and lists elements that the certificate must include.

Duration and Statutory Fees: The Mediation Act does not establish a duration for private mediation procedures. It merely provides, in Article 21, that the mediation shall be conducted as expeditiously as possible, in the fewest number of sessions necessary (paragraph 1). The parties and the mediator determine the procedure's duration in the Article 16 mediation protocol, but it may

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Background and Acknowledgments

In each of these *Worldly Perspectives* columns, authors Giuseppe De Palo and Mary B. Trevor are presenting a summary of a forthcoming country report that has resulted from the Rebooting Mediation Project study of individual nations' ADR efforts. See the authors' accompanying credit line and this website: www.dialoguethroughconflict.org/rebooting-the-eu-mediation-directive. This month's Ireland column relies on data from the project.

This month's column was prepared in collaboration with Cátia Marques Cebola and Ana Maria Maia Gonçalves. Cebola is an assistant professor at the Polytechnic of Leiria, Portugal, where she teaches alternative dispute resolution and civil law. She completed her Ph.D. at the University of Salamanca, Spain, with a dissertation on mediation. She holds both a law degree and a master's in civil law from the University of Coimbra, Portugal. In 2006, she attended a Practical Mediation Course approved by the Portuguese Ministry of Justice, and in 2010 she took part in the Harvard Mediation Program. She is the author of several studies and articles on mediation and arbitration, and actively participates in research projects in this field.

Gonçalves is a certified mediator by IMI, and ICFML, with 30+ years of international experience. She is a mediator, a founder of ICFML; pedagogical coordinator at the Catholic University of Portugal, U.N. Global Mediation Panel member, Fellow of National Center for Technology and Dispute Resolution, and a co-founder of the Alliance of Mediators for Universal Disclosure, a global initiative promoting adherence to the Universal Disclosure Protocol for Mediation by ADR and ODR professionals.

Worldly Perspectives

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subsequently be amended by mutual agreement (paragraph 2).

Likely reflecting the flexibility in this area, respondents In the *Rebooting* study survey chose widely varying ranges for duration, but with the majority (totaling 92.5%) selecting somewhere between "up to 30 days" and "61-90 days."

There is also no statutory fee for private mediations, although Article 25(b) of the Mediation Law does establish the mediator's right to receive remuneration. Under Article 29, the parties and the mediator agree on the fee, which must be stated in the Article 16 mediation protocol.

The Demand Side

Parties come to mediation in Portugal by statute, judicial referral, contract clauses, and agreements.

Recourse by statutory measures: Portuguese law does not provide for any form of mandatory mediation, nor does it impose any sanction for failure to attempt this procedure.

Under Mediation Law Articles 3 and 4, all mediations that take place in Portuguese territory are voluntary, and the parties' consent to participate in mediation must be informed and freely given. In line with this approach, Article 26 requires the mediator, in the pre-mediation phase (Article 16), to inform the parties of the nature, purpose, fundamental principles, and stages of the mediation procedure, as well as the rules to be followed. Any party may withdraw at any time (Articles 4(2) and 4(3)).

Proposals to change this situation have, so far, not been implemented. Some have advocated, without success, for requiring the parties to attend at least one informative pre-mediation session before resorting to court.

Furthermore, CPC Article (533(4)) allowing cost sanctions for a claimant who rejects resolution by an available alternative dispute mechanism in favor of litigation, has never been implemented by the required Ministerial Order.

Recourse by judicial referral: Under CPC Article 273(1), a judge may suspend the proceedings at any stage to refer the case to mediation, but only if none of the parties expressly objects. Responses to the *Rebooting* study indicated, however, that courts are not proactive in this area.

Litigating parties may jointly decide to resolve the dispute through mediation and so request the suspension of the judicial proceedings for a maximum period of three months (CPC Article 273(2)). If they reach a settlement, they return to court to obtain approval of the agreement by the judge.

Recourse by contract clause: The Mediation Law regulates mediation clauses in Article 12, under the name "Mediation Pact" (*convenção de mediação*). By signing these pacts, the parties make an enforceable commitment. Thus, under Article 12(4), if one of the parties ignores a valid mediation clause and files a lawsuit, the other party may invoke the clause. The judge must then suspend the proceedings to allow the mediation attempt.

Mediation pacts are void if not in writing (Article 12(2) and 12(3)), even if the underlying contract is not subject to any form requirements or was concluded orally. The written form requirement is flexible, however, allowing not only for a formal written document signed by the parties, but also for snail mail and email exchanges, telegrams or faxes, or even WhatsApp, as long the agreement of both parties is clear.

If the subject matter of the dispute is not suitable for mediation, the pact is not enforceable. And for contracts of adhesion, Decree-Law No. 446/85, of 25 October (available at https://bit.ly/4oOggnd), imposes a good-faith obligation that the party proposing the standardized mediation clause not take undue disadvantage of the other party.

Recourse by voluntary agreement: Parties are free at any time to turn to mediators of their own choosing to try to resolve a conflict. Lawyers may also suggest that their clients attempt mediation before resorting to litigation, although the Code of Ethics for Lawyers (Law No. 145/2015 of 9 September) does not refer to mediation or establish a duty to inform clients about it. The absence of any legal or ethical obligation in this regard was acknowledged by the vast majority of the respondents to the *Rebooting* study.

Ensuring Quality

There are no training requirements to work as a private mediator. The Mediation Law, however, created training incentives. For a privately mediated agreement to be directly enforceable, the mediator must be listed on the Directorate-General for Justice Policy's official register of private mediators (Order No. 344/2013 of November 27). To be listed, Article 3 of the Order requires successful completion of a conflict mediation course delivered by an entity accredited by the Ministry of Justice.

Parties are free at any time to turn to mediators of their own choosing to try to resolve a conflict.

By Order No. 345/2013, Portugal adopted an accreditation system for mediation training entities. To obtain accreditation, training entities must submit a technical-pedagogical dossier to the DGPJ. But the law does not establish a minimum number of training hours or prescribe specific course content, so courses may vary widely. Responses to the *Rebooting* study suggested a significant level of misunderstanding of the requirements in this area.

All mediators must adhere to the European Code of Conduct for Mediators (Mediation Law, Article 26(k) (available at https://bit.ly/41ZsC26). Mediators listed in the public mediation systems or in the official register of private mediators (both maintained by the DGPJ) are subject to oversight by the DGPJ in the event of a complaint or grievance submitted by a party to a mediation. Possible sanctions include, for private mediators, removal from the register for a period of two years (Article 7 of Order No. 345/2013).

Assessing the Market

Size of the market: Statistical data on mediation use are published only for public mediation systems. The JP Courts, the only public system that handles civil and commercial mediations, resolved 844 of 7,507 cases in 2024 through mediation (available at https://bit.ly/4mvA6Ce).

There are no private mediation centers in Portugal that specialize exclusively in dispute resolution through mediation. Consumer

Dispute Arbitration Centres do each publish annual activity reports, which include data on dispute resolution through mediation. The centers' mediation practices, however, often consisting merely of letter or email exchanges between a company and a consumer, do not always involve the active participation of a mediator.

For judicial proceedings, there are no published figures on the number of cases suspended for the purpose of mediation or on the number of settlements achieved through this mechanism.

In the *Rebooting* study, more than half of the respondents indicated that fewer than 1,000 mediations take place annually in Portugal. Nearly three quarters indicated that the supply of mediation services for civil and commercial disputes exceeds demand. A majority strongly disagreed with the idea that there is currently a "balanced relationship between mediation and judicial proceedings," as required by EU Mediation Directive Article 1.

Mode of mediation: Available data do not indicate how mediations are conducted in Portugal. During the Covid-19 pandemic, public mediation systems promoted online mediation, which remains possible today. But no data indicate the proportion of mediations conducted in person versus online. A majority of *Rebooting* study respondents suggested that online mediation is used minimally or not as often as in-person mediation.

