Alternatives
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ADR Techniques

A Conflict Coach's Guide to Apologies in Corporate Settings: Minimizing Litigation Through Genuine Repair

BY JULIE COBALT

Apologies can be powerful. Or they can be disastrous.

In a commercial context, an apology can soothe ruffled feathers and avert a major lawsuit—or it can inflame tensions further if it's forced, halfhearted, or poorly timed.

As a conflict coach and mediator, I've spent years observing how apologies operate in both personal and professional settings. Again and again, I've seen that a well-crafted, sincere apology can transform a potential legal battle into an opportunity for resolution and repair.

But what makes one apology effective and another one a ticking time bomb? How can business leaders, corporate counsel, and their teams use apologies strategically to reduce litigation risk and maintain trust?

Below is a blueprint for delivering meaningful apologies in commercial disputes, along with an examination of why halfhearted attempts fail, and how conflict coaching can make all the difference.

Halfhearted Apologies Don't Work

My earliest memories of being forced to apologize date back to childhood. My mother's approach to conflict between my younger sister and me was simple: separate us, order us to say, "I'm sorry," and declare the disagreement over.

From her perspective, those two little words should have magically made the problem vanish.

Unsurprisingly, the conflict rarely felt resolved. I remained angry, my sister remained hurt, and we both learned to say the words but never address the deeper emotions fueling our fight. This "say you're sorry and move on" tactic glossed over genuine feelings of frustration and betrayal, causing resentment to simmer just below the surface.

As a child, I couldn't articulate why it didn't work, but now, as an adult who facilitates conflict resolution, it's clear: a forced apology—especially one that lacks remorse or accountability—only masks the underlying conflict. It doesn't repair anything.

In commercial contexts, halfhearted apologies function similarly. A manager quickly says, "I'm sorry for the inconvenience," or "We regret that you feel that way," and expects employees, partners, or clients to move on. But underneath, anger festers, trust erodes, and the seeds of a potential claim get planted. When the offended party feels dismissed or patronized, they're more likely to seek legal redress.

Key Takeaway: If an apology serves only to quickly defuse tension without

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The author is a conflict coach, mediator, and trainer based in Dubai, UAE. She works with individuals and organizations to navigate conflict with clarity and confidence, fostering stronger, more authentic connections. Her approach emphasizes effective communication and practical resolution strategies. See juliecobalt.com.

CPR News

Register Now: The Return of CPR's Africa Arbitration Day–New York (AAD-NY)

There is still time to register for this month's 2025 CPR Institute's Africa Arbitration Day—New York (AAD-NY).

The program will be held Thursday, Nov. 20, 2025, 1:15 p.m.-6:00 p.m. Eastern at DLA Piper—the host sponsor—at 1251 Avenue of the Americas, New York, N.Y. 10020. AAD-NY will include two substantive panels, with CLE pending, and networking, including a cocktail reception. Online registration for video participation is available.

Advance registration is required. In-person registration closes on Nov. 19 at 12:00 pm Eastern.

The panels will include:

- *Emerging Trends and Opportunities for Growth Identified by the 2024 SOAS Arbitration in Africa Survey*: The SOAS Arbitration in Africa Survey Reports have offered invaluable insight into the state of Africa arbitration since 2018. This panel will analyze the 2024 Survey, which highlighted arbitration growth on the continent, key arbitration-friendly jurisdictions, arbitrator gender representation, and the role of tribunal secretaries.
- *The Future of Arbitration in Africa: Legal Reforms, Investment Disputes, and Regional Institutions:* This panel will convene officials from African nations to discuss the evolving arbitration landscape across the continent. The conversation will delve into recent treaty practices related to investor-state dispute settlement, recent reforms aimed at modernizing arbitration frameworks, and the development of regional institutions designed to enhance dispute resolution mechanisms. Key topics expected to be covered include the status of the African Continental Free Trade Area protocols and the role of arbitration under the protocols; newly enacted arbitration laws in countries such as Nigeria, Sierra Leone, Tanzania, and Malawi, and the possibility of establishing regional dispute resolution institutions, including an investment court or a court of commercial arbitration.