While some think the Covid-19 pandemic gave momentum to mediation use, no overall statistics are available for civil and commercial disputes to test this perception. Significantly, in the JP Courts, the number of cases resolved through mediation fell from a pre-pandemic (2019) figure of 1,089 to a 2024 figure of 844.

The online RAL+ Platform (available at https://bit.ly/3JuCivm) is currently being developed and progressively implemented. On it, parties may request a public mediator, although the platform does not yet support conducting the mediation online. It remains to be seen whether the trend of global digitalization will lead to an increase in the number of online mediations.

Settlement rates: Data on the success rate of mediation in civil and commercial disputes in Portugal is also unavailable. Even in the context of mediation conducted within the JP Courts, only the number of agreements reached is known (844 in 2024). But there is no information on the total number of mediations conducted, and therefore, it is not possible to determine how many ended without settlement.

Costs: It is only possible to provide exact cost data for public systems, since their user charges and mediator's fees are regulated by law. In the JP Courts, each party pays 25 euros if they resolve the dispute through mediation. The mediator receives 110 euros if the mediation concludes with an agreement, 90 euros if no agreement is reached.

With respect to private mediators, no official cost data are available, and each mediator is free to set their fees in the mediation protocol by agreement with the parties. Market rates, however, are generally higher than those applicable to public mediators. *Rebooting* study estimates in this area mostly ranged from "up to €500" to between €1,001 and €1,500.

Number of mediators: The official list of private mediators currently includes 1,364 professionals. Within the public mediation systems, there are 131 family mediators and 19 labor mediators (noting that many operate in more than one municipality). In the JP Courts, 99 mediators are registered, many of whom also serve in multiple jurisdictions.

Because many private mediators are also active in public mediation systems, the total number of mediators listed across both public and private systems should not be aggregated. There may be additional mediators, or at least individuals with specific mediation training, since registration on the list of private mediators is not mandatory.

Rebooting study participants expressed widely varying opinions regarding the size of the mediation market, but overall, suggested that the number of mediators is disproportionately high relative to the demand for mediation services.

Key Challenges and Ideas For Change

While the Portugal mediation structures are strong, the *Rebooting* study confirmed that use is low, with possible reasons including low referral by judges, lack of understanding of mediation and mediator requirements, and lack of incentives or mandates for mediation use.

To increase mediation use, the report authors first propose that Portugal should sign, without delay, the Singapore Convention on Mediation (available at www.singaporeconvention.org) on the enforcement of international mediated agreements. In so doing, Portugal can position itself favorably for conducting international mediations, particularly within Portuguese-speaking countries.

> The authors believe that lawyers play a key role in the success of mediation and that many do not understand its advantages.

The authors further believe that lawyers play a key role in the success of mediation and that many do not understand its advantages. The *Rebooting* study data revealed a degree of misunderstanding regarding mediation's procedural and legal safeguards. While respondents gave mixed opinions about whether lawyers should be required to inform clients about mediation, they would be more likely to do so if well informed about it.

We also believe that greater outreach efforts targeting the judiciary would be worthwhile to encourage judges to make greater use of their ability to suspend judicial proceedings so the parties can try mediation.

Finally, the authors agree with the majority of *Rebooting* study respondents, who consistently endorsed the idea that mandatory mediation or mandatory information sessions should be introduced.

* * *

Mediation in Portugal remains an unfulfilled promise. In 2013, the Mediation Law was seen as the instrument that would boost its use; however, in practice, mediation continues to be underused. But, as discussed here, this problem is not for lack of a robust legal framework.

In December 2024/January 2025, the Secretariat of State for Justice was preparing a strategic plan for alternative dispute resolution in Portugal. At the time of this report, this Plan is not yet known, but it is expected that it will contain concrete measures that will expand mediation's use.

Back to School on Dispute Management

Contractual Clauses: A Critical Role in Avoiding Disputes

BY KATE VITASEK

Can a contract clause help you prevent disputes?

My co-authors of the book *Preventing the Dispute Before it Begins* argue it does.

In our book, co-authors James P Groton, Ellen Waldman, Allen Waxman, and I outline four contractual clauses designed to support dispute prevention: covenants of good-faith and fair-dealing clauses, contract change clauses, notice and cure agreement clauses, and dispute management clauses.

In this article, I explore each of these clauses and share how–if properly structured–can help parties prevent disputes. The fun part of the article? A case study that shows how one company is putting these clauses to work in a large outsourcing contract.

Good Faith and Fair Dealing

Covenants of good faith and fair dealing obligate contracting parties to deal with each other honestly, fairly, and in good faith with the intent not to destroy the right of the other party or parties to receive the benefits of the contract.

The laws of many jurisdictions impose an implied duty of good faith and fair dealing in every contract.

In the book, we argue contracting parties should explicitly include a formal covenant of good-faith and fair-dealing clause in their contract. Why? Formal good-faith and fair-dealing clauses often include contractual language steering the parties toward constructive behavior if a conflict or controversy emerges.

While skeptical lawyers often wonder what value such clauses bring, the act of negotiating such a clause can itself increase the parties' awareness of the need to make fair decisions and work swiftly to de-escalate tensions.

Explicitly including formal good-faith and fair-dealing clauses can act as important anchors in long-term business relationships where the contract, as stated, may not be in step with the changing business conditions, and the parties can use the clause to foster good faith discussions.

Contract Change Clauses

Contract change clauses enable contracting parties to make changes to a contract.

A good contract change clause seeks to keep the parties in alignment—allowing flexibility while also recognizing that a need for a contract change should not adversely affect the other party. Staying aligned ultimately helps the parties prevent disputes.

A good contract change clause formally outlines how the parties should address changes to the contract. For example, in a construction contract, the contract change clause typically gives the owner the right to change the contract while recognizing the contractor's right to payment for the reasonable costs engendered by the changes.

Dispute Management Clauses

Dispute management clauses guide contracting parties on how the parties should handle problems, conflicts, and disputes in their business relationship. For example, the parties might choose an escalation management process committing the parties to step negotiations.

Step negotiations encourage organizations to engage in commercially rational processes, such as good-faith notice and negotiation as a pre-condition to initiating arbitration or litigation.

Some clauses require the participation of indemnitors at an early stage. Some negotiation "steps" are further divided to contemplate the involvement of senior managers only if junior managers cannot resolve the problem (thus rewarding junior managerial negotiation skills but allowing recognition of the potential need to remove the individual whose conduct is at issue from the negotiation process).

Mediation is often used either prior to initiation of a formal claim or at a designated point in the pursuit of such a claim. Some multistep clauses also set forth a schedule for the exchange of certain information so that mediation can take place in an informed manner early in the process.

In the event of failure to resolve a dispute using these methods, the clauses call

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

for arbitration or litigation, usually also addressing the parties' selection of venue, choice of law, waiver of jury, and other issues.

The International Institute for Conflict Prevention and Resolution—CPR has prepared a model set of dispute prevention provisions, which parties can incorporate into their contracts. (Available at https://drs.cpradr.org/model-clauses/dispute-prevention; CPR publishes *Alternatives*.) These provisions aim to enable the parties to create a process to help avoid the conflict from turning into a dispute. Kate Vitasek, "Using 'Modern' Standing Neutrals Keeps Parties' Interests Aligned," 43 *Alternatives* 109 (July/August 2025) (available on *Westlaw*).

Notice and Cure Agreement Clauses

Notice and cure agreement clauses in a contract signal a warning when there is a serious issue between contracting parties—typically a potential breach of contract.

The logic behind this clause is to allow the parties to send a warning signal before issuing a termination. This lets the offending party respond by explaining how they will address any issues to get back into compliance with the contract.