The CPR Africa Arbitration Day—AAD-NY also will feature a commercial arbitration moot competition from pre-selected law student teams.

The AAD-NY Moot has been approved to use the Willem C. Vis International Commercial Arbitration Moot problem, providing an opportunity for students preparing for the annual Vis Moot competition in Vienna in Spring 2026. The competition will include written and oral arguments.

Test prep company Barbri has sponsored an award to the winning student in competitions for Best Oralist and Best Written Submission—a $500 certificate each toward Barbri tuition.

Along with DLA Piper, the New York-headquartered law firm of Curtis, Mallet-Prevost, Colt & Mosle is a Gold Sponsor of the 2025 CPR AAD-NY event.

Registration, along with a list of speakers, and last-minute

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Editor:
Russ Bleemer

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Editor: Russ Bleemer. **Production Editor:** Ross Horowitz.

Address for Editorial Correspondence: Russ Bleemer, Editor, *Alternatives to the High Cost of Litigation*, International Institute for Conflict Prevention & Resolution, 30 East 33rd Street, 6th Floor, New York, NY 10016, email: alternatives@cpradr.org.

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Corporate ADR

Behind Closed Doors: Mandatory Arbitration Clauses And the Future of Corporate Governance

BY ROBERT WISNER & PAOLA RAMIREZ

Mandatory arbitration clauses in shareholder disputes are gaining quiet momentum. Once limited to consumer and broker-dealer contracts, these provisions are now appearing in corporate charters and bylaws, steering shareholder claims away from public courts.

Supporters emphasize efficiency, cost savings, and procedural flexibility. Critics warn that shifting disputes behind closed doors undermines transparency, weakens investor protections, and erodes accountability.

While the U.S. Securities and Exchange Commission long resisted these clauses, international jurisdictions are increasingly open to arbitration in corporate settings. The result has been a fragmented global landscape with varying levels of shareholder protection.

This article examines the rise of mandatory arbitration in corporate governance. It considers how these provisions affect board accountability, investor enforcement, and market confidence.

The question is not whether arbitration should play a role, but how to ensure it supports both fairness and efficiency in a global economy.

U.S. Shareholder Arbitration

Mandatory arbitration in shareholder disputes has long been a topic of corporate reform in the United States. It promises a faster, more efficient alternative to class actions but has struggled to take hold.

Courts have generally supported arbitration, yet the SEC has remained a firm obstacle, citing investor protection and public enforcement concerns. See Alison Frankel, "Shareholder Alert: SEC Commissioner Floats Class-Action-Killing Proposal," *Reuters* (July 18, 2017) (available at http://bit.ly/4lCwnS0).

For dispute resolution professionals, the challenge is balancing procedural efficiency with transparency and accountability in public markets. While recent SEC leadership shifts suggest the debate is far from over, mandatory shareholder arbitration remains more an experiment than a norm.

Since the late 1980s, the U.S. Supreme Court has consistently favored mandatory arbitration, especially when enforcing contractual clauses. In *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220, 242 (1987) (available at https://bit.ly/4n9ou8n), the Court held that claims under the Securities Exchange Act could be arbitrated if the brokerage agreement included such a clause, confirming that the Federal Arbitration Act applies to statutory claims.

This marked a shift toward accepting arbitration as a substitute for litigation in complex financial disputes.

The Court reinforced this position in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (available at https://bit.ly/3Ii4eCk), upholding an arbitration clause that barred class actions, even when individual arbitration was not economically viable. It held that the FAA requires courts to enforce arbitration agreements as written, even if that limits access to collective procedures or statutory remedies.

Together, these decisions reflect a firm judicial view that once arbitration is contractually agreed to, it must be enforced, regardless of its impact on access to justice.

Despite the Supreme Court's strong support for mandatory arbitration, the SEC has consistently opposed its use between public companies and investors, viewing such clauses as conflicting with the anti-waiver provisions of federal securities laws and broader public policy objectives. See "Letter from Jeffrey P. Mahoney, General Counsel," Council of Institutional Investors at page 1 (January 29, 2018) (available at http://bit.ly/3UFoO2g). In particular, the SEC has blocked multiple attempts to include arbitration clauses in corporate governance documents.

In 2012, when the Carlyle Group sought to add an arbitration clause ahead of its IPO, the SEC warned it would not accelerate the company's registration statement, prompting Carlyle to withdraw the clause.

Later, it allowed Pfizer Inc. and Gannett Co. to exclude shareholder proposals requiring arbitration of direct and derivative claims from their proxy materials, cautioning that such provisions could violate federal securities laws. These actions underscore the regulatory barrier that persists, even as judicial support for arbitration continues to grow. See Barbara Roper & Micah Hauptman. "A Settled Matter: Mandatory Shareholder Arbitration is Against the Law and the Public Interest," 1 *Consumer Federation of America* (available at http://bit.ly/460hxAh).

At the core of the SEC's position is Securities Exchange Act of 1934 Section 29(a), which prohibits contractual provisions that waive compliance with the act or restrict an investor's ability to bring private enforcement actions. Intended to preserve investor rights regardless of contractual terms, the SEC interprets this to mean that mandatory arbitration clauses, particularly those barring class actions, risk undermining these protections. See Garry D. Hartlieb, "Enforceability of Mandatory Arbitration Clauses for Shareholder-Corporation Disputes," 4 *Mich. Bus. & Entrepreneurial L. Rev.* 131, 158 (2014) (available at http://bit.ly/4nsCCt2).

In its view, such clauses operate as waivers in substance and violate the purpose, if not the text, of Section 29(a), especially when embedded in corporate charters or bylaws without

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The authors are partners in the Litigation & Dispute Resolution Group at McMillan LLP in Toronto.

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explicit shareholder consent. See Joseph Lee, "Intra-Corporate Dispute Arbitration and Minority Shareholder Protection: A Corporate Governance Perspective," 1 *U. of Manchester School of L.* 14 (2015) (available at http://bit.ly/3VewOHu).

This, the SEC argues, limits access to judicial forums and erodes a fundamental safeguard of investor protection. See Thomas L. Riesenberg, "Arbitration and Corporate Governance: A Reply to Carl Schneider," 4 (8) *Insights: Corp & SEC L Advisor* 2 (1990). While the SEC views mandatory arbitration as incompatible with Section 29(a), the *McMahon* Court took a narrower view.

It held that Section 29(a) bars waivers of substantive obligations under the Securities Exchange Act but does not prohibit agreements to arbitrate statutory claims. The Court reasoned that arbitration is a procedural mechanism, not a waiver of compliance with the law, and that such agreements do not inherently prevent investors from enforcing their rights.

It further noted that the SEC oversees self-regulatory organizations whose rules include arbitration clauses, suggesting this oversight helps ensure consistency with federal law. Where the SEC had not objected, the Court found no basis to treat such agreements as violating Section 29(a).

Given the judiciary's pro-arbitration stance, some academics and corporate lawyers have renewed calls for mandatory shareholder arbitration. Proponents contend it could curb frivolous, costly securities litigation that discourages companies from going public and help reverse a long-term decline in IPOs. See Hal S. Scott, "Shareholders Deserve Right to Choose Mandatory Arbitration," *CLS Blue Sky Blog* (Aug. 21, 2017) (available at https://bit.ly/42jncPK).

In 2017, for instance, there were only 237 U.S. IPOs compared with more than 2,000 on foreign markets, a gap partly attributed to the absence of effective tools to deter meritless shareholder claims. Benjamin Bain, "SEC Weighs a Big Gift to Companies: Blocking Investor Lawsuits," *Bloomberg* (Jan. 26, 2018) (available at https://bit.ly/4nr5SAi).