Some companies use a notice-and-cure provision in conjunction with a dispute management clause–which makes sense because triggering a notice is an essential step in an escalation. Regardless of your approach, parties can choose the best process to meet their underlying goals when drafting their dispute management clauses.

Case Study

DefenseCo is a leader in providing defense services to the U.S. government. Strategic supplier agreements are a cornerstone of DefenseCo's success. DefenseCo has been an early adopter of formal relational contracting, which seeks to embed relational constructs into its contracts.

In this case study, we share how DefenseCo changed the lens of five contract clauses from more traditional power-based wording to one that promoted a bilateral commitment focusing on dispute prevention and management. The wording in the clauses below is an excerpt from the actual contract. The names of the companies, however, were changed to DefenseCo and Supplier.

Covenants of Good Faith and Fair Dealing Clause: DefenseCo and Supplier expanded the traditional covenants of good faith and fair dealing due to the strategic nature of their relationship and the decision to create a formal relational contract.

For this agreement, the Parties have committed to a "Vested" relationship. See www.vestedway.com/the-story-of-the-vested-movement. As part of that goal, DefenseCo and Supplier have mutually established a "OneTeam" Shared Vision and the high-level Desired Outcomes as depicted in the chart below.

To achieve their mutual Shared Vision and their high-level Desired Outcomes, the Parties agree to a highly collaborative relational contract founded on the following Guiding Principles. These Guiding Principles are the shared set of critical social norms and values that will guide the Parties in all dealings during the term of the agreement.

- *Reciprocity*: Each organization will make fair and balanced exchanges that are mutually beneficial. We will place no expectation upon the other that we are not willing to bear.
- *Autonomy*: Each organization is empowered and expected to make objective business decisions toward our Shared Vision.
- *Honesty*: Each organization will act in a sincere, forthcoming and truthful manner.
- *Loyalty*: Each organization is committed to this partnership, regardless of other business interests.
- *Equity*: Each organization will act equitably to fairly balance risk and reward.
- *Integrity*: Each organization will act transparently and ethically.

In addition to their strong commitment to promoting and striving to achieve the Guiding Principles of their Vested relationship set forth above, the Parties understand and agree that they will each be legally bound by the covenant of good faith and fair dealing implied in contracts governed by Virginia law.

Contract Change Clause/Process: The following wording appears in the Master Services Agreement which references a more detailed schedule (Contractual Change Management Procedure):

Flexible Contract Framework: This Agreement is designed as a flexible contracting framework in order to embrace the dynamic nature of the business relationship between the Parties. Accordingly, the Parties agree to use the Change Process set forth in Schedule XX (Contractual Change Management Procedure) as frequently as necessary to adapt to changing business needs.

Potential Changes to Services: Either Party may request changes or modifications to the scope or specifications for the Services or to this Agreement (including any Schedule or Appendix hereto) in accordance with the change management procedures set forth in Schedule XX (the "Change Process").

As you can see, the Master Services Agreement points to a much more detailed schedule,

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Shared Vision: OneTeam to provide innovative solutions addressing dynamic challenges of today's workplace. Our drive for operational excellence ensures we consistently deliver exceptional value, enabling our businesses to grow and thrive in a competitive landscape.
Cost Control: Be outstanding fiscal stewards of all resources.
Performance & Teaming: Sustain a high-performing, fully integrated team, and a winning culture.
Workplace Experience: Provide an optimal and sustainable workplace environment enabling OneTeam employees to achieve enterprise objectives and mission success.
Growing Together: Committed partners recognizing and executing on opportunities to advance our mutual growth goals.

Dispute Management

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which is five pages long. Due to its length, we are highlighting only some of the elements.

Introduction to Contractual Change Control Procedure

The Parties agree that changes to the Agreement reflect a healthy, timely and disciplined practice to ensure continual alignment. The Parties further agree to use a formal Contractual Change Management Procedure which:

- ensures alignment to the Shared Vision/ Desired Outcomes and Guiding Principles when executing Changes;
- records and tracks Change requests; and
- ensures the timely implementation of any agreed Changes.
- Any change in business practice that varies from the Agreement will trigger the Change Control Procedure. Changes may reflect additions, deletions, modifications, adjustments and updates to the terms and provisions of the Agreement and/or any Schedules or Appendices to manage, improve or optimize the relationship between the Parties.

Changes may be operational or strategic in nature and generally cover:

- an activity or event that changes or modifies the scope or specifications of the Services or the Agreement (e.g., a New Service request);
- any action taken by or on behalf of Supplier or a Subcontractor on its own initiative (i.e., not at the request of DefenseCo) that will or can reasonably be expected to impact costs or performance; and
- an activity requested by DefenseCo that would constitute or result in a change to the scope or nature of, or the specifications or performance schedule for, the existing Services.

Changes often derive from:

- Periodic reviews of Desired Outcomes, Strategic Objectives and Portfolio Management Strategies including changes resulting from DefenseCo corporate activity (e.g., mergers, acquisitions and divestitures);
- Revisions to policies and procedures to comply with statutory or regulatory changes;
- Changes to scope including New Services or updates to the Requirements Roadmap, Taxonomy or Workload Allocations;
- Revisions to the Pricing Model (Schedule ABC);
- Updates or modifications to performance standards, metrics, key performance indicators and service level agreements;
- Revisions to resource and infrastructure requirements; and

Good Words

The task: Drafting contracts to resolve conflict and, ideally, prevent issues from blowing up.

The signaling: Easily, the most frequent lesson on ADR this newsletter has attempted to provide since publishing began in 1983: draft better.

The practice effect: Your drafting should have prevented this conflict. Lesson learned?

- Changes to Key Personnel as people leave Supplier and DefenseCo or change roles within either organization.

Administration of Change Control Procedure: The Parties' respective Commercial Managers have the primary responsibility for jointly managing the Change Control Procedure. Upon receipt of required approvals to proceed with the Change, Commercial Managers will log the approved Change.

Signed Changed Orders will be memorialized by amendment to the Agreement periodically as needed, but no less than on a quarterly basis. The Parties agree that, for ease of use by the reader, the Master Services Agreement, Schedules and Appendices will not be amended in a piecemeal fashion. Instead, any change to the MSA, a Schedule or an Appendix will result in a fully amended and restated version of that document.

The Commercial Managers will maintain a SharePoint site (or other platform accessible by all OneTeam members) to physically update the Agreement, assigning a revision number and date to each revised Schedule or Appendix, so that the current version of the Agreement and each of the Schedules and Appendices thereto are available 24/7 for quick access by the OneTeam.

Commercial Managers will also be responsible for including a copy of the original Agreement and all previous versions/ revisions in the Change Control Log.

In addition, the Contract Change Management Procedure Schedule includes a step-by-step process (including a flow chart to help easily show the stepped escalation process) and the inclusion of a standing neutral [internal contract reference omitted].

Dispute Management Clause: DefenseCo and their Supplier's dispute management clause has the following six sub-sections:

1. Governing Law: This Agreement and performance under it will be governed by the laws of the Named State without giving effect to conflicts of laws.
2. Jurisdiction: Each Party agrees that any lawsuit or proceeding brought by it relating to this Agreement must be brought exclusively in any federal or state court in the named state. Each Party submits to the exclusive jurisdiction of the courts in Named State with respect to any action, suit or proceeding brought by it or against it by the other Party.
3. Jury Waiver: DefenseCo and Supplier acknowledge that the right to trial by jury is a constitutional one, but that it may be waived. Each Party, after consulting with counsel of their choice, knowingly and voluntarily waives any right to trial by jury in the event of litigation relating to this agreement.
4. Obligation to Proceed: Pending resolution of any dispute or controversy relating to this Agreement, the Parties agree to proceed diligently with the performance of this Agreement. Supplier acknowledges and agrees that any interruption to the Services could cause irreparable harm to DefenseCo, in which case an adequate remedy at law may not be available. Supplier agrees that, pending resolution of any dispute or controversy, it will not deny, withdraw, or restrict Supplier's provision of the Services to DefenseCo under this Agreement.
5. Dispute Prevention and Resolution: The Parties agree to follow a defined structure for the management of the relationship

as set forth on Schedule XX (Relationship Management Framework).