Harvard Prof. Hal S. Scott championed this view, seeking a ruling on the validity of mandatory arbitration bylaws. See Ethan Wolff-Mann, "Why a Harvard Professor is Asking Shareholders to Vote Away their Right to Sue," *Yahoo Finance* (Feb. 7, 2020) (available at https://bit.ly/460jAVa). Beginning in 2019, he represented a small shareholder challenging Johnson & Johnson's rejection of a bylaw proposal requiring securities fraud claims to be arbitrated. The company argued it would violate New Jersey law, and the federal district court ultimately found the issue non-justiciable because it was contingent on future events and would amount to an advisory opinion. See also *Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson*, No. 22-1657 (3d Cir. 2023) (available at https://bit.ly/41Rh5Sz).

Boards, Shareholders, And Conflict

The question: Where does arbitration fit in with shareholders' disputes?

ADR's placement: It belongs in disputes between boards and their stockholders. The inquiry is how it fits, and when, to ensure fairness and efficiency.

The status, just renewed: Outside the United States, there have been clear benefits with arbitration for these disputes. And in September, the SEC lifted its 'unwritten ban' on mandatory arbitration of shareholder disputes in offerings. The time has come?

The SEC's traditional opposition to mandatory shareholder arbitration in corporate charters appeared to soften during President Donald Trump's first term. In 2017, SEC Commissioner Michael Piwowar publicly encouraged companies to seek SEC relief to include such provisions, and then-Chair Jay Clayton declined to reject the idea, stating he had not formed a definitive view on its appropriateness in the IPO context. See Kevin LaCroix, "Mandatory Arbitration of Shareholder Claims: What's the Latest?" *The D&O Diary* (April 29, 2018) (available at https://bit.ly/47BImfx).

A U.S. Treasury Department Capital Market Report from the same period urged the SEC to consider whether arbitration could reduce litigation costs while protecting investors' rights. With President Trump beginning a second term in 2025, the administration may again press the SEC to relax its stance. At the time of writing, most of the SEC's four commissioners are Republicans appointed by President Trump. See "SEC Commissioners," U.S. Securities and Exchange Commission (April 21, 2025) (available at https://www.sec.gov/about/sec-commissioners).

The SEC also recently voted 3-1 to lift its unwritten ban on mandatory shareholder arbitration in public securities offerings. See Douglas Gillison, "US SEC revokes ban on mandatory shareholder arbitration in IPOs, ending long-standing practice," *Reuters* (September 17, 2025) (available at https://bit.ly/4moIaE0). While it is unclear whether, or to what extent, the Trump administration exerted pressure behind the scenes, this development is expected to ease the path for companies going public to submit securities disputes to arbitration.

While current political attention still centers primarily on trade and tariffs, the Supreme Court's consistent pro-arbitration stance, combined with potential renewed pressure under a second Trump administration, raises the question of whether legal barriers to mandatory arbitration clauses will soon be further dismantled, and whether concerns about its impact on investor confidence and shareholder recourse will be effectively addressed.

Governance Under Pressure: The Stakes

Assessing the future role of mandatory arbitration in corporate governance requires examining what is at stake when shareholder protection and board accountability move from courtrooms to closed-door proceedings.

Critics point to two main concerns: the lack of transparency and the lack of shareholder consent. Both, they argue, weaken

deterrence of misconduct, reduce board accountability, and limit access to justice for small shareholders.

(1) Transparency, deterrence, and accountability: A key criticism of arbitration is its lack of transparency. Unlike public trials, arbitration occurs behind closed doors, and arbitrators are not required to issue lengthy opinions for their decisions. See Paul Weitzel, "The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws," 2013 (1) *BYU L Rev* 65, 95 (2013) (available at https://bit.ly/4n0kW8f).