6. Dispute Resolution: Any dispute or controversy between the Parties concerning the interpretation, performance, breach, threatened breach or termination of this Agreement will be resolved as provided on Schedule XX-YY (Issues Resolution Process).

In addition, DefenseCo and Supplier outlined a detailed issue resolution process as part of a Relationship Management Schedule. The issue resolution was three full pages and included 10 key points. Due to the length, we are highlighting only some of the elements.

1. Issue Escalation Procedures: From time to time, issues will arise that cannot be resolved at the various levels of management within the DefenseCo and Supplier teams, and the Parties may wish to resolve such issues through the alternative procedures set forth in this Schedule XX-YY. These issues may involve obligations of a Party, performance, commercial issues, business impacts, personnel and others. It is the intent of DefenseCo and Supplier to resolve issues in a constructive way that reflects the concerns and commercial interests of each Party. Both Parties' primary objective and intent is to have issues resolved by the appropriate levels of authority without the need for escalation. With this in mind, the following steps are to be followed by the Parties:

1.1 Empowerment: Both Parties agree that issues are to be resolved at the lowest level possible in keeping with the intent of the Agreement.

1.2 Documentation: Both Parties will jointly develop a short briefing document that describes the concern, relevant impact and positions of both Parties. All briefing documents will be stored in a central location that's accessible by both Parties.

1.3 Request for Assistance: A meeting will be scheduled with appropriate individuals as described below (phone or videoconference in most cases). The briefing document will be sent in advance to the participants.

1.4 Escalation: It is the intention of DefenseCo and Supplier that concerns will be escalated for review and resolution to the next management level as shown on the following chart. Additionally, a flowchart is provided to further illustrate the issue resolution process.

Notice and Cure Agreements: DefenseCo and their Supplier's Notice and Cure Agreement was a sub-section of a much broader termination clause. It reads:

If either Party

(a) commits a material breach of this Agreement, which breach is not cured within thirty (30) days after notice of the breach;

(b) commits a material breach of this Agreement which is not capable of being cured within thirty (30) days; or

(c) commits numerous breaches of its duties or obligations which collectively constitute a material breach of this Agreement and fails (i) to cure such breaches within thirty (30) days after receiving notice of such breaches and (ii) to give the other Party adequate assurances that the cause of such breaches has been corrected and will not recur again;

then either Party may terminate the Term with respect to all or any part of the Services, in whole or in part, as of a date specified in the Notice of termination. If DefenseCo chooses to terminate this Agreement in part under Section XYZ the amounts payable under this Agreement will be adjusted to reflect such partial termination.

The Master Agreement also included a formal notice clause with guidance on how the parties should use notices.

Notice: All notices, waivers, approvals, consents, demands, requests or other communications required or permitted under this Agreement will, unless otherwise expressly provided, be in writing and be deemed to have been properly given, served and received (i) if delivered by messenger, when personally delivered, (ii) if mailed, on the second business day after deposit in the United States Mail, certified or registered, postage prepaid, return receipt requested, or (iii) if delivered by reputable overnight express courier, freight prepaid, the next business day after delivery to such courier; in every case addressed to the Party to be notified as follows: [the clause listed who and how it is appropriate to send notices].

> At the beginning of contracting, the parties should identify mechanisms for addressing the inevitable frictions and problems that will arise in the course of their relationship.

The Bottom Line: Contract clauses can provide guidance on how the parties should respond to unanticipated events and manage problems with the goal of preventing disputes.

* * *

Next month, Back to School on Dispute Management columnist Kate Vitasek will explore Relational Negotiations.

Court Decisions

(continued from front page)

Our second trap for the unwary is a decision of the U.S. Court of Appeals for the Second Circuit, *Molecular Dynamics, Ltd., et al. v. Spectrum Dynamics Med. Ltd.*, No. 24-2209-cv, slip op. (2d Cir. July 2, 2025), which held that under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (best known as the New York Convention, and available at www.newyorkconvention.org/english), U.S. federal courts lack subject matter jurisdiction to vacate arbitration awards that were made outside the United States in the territory of a another New York Convention signatory state. Slip op. at 37-38.

Under the Convention's plain language and its implementing legislation, an application to vacate a foreign arbitral award—here one made in Switzerland— simply does not "fall under" the Convention for purposes of 9 U.S.C. § 203, the Convention's subject-matter-jurisdiction enabling provision. Slip op. at 33-37. That remained true even though the parties to the arbitration agreement agreed that New York courts would have the "exclusive jurisdiction" over all matters concerning the arbitration." Slip op. at 3; see also slip op. at 7-9.

Consequently, the Second Circuit found that the award challenger—who sought unsuccessfully $173.8 million in damages on its counterclaims and was found liable for $6.9 million in costs and attorney fees—had its petition to vacate the award dismissed for lack of subject

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Court Decisions

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matter jurisdiction. See slip op. at 9-12, 12-14.

The upshot of the appellate panel's decision was that the challenger should have made its petition to vacate in the Swiss courts—that is, in the courts of the arbitration seat. We do not know if, under Swiss law, vacatur in Switzerland is an option that might still be open to the award challenger—but if not, then the Second Circuit's decision was probably a tough break for the losing party and its counsel. Presumably, the losing party and its counsel believed that the parties' agreement to New York jurisdiction should trump the court's interpretation of the Convention and FAA Chapter Two enabling legislation.

This Part 1 of a two-part article addresses these two subject-matter-jurisdiction developments in greater detail. It focuses on the Ninth Circuit *Badgerow/Tesla* Amount-in-Controversy Trap. Part 2 in the November *Alternatives* will address in more detail the Second Circuit *Molecular Dynamics*, New York Convention Subject Matter Jurisdiction Trap.

'On the Face'

With respect to the *Badgerow/Tesla* Amount-in-Controversy Trap, federal courts have diversity jurisdiction where the citizenship of the parties is diverse, and "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. …" 28 U.S.C. § 1332(a).

Badgerow held that the facts establishing subject matter jurisdiction over a petition to confirm an arbitration award must appear on the face of the petition and cannot be established by "looking through" the FAA Section 9 petition to the facts of the arbitration that resulted in the award. 596 U.S. at 5, 9-11. The logic of the holding is equally applicable to petitions or applications to vacate or modify awards, though *Badgerow* did not specifically address that point. See 9 U.S.C. §§ 10, 11.

Badgerow also did not directly address how to determine the amount in controversy for an FAA award enforcement petition. In terms of what must appear on the face of the petition to support jurisdiction, the Court only said that "[i]f [the petition] shows that the contending parties are citizens of different States (with over $75,000 in dispute), then § 1332(a) gives the court diversity jurisdiction."

While not immediately apparent from the Supreme Court's decision, *Badgerow* may have a profound effect on how, in petitions for post-award FAA relief, the amount-in-controversy is determined for diversity jurisdiction.

Before *Badgerow* put the proverbial kibosh on "looking through" to the underlying arbitration proceeding, courts typically determined the amount in controversy requirement could be assessed based on the amount set forth in the award, the amount demanded in the underlying arbitration, or on the amount that would be in controversy were the matter remanded to the arbitrator. See, e.g., *Karsner v. Lothian*, 532 F.3d 876, 882-84 (D.C. Cir. 2008) (pre-*Badgerow* adopting "demand" approach) (citing cases); *Pershing L.L.C. v. Kiebach*, 819 F.3d 179, 182-83 (5th Cir. 2016) (pre-*Badgerow* adopting "demand" approach); but see *Pershing*, 819 F.3d at 183-190 (pre-*Badgerow* concurring opinion criticizing judicial decisions distinguishing approach-based jurisprudence and proposing a fact-driven flexible rule) (Mills, D.J., concurring in result).

'Traps for the Unwary'

The subject: The progeny of Scotus's 2022 *Badgerow* decision barring looking through to underlying litigation to determine federal court jurisdiction over a case.

The rule: 'Courts do not possess jurisdiction to decide ordinary motions by virtue of the look-through method.'

The arbitration jurisdiction rule: The Ninth Circuit's *Tesla* opinion won't allow a party's ordinary motion to confirm an arbitration award where the damages against it were $0.00. No federal jurisdiction. This is the Amount-in-Controversy Trap.

Post-*Badgerow*, there are decisions finding that the amount of the award dictates the amount in controversy, see, e.g., *Dixon v. PayPal Inc.*, 22-CV-5710 (RPK) (LB), slip op. at **1, 3, 4 (E.D.N.Y. Sept. 26, 2023) (post-*Badgerow* decision holding amount of award establishes amount in controversy, citing cases), while there are a few decisions that, after *Badgerow*, have used the demand approach to determine amount-in-controversy. See, e.g., *Sisam v. Strategic Funding Source Inc.*, No. SA-23-CV-0914-JKP, slip op. at *6 (W.D. Tex. Sept. 28, 2023).

At the very least, the Ninth Circuit's decision appears to take off the table in that circuit the demand approach and might also undermine the remand approach.

How does the—no-longer-cognizable in the Ninth Circuit— demand approach work? Suppose, for example, the arbitration petitioner demanded the arbitrator award her $1 million in general and consequential damages for breach of contract. After a hearing, the arbitrator awards nominal damages of $1 for the breach, finding that the arbitration petitioner established breach but not the amount of damages resulting from the breach. The arbitration respondent, wishing to reduce its $1 million victory to judgment, files a petition in federal court to confirm the award, and the arbitration petitioner cross-petitions to vacate the award.

If amount in controversy is assessed based on the demand in the underlying arbitration, a district court would unquestionably have jurisdiction over the petition to confirm. But not so under *Badgerow*, according to the Ninth Circuit.

After *Badgerow*, one can persuasively argue that determining the amount in controversy by looking to the amount in dispute in the underlying arbitration is functionally no different from looking through to the underlying arbitration to determine if there is federal question jurisdiction.

Even though *Badgerow* did not directly address the issue of how the amount of controversy should be calculated, by barring federal question jurisdiction based on "look-through," it may foreclose amount-in-controversy determinations that are based on the amount demanded in the arbitration.

That's the point of the Ninth Circuit's *Tesla* decision. See 134 F.4th at 561. There, a former employee asserted defamation claims against Tesla and Elon Musk, which sought an amount exceeding $75,000, exclusive of interest and costs.

After a hearing, the arbitrator denied the claims and made a zero-sum award in favor of Musk and Tesla, which they sought to confirm in federal district court. Relying on *Badgerow*,

the *Tesla* Court held that the zero-sum award determined the amount in controversy, $0.00, and dismissed the case for lack of subject matter jurisdiction.

The "'look through' approach is prohibited under *Badgerow*," stated the *Tesla* opinion, and therefore "facts establishing that the amount in controversy exceeds $75,000 must be present on the face of a Section 9 petition to confirm an arbitration award before a district court can assert diversity jurisdiction[,]" a "requirement [that is] not satisfied in this case." 134 F.4th at 561 (citations omitted).

"On its face[,]" the opinion adds, "a petition to confirm a zero-dollar award cannot support the amount in controversy requirement."

Because the petition did not set forth any "jurisdictional facts establishing the amount in controversy, … and a court cannot 'look through' the petition to the underlying substantive controversy under Section 9, we hold that the district court did not have subject matter jurisdiction." 134 F.4th at 561.

Is *Tesla*—the spawn of a *Badgerow* subject-matter-jurisdiction trap for the unwary—going to be the last word on the amount-in-controversy requirement for award enforcement proceedings governed exclusively by FAA Chapter 1? Not necessarily, but it will likely prove quite influential since its conclusion appears to follow logically from the *Badgerow* rationale.

That is not to say that there are no arguments that might support a different outcome in a case like *Tesla*. Without getting into the details or expressing any view one way or the other, one might argue that the value of an arbitration award (including a zero-dollar award) is not necessarily the amount stipulated in the award, and for the same award it might differ depending on the type of post-award relief sought, and whether the value is assessed from the standpoint of the petitioner or the respondent. See, generally, *Hunt*, 432 U.S. at 347; *Maine Cmty. Health*, 993 F.3d at 723-24; *Obex Grp.*, 958 F.3d at 135; *Lovell*, 466 F.3d at 897-98; *Dixon v. Edwards*, 290 F.3d at 710-11.

The obvious lesson for the would-be unwary is for counsel to analyze carefully—as they always should—the issue of subject matter jurisdiction in light of *Badgerow* and other applicable, or potentially applicable, case law before commencing a proceeding to confirm, vacate, or modify an award. See 9 U.S.C. §§ 9, 10, & 11.

* * *

Next month's Part 2, which will address the Second Circuit's new Convention Subject Matter Jurisdiction Trap for the unwary: There is no subject matter jurisdiction under the New York Convention to vacate a foreign arbitral award.

International ADR

How Rwanda Is Integrating Mediation in Courts, Government, and Society

BY ANITHA MUKESHIMANA

For the past 30 years, Rwanda has relied on both customary mediation and formal ADR systems to promote unity and social cohesion, anchored in the constitutional principle of citizen governance. Constitution of the Republic of Rwanda, Official Gazette n° Special of 04/08/2023, Art. 11.

Building on the already existing ADR mechanisms, in 2022 Ministry of Justice introduced two key policies: the ADR Policy and Criminal Justice Policy in 2023.

The aim was to integrate ADR throughout institutions—"a rare governmental examination of the use of conflict resolution across the society it governs." Christine Nyiranshimiyimana, "'The Full Strength of the Human Spirit': Rwanda Launches Policy Boosting ADR Use," 41 *Alternatives* 110 (July/August 2023) (available on *Westlaw*), and Christine Nyiranshimiyimana, "Rwanda Launches Policy Boosting ADR Use," *CPR Speaks* (Feb. 10, 2023) (available at https://bit.ly/3HfsPax).

This article updates the progress of the ADR Policy's integration over the past two years, including the use of conflict resolution process in Rwanda commercial disputes.

Prior to the establishment of these policies, Rwanda employed both informal and formal customary mediation practices monitored by the National Strategy for Transformation (NST1) (2017-2024) under a Transformational Governance pillar (see the strategy's page 34 at http://bit.ly/4lDS18Q), and the Ministry of Gender and Family Promotion (available at https://www.migeprof.gov.rw/).

These initiatives were monitored and implemented through different local programs such as the Family Promotion and Child Protection Directorate program (*Inshuti z'Umuryango*), which deploys community mediators to address emerging disputes at both family and community levels. (For details on the programs' work, see https://bit.ly/4fDM8Hg.)

Furthermore, Rwandan ADR framework such as the National Arbitration Law No. 005/2008, the Kigali International Arbitration Centre, and the Abunzi Community Mediator Committees have long functioned to alleviate court backlogs and expedite justice through structured arbitration and mediation processes. See an explanation and description of the law creating the Abunzi mediation services at https://bit.ly/4oKJfZm.

Fast forward to 2024, when the Rwanda Ministry of Justice published two assignment studies: one on the Strategic Implementation of ADR Policy ("A Needs Assessment Study for the Strategic Implementation of the Alternative Dispute Resolution (ADR) Policy—Final

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The author, a 2025 Garvey-Nkrumah Fellow, was a 2025 summer intern at the CPR Institute, which publishes *Alternatives*. She is in her final year of law school in Kigali, Rwanda. For information on her fellowship, see https://afca-us.org/garvey-nkrumah-fellowship-program.

International ADR

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Report" (May 2024), with UNICEF Rwanda and the United Nations Development Program), and another on Criminal Justice Policy ("A Needs Assessment Study for the Strategic Implementation of the Criminal Justice Policy—Final Report" (May 2024), also prepared with UNICEF Rwanda and the UN Development Program), to roadmap an effective implementation strategy and realization of the 2022 ADR Policy aspirations.

The evaluation of the ADR Policy assessments is centered on identifying key ADR actors and tracking the process of legal reforms concerning ADR Laws, as well as the civil, commercial, labor and administrative procedures. The review also examines the Law on Arbitration and Conciliation (available for download at https://bit.ly/4lJFpgs), the Abunzi law, and the statutes governing private professional mediators.

Finally, the ADR Policy study recommends a comprehensive relationship between Rwanda's homegrown solutions and national legislation modeled on UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (available at https://bit.ly/41GBdqf).

Furthermore, in respect for international development, the study seeks to evaluate the enactment of both the Ratified Singapore Convention (formally, "Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Rwanda on the Promotion and Protection of Investments") and the Law on Mediation, which will be modeled on UNCITRAL Model Law.

The Role of Policy Actors

Although mandatory mediation already exists within Rwanda's ADR system under labor laws and the Abunzi law through "pre-filing," the Ministry of Justice and the Rwandan Law Reform Commission are actively progressing to realize the full execution of legal reform and enactment of the ratified Singapore-Rwanda Convention and ADR laws.

The Family Law was amended to mandate a mandatory mediation process through Family Councils, as established under Law No. 71/2024 of 26 June 2024 Governing Persons and Family (Official Gazette n°. Special of 30/07/2024, Articles 8 and 154) (available at https://bit.ly/45oLFoT).

Additionally, in line with this ADR Policy study assessment, mediation and court-annexed mediation mechanisms have proven to be highly effective, resolving 283 commercial cases over the course of the study valued at more than 11 billion Rwandan francs mainly through mediation and commercial court ordered mediation. Overall, between 2022 and 2023, a total of 56,652 cases were resolved through other policy actors such Ministry of Justice legal officers, the Kigali International Arbitration Centre, the Office of the Ombudsman, and private court mediators (available at https://bit.ly/4n8uZYT).

Mediation in Commercial Disputes

In addition to court annexed mediation in commercial courts, the Private Sector Federation, a business community professional

Seeking Access to Justice with ADR

While conducting a study on court-annexed mediation in Rwanda, this author had the privilege to attend a commercial mediation session at the Commercial High Court. The case filed to the court was a class action claim involving legal issues arising from a concurrent claim.

In the course of the observation, this author noted that timely justice delivered through mediation is not merely a legal fix, but rather a currency in the Rwandan civil justice system: "Compelled voluntarism," in "pre-filing" for mediation, can be both an input into the system and a path to justice.

To illustrate, we need to look into two popular and debated concepts: the legal rights of the parties and the civil liabilities within a mediation claim. Inna Horislavska examines different theories, including one by O.O. Kot (2019), which explores the nature of civil liability as rather a compensatory function directed only toward the victim's property. See Inna Horislavska, "Correlation of mediation as an alternative way to protect civil rights and interests and tort liability," *Law. Human. Environment* (2022) (available at https://bit.ly/41wcGnW).

Similarly, Stella Vettori, in her article subtitled "An obstacle to access to justice," argues that mediation disputes are not one-size-fits-all and therefore should not be subjected to mandatory mediation universally. She emphasizes that the essence of mediation is voluntary, with the focus on settlement rather than the attainment of justice through court procedures. Mandatory mediation, in her view, may undermine the principle of voluntarism and is unfit for all types of disputes. Stella Vettori, "Mandatory mediation: An obstacle to access to justice," 15 *African Human Rights Law Journal* 355 (2015).

When considering these two theories, some may argue that compelled voluntarism can trigger a fragmented legal system. I assert the contrary. Reflecting on Horislavska's article, it is clear that the mediator's expertise plays a vital role in fostering a genuine willingness in both parties to engage in mediation.

In my view, the likelihood of a voluntary settlement depends on the mediator's psychological expertise, particularly the understanding of human behavior through the cultural and legal contexts. It is the key to producing a true spirit of voluntarism within the parties.

Although litigious culture is still popular in Rwanda, recognizing that the true value lies in the timely delivery of justice can pave the way for the benefits of mandatory mediation. Timing is not only crucial in labor disputes; it transcends all legal fields, including construction claims, commercial, civil, and especially criminal matters.

As highlighted by Horislavska, settlement serves as an immediate relief. It benefits individuals' socio-economic development, the country, and the economy as a whole.

This author believes that mediation's ultimate power lays in its capacity to rewrite defaulted business relations, fostering a hopeful future, while protecting the freedom and the parties' civil rights—all delivered promptly and efficiently.

Institutionalizing mandatory mediation is just as fitting as court-annexed mediation. "Compelled voluntarism" is a powerful tool for the civil justice system.

—By Anitha Mukeshimana

organization (see https://psf.org.rw/), has initiated efforts to raise awareness and strengthen mediation in commercial disputes.

As highlighted in the *KT Press* article, practical implementation of mediation has demonstrated a significant increase in commercial cases and a significant increase in the number of cases settled through court-annexed mediation—in the 2024-2025 judicial year, a total number of 230 commercial cases were resolved by commercial courts through mediation. Daniel Sabiiti, "Private Sector Federation Ventures Into Mediation to Reduce Court Case Backlog," *KT Press* (May 15, 2025) (available at https://bit.ly/4g6jsH2).

Furthermore, in line with the ADR Policy's implementation, the KIAC progressively promotes the use of mediation both prior to and following arbitration proceedings. Recently, 18% of cases were successfully resolved through mediation in 2024, marking a notable progress of mediation within the institution. See the 2024 KIAC report at https://bit.ly/45zHUvv.

Capacity Building

At the present, the Private Sector Federation has mobilized Abunzi-like professionals to assist within civil matters that are beyond or not part of the competence of Abunzi. In respect to commercial disputes, PSF has already deployed mediation committees at both district and provincial levels.

These are pro bono services for the indigenous and vulnerable people in the community as a way of giving back. See "A Needs Assessment Study for the Strategic Implementation of the Alternative Dispute Resolution Policy," linked above.

In addition to its institutional framework, KIAC collaborates with the Chartered Institute of Arbitrators, which encompasses more than 390 ADR professionals in Rwanda. Collectively, these institutions intertwine to contribute a significant role in capacity building, professional training, and the resolution of international commercial disputes. See Clementine Nyirangaruye, "Ciarb Rwanda Branch to encourage the use of arbitration and dispute Resolution," *Forefront Magazine* (June 23, 2023) (available at https://bit.ly/3Hig6nz).

Through such initiatives, in 2024 KIAC sponsored University of Rwanda law students to participate in the Vis Moot Competition in Vienna; trained around 50 law students on ADR, and introduced ADR to more than 100 high school and university students.

Moreover, arbitration training was mobilized to about 80 professionals, including lawyers, engineers, quantity surveyors, and young arbitrators. Currently, ADR service providers and ADR clubs are working closely with the Private Sector Federation, KIAC, and the ADR Center (see "Rwanda Inaugurates Alternative Dispute Resolution Center in Nyamirambo: A Milestone in Rwanda Justice System," Minijust (Rwanda Ministry of Justice news resource) (2024) (available at https://bit.ly/4mjoSRd) to empower youth, professionals, lawyers, and community leaders through capacity building and training initiatives.

* * *

Overall, the ADR Center noted immediately above now operates as an official and independent body, aiming to facilitate in mediation and other ADR matters, as well as raise ADR awareness. Thus, the Center progressively engages in initiatives aimed at raising community awareness through targeted ADR trainings, community-led activities, and youth empowerment.

While commendable progress has been made in implementing the policy, some initiatives are continuing. These include the development of ADR information technology tools such as the Abunzi Management Information System and integration of electronic information management systems with ADR systems, continuing social awareness campaigns, and progressive legal reforms aimed at strengthening the ADR framework.

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ADR Brief

New York Sees 60% Settlement Rate for Presumptive ADR Program

BY SEAN FITZGERALD

Courts across New York State can refer parties to a pre-trial mediation session in a wide variety of civil cases. Beginning in 2019, jurisdictions rolled out their own guidelines, procedures, and best practices for the state's then-new "presumptive ADR" program in an effort to increase efficiency within the courts and provide parties with more favorable outcomes.

The author is a second-year student at Brooklyn Law School in New New York. He was a 2025 CPR Institute summer intern.

Now, courts see a variety of results depending on the type of case, the type of ADR provider, and whether parties are willing to continue mediation after the free 90-minute session provided by the state.

The state reports that it is in the process of developing a data collection system on

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presumptive mediation sessions, but says that the program has seen high levels of client satisfaction among those who have participated, and is reporting consistency in the results it has seen so far.

Then-Chief Judge Janet DiFiore spearheaded the program's introduction after an ADR Advisory Committee issued a report building off of the courts' existing network of ADR programs. Courts in the state's current 12 judicial districts via the court rules were given the freedom to adopt programs in accordance with local demand–making ADR plans based on their typical cases and using techniques that worked best for those cases.

The initiative brought several challenges: some cases are not suitable for ADR, and there were issues with language diversity of neutrals, power imbalances in mediation, opt-out provisions for certain cases, and neutrals' compensation. Savannah Billingham-Hemminger, "Update: ADR Breakfast on New York State's Presumptive Mediation Implementation," *CPR Speaks* (July 16, 2019) (available at https://bit.ly/4lW9hpD).

The courts conducted a massive training initiative to build ADR infrastructure, confidence, and familiarity and trust in public employees. From 2019 to 2021, more than 550 trainees, including more than 300 court staff, attended the initial training sessions, which varied from 90-minute to multi-day sessions and involved various skills workshops. The trainings also served to address the concerns of litigators and mediators who might have felt that they would no longer perform familiar tasks in a familiar forum.

Additionally, the court system drafted protocols and templates, published an ADR SharePoint Intranet site for judicial districts to share learned experiences, hosted webinars, and created an ADR case management database to track efforts in local courts. The official ADR page of the NYC Unified Court System can be found at: https://ww2.nycourts.gov/ip/adr/index.shtml.

Joan Levenson, the principal law clerk to New York County Deputy Chief Administrative Judge Deborah Kaplan, said in a 2020 training session that the courts learned important lessons from early programs run at the county level.

First, many cases simply are not appropriate for mediation. Second, courts need to set an appropriate time limit from a case filing to choose a mediator or have one assigned. Third, many attorneys in general practice were averse to the idea of mediation.

To address this last issue, courts pushed attorneys to attend a 40-hour mediation training session. For an account of the training points, see Yixian Sun, "Building a Boot Camp for New York's New Presumptive ADR," *CPR Speaks* (June 22, 2020) (available at https://bit.ly/463pi7D).

Those lessons remain at the core of the presumptive ADR program's agenda today. The court system requires those who want to become mediators to take a series of training courses before getting on board. Under Part 146 of the Rules of the Chief Administrative Judge, "[m]ediators who wish to serve on court rosters must have taken at least 40 hours of mediation training and must have recent experience mediating actual cases." The 40 hours of mediation training may consist of 24 hours of initial training, and 16 hours of additional mediation skills training, grounded in the court and case type-specific context in which the trainees will mediate. Part 146 details can be found at http://ww2.nycourts.gov/ip/adr/Part146.shtml.

Now, the New York court system is seeing consistent levels of client satisfaction in cases that have gone to presumptive ADR, according to Daniel Kos, the Statewide ADR Coordinator. While the foundation of the program has stayed the same–neutrals are still required to have at least 40 hours of training, and jurisdictions across the state still share guidelines and experience–the practice of presumptive ADR varies according to jurisdiction, as well as case type.

ADR in New York is multifaceted. For example, Kos explains that while referrals to mediation are common among all courts and case types, arbitration is most commonly used in city and district courts as well. Aside from these ADR processes, Kos also notes, judges and court attorneys facilitate tens of thousands of settlement conferences a year—a critical part of the court's ADR strategy.

The statewide agreement rate for court-referred cases that completed mediation in 2024 was 60%, the state reports. In New York, cases referred from City Courts and District Courts are primarily small claims cases; cases referred from Family Courts are primarily custody and visitation cases; cases referred from Supreme Court—New York's trial level court—are a combination of matrimonial, general civil, commercial, and personal injury cases; and cases referred from Surrogates Court are primarily cases involving probate matters. A breakdown of settlement rates by court type and provider type can be found in the table below.

The number of mediated cases reflected in the table is 7,164. "NA" is listed when the sample size is fewer than 100 mediations. Additionally, data from NYC Civil Court is only partially included in the City Court row, as cases conducted by a volunteer roster and certain law school partners are not reflected. Cases mediated under the statewide Child Permanency Mediation Program are not included in the Family Court row. The statewide settlement rate for those cases is 65%.

It adds up to a lot of mediation in New York state courts. Agreement rates over the past three years have been consistent. In 2022, the aggregate agreement rate in cases referred to ADR was 63%. There was a 64% agreement rate in 2023, and last year saw a slight dip, to a 60% agreement rate.

New York State Completed Mediation Matters—Rates by Court and Provider

	Court Staff	Mediation Centers (CDRC)	Roster Neutral	Total
City Court	NA	56%	NA	57%
District Court	NA	49%	NA	49%
Family Court	82%	68%	64%	68%
Supreme Court	63%	NA	49%	57%
Surrogate's Court	NA	NA	40%	48%
Grand Total	**66%**	**60%**	**54%**	**60%**

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The New York court system has instituted "earliest practicable time" language into its rules to describe when ADR sessions may be ordered. See New York's Part 160 Rules of the Chief Administrative Judge – https://ww2.nycourts.gov/rules/chiefadmin/160.shtml.

This allows more flexibility in scheduling ADR sessions, as it is not always clear when a session would be most beneficial. For example, personal injury cases are not likely to go to mediation before discovery has taken place because attorneys cannot be sure that mediation would be appropriate beforehand.

One typical recent policy statement about ADR from the New York courts describes the program's breadth: "It is the policy of the Unified Court System (UCS) to encourage the use of mediation, arbitration, neutral evaluation, settlement conferences, summary jury trials and other appropriate dispute resolution processes to support timely, affordable, and meaningful resolution of civil legal disputes. Unless certain exceptions apply, civil actions or proceedings heard in the Supreme Court, Surrogate's Court, County Court, Family Court, and City Court shall be eligible for referral to an appropriate dispute resolution process at the earliest practicable time." See, e.g., the ADR page of the New York state Third Judicial District, based in Castleton-on-Hudson, N.Y., at https://ww2.nycourts.gov/courts/3jd/ADR.shtml.

In New York, court attorneys and law clerks do a great deal of settlement work, as indicated in the table's Supreme and Family court lines. New York judges can order settlement conferences which can be run by court staff.

While the use of ADR programing is unified across the state, it is not uniform. Kos explained that local courts fine tune program designs based on when they think referrals to ADR are most fruitful, taking into consideration different case types and the local legal culture.

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passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as being self-evident."

The challenge we face is arriving at a point where Dispute Prevention is accepted as self-evident throughout corporate culture.

It was in pursuit of this challenge that we convened this group facilitation as one of the panel presentations last February. This author moderated the panel which began with speakers sharing a range of Prevention successes in disparate sectors of legal practice.

One of the persistent challenges in gaining broader acceptance of Prevention is that practitioners often interpret the concept through the lens of their own legal or professional specialty. This can limit appreciation of Prevention's flexibility and broader applicability across diverse contexts. This introductory section was intended to broaden the perception of Prevention by highlighting its flexibility.

Panelist Ellen Waldman, former CPR Institute senior vice president, spoke about the concept of partnering from the new book she co-authored with Kate Vitasek, Allen Waxman, and James Groton, "Preventing the Dispute Before It Begins: Proven Mechanisms for Fostering Better Business Relationships" (ABA 2025). Partnering, she said, is a relationship-centered approach that emphasizes trust, shared goals, and open communication. It encourages alignment between parties before formal contract terms are defined.

Co-author Vitasek has been successfully teaching Partnering concepts, primarily in the area of contract procurement. [Vitasek writes the writes the monthly *Back to School on Dispute Management* column in this newsletter—see page 150 for this month's column on contract clauses; Waxman is a former CPR Institute president and chief executive officer who is now of counsel in the New York office of DLA Piper, and Groton is a retired partner of Evershed Sutherland in Atlanta, and an advocate for construction dispute resolution and prevention for decades.]

Panelist Cynthia Randall, Vice President and Deputy General Counsel, Litigation at Microsoft Corp., and co-chair of the CPR Council, spoke about an intentional focus on the intentional use of Prevention skills. A culture shift from competitive and zero sum to one of relationship building with an emphasis on communication and trust. This intentional focus on mutual interests and relationships instead of the more traditional adversarial culture has positively affected Microsoft's credibility, reputation, and business relationships, Randall told the CPR Annual Meeting audience.

Panelist Deborah Mastin, a mediator and arbitrator based in Aventura, Fla., shared an experience involving a Dispute Review Board during a construction project. The parties were headed toward litigation with dire consequences for a construction project. The parties were talking to one another, Mastin reported, but they were not listening to one another.

The neutral hearing both sides was able to identify a simple solution that the parties themselves could not see because they were focused on gaining legal advantage. The solution presented by the neutral was simple but would have gone unseen. This intervention avoided huge disruption and expense and was literally win/win, explained Mastin.

Panelist William Dodero, Senior Vice President and General Counsel at Bayer USA in Whippany, N.J., spoke about how listening and learning about the underlying interests of the other side avoided litigation in a situation in which Bayer was terminating a business relationship.

By moving the conversation from who would prevail in a battle litigating over legal contract rights, the parties shifted their focus to one of mutual interests. This allowed them to fashion a creative solution that satisfied both companies' interests, explained Dodero, who is a member of the CPR Council.

Bayer invested money in its former partner. The former partner benefited from this investment. The two companies continued with a good relationship even though the nature of the relationship was altered

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by mutual agreement. Through this creative approach, said Dodero, both sides benefited.

Panelist Steven M. Bierman, founder of New York's Bierman ADR LLC and former Sidley Austin partner, spoke about his work at CPR with Mixed Mode/Guided Choice/Process Design in ADR. Prevention allows parties more choices than mediation or litigation. As is seen above, a neutral process expert can use the full set of processes and skills to find ways for parties to deal with conflict resolution, noted Bierman, who co-chairs CPR's Mediation Committee.

Following this introduction, the speakers helped to facilitate discussions among CPR Annual Meeting attendees focused on three questions. The following was the result of this facilitation.

1. Is our use of the term Prevention appropriate? Is this the correct terminology? Are we too far down the road to adopt another term? Is the term "Prevention" understood, or will it be misunderstood? We at CPR understand that the term "Prevention" is about anticipating the structural and relational risks inherent in long-term business relationships. Prevention, as we are using the term, is a shift from a reactive, dispute-resolution posture to one of continuous intentional vigilance and adaptation to unavoidable changes in circumstances and inevitable friction and misunderstandings. Prevention, as we are using this concept, encompasses processes and skills to be used from the inception of the relationship throughout. Organizations that define prevention narrowly—as just avoiding disputes—miss opportunities to shape behavior, expectations, and relationship resilience. Prevention also boosts reputational capital. Future partners will be more likely to trust and engage with organizations known for clarity, fairness, and adaptability. Despite the fact that "Prevention" continues to confuse people, especially at first, we do not have a better alternative. Also, the name "Prevention" appears to be taking hold. Our group did not have any suggestions. It seems like Prevention is the winner so far.
2. Why aren't businesses doing enough? Even among CPR's members, a self-selecting segment of the business community that has demonstrated a commitment to dispute resolution and prevention, why are we not doing more? What systemic and cultural impediments exist?

- Delayed or incomplete buy-in for process roles such as process managers or deal coaches.
- Insufficient consideration of internal capacity vs. need for external support.
- Gaps in funding clarity and sustained resource allocation.
- Recognizing risks related to availability, funding, and delivery capacity.

Are businesses viewing Prevention as process overhead instead of strategic infrastructure? While core business teams may acknowledge the need for alignment and risk mitigation, those responsible for execution often lack support, mandate, or incentives to execute. Engagement may be strong in moments of friction, but weak during planning or contracting phases. Doing "enough" means integrating these disciplines into standard operating procedures, supported by leadership accountability and measurable outcomes.

3. What else might the business community do? What specifically would we do if we could get more buy-in? Key strategies identified in the facilitation sessions included:

- Clearer, more adaptive contracting mechanisms.
- Greater alignment among stakeholders through early role definition.
- Decreased likelihood of future conflict via structured learning and feedback.
- Institutional knowledge from pilot programs and pre-mortems that anticipate potential failure points.
- Writing contracts that anticipate risk and clarify responsibilities.
- Applying contextual data from previous disputes to shape agreements and expectations.

Embedding structured processes—like smart contracts, pre-mortems, and pilot feedback loops—makes it easier to identify risks early and reduce the likelihood of conflict. Data from prior disputes can be leveraged as a corporate asset to inform future decisions. Contracting, in this way, becomes a collaborative strategic tool rather than merely a legal formality.

4. What should be next steps? To move forward effectively, the following steps are recommended:

- Expand and refine the working definition of Prevention to include feedback loops and early metrics.
- Launch pilot programs that apply these principles in live contexts.
- Assign named process managers and secure clear funding sources.
- Create an accountability structure for availability and capacity commitments.

Strategic next steps require a focus on learning, action, and institutionalization. Launching pilot programs is a low-risk way to test new models, build momentum, and demonstrate value. But pilots must be structured for learning.

Framing Prevention not as a soft benefit but as a measurable business enabler—resulting in less litigation and higher partner satisfaction—will drive adoption. Organizations should also codify successful practices into templates, training, and leadership key performance indicators to sustain momentum.

CPR continues to lead in the important work of Prevention. At #CPRAM25 early this year, the experiences shared by the panelists demonstrated how Prevention, when intentionally designed and applied, delivers measurable value.

Looking ahead, the CPR community will continue to work to accelerate adoption and to equip business leaders and legal professionals with tools, frameworks, and enhanced skills. By continuing this important work on greater awareness and wider adoption of Prevention, we can move closer to a future where active relationship management is viewed not as optional, but as essential to sustainable business success.