Indeed, this privacy is one attribute that appeals to participants who seek to avoid publicizing their disputes. See Elizabeth Chamblee Burch, "Securities Class Actions as Pragmatic Ex Post Regulation" 43 *Ga. L. Rev.* 63, 117 (2008) (available at https://bit.ly/4pj4PnW). The lack of transparency, however, also shields corporate actors from reputational damage, thereby weakening litigation's positive effects in deterring misconduct and reducing the board's accountability. See Roy Shapira, "Mandatory Arbitration and the Market for Reputation," 99 *BUL Rev.* 873, 875, 905–06 (2019).

One counterargument to this proposition suggests that arbitration's lack of transparency is not significantly different from litigation when its high settlement rate is considered. See "Securities Class Action Filings: 2024 Year in Review," Cornerstone Research 6 (2025) (available at https://bit.ly/47YXsvV). Like decisions in arbitration, settlements often provide only an outcome to the public without justifications or details, and what occurred in settlement negotiations are locked behind confidentiality clauses.

The high settlement rate in shareholder securities class actions combined with the higher chance of shareholder litigation being killed in its infancy reduces the overall transparency gap between arbitration and litigation. See James D. Cox & Randall S. Thomas, "Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law" 6 ECFR 164, 169 (2009) (available at https://bit.ly/46k5HzU).

But even when litigation settles or is dismissed early, it can still generate valuable information about market behavior that prompts non-legal sanctions. Shapira notes that because few shareholder suits reach discovery or a published opinion, they often produce "front-loaded" information.

To survive early dismissal, plaintiffs are more likely to conduct pre-discovery investigations, such as inspecting company records or seeking inside informants, and file detailed complaints. See Geoffrey P. Miller, "Pleading After *Tellabs*," NYU Law and Economics Research Paper No. 08-16, 31–32 (2008) (available at https://bit.ly/4n0VZtx).

Arbitration, by contrast, produces far less information because discovery is more limited, and shareholders have little incentive to pursue costly discovery efforts when there is no credible forum to share their findings.

(2) Consent and access to justice: When mandatory arbitration clauses are adopted without shareholder consent, concerns over fairness and access to justice take center stage.

The Delaware Court of Chancery treats corporate charters and bylaws as binding contracts and has upheld clauses adopted unilaterally by directors, which bar shareholders from pursuing court actions individually or as a class. See Samuel M. Ward & Michael A. Toomey, "Mandatory Arbitration Does Not Give Stockholders A Choice," *CLS Blue Sky Blog* (Aug. 28, 2017) (available at https://bit.ly/460oCkw); *Kidsco Inc v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995) (available at https://bit.ly/4mVHcAh).

Critics argue this can compromise fairness, pointing to unequal bargaining power in selecting arbitrators, potential bias toward repeat corporate players, and inconsistent application of legal rules. Such concerns fuel the view that mandatory arbitration, when imposed without consent, can deny shareholders meaningful access to justice and weaken their protection. See Emily Farinacci, "In a Bind: Mandatory Arbitration Clauses in the Corporate Derivative Context," 28(3) *Ohio St. J. on Disp. Resol.* 737, 751 (2013) (available at https://bit.ly/41Pkq4H).

Whether shareholder consent is truly lacking is debatable when investors are aware that the board can unilaterally adopt mandatory arbitration. Market prices often reflect the presence or possibility of such provisions, suggesting that purchasers accept this authority.

In *Corvex Management LP v Commonwealth REIT*, Case No. 24-C-13-001111, 2013 WL 1915769 (Md. Cir. Ct. May 8, 2013) (available at https://bit.ly/46nRwtS), the Maryland circuit court found shareholders had actual knowledge of the bylaws and constructive knowledge of the board's unilateral amendment power, concluding they had assented to the arbitration clause.

The consent issue may therefore be overstated, but ensuring a fair arbitration process remains essential to protecting shareholders.

Comparative Insights

While mandatory arbitration in shareholder disputes poses governance risks, experiences in Canada, Brazil, the United Kingdom, Singapore, and Hong Kong suggest it can be reshaped to mitigate them. Here are views as to how other jurisdictions are balancing the equation.

Canada: Consistent with Canada's arbitration-friendly reputation, courts generally uphold and interpret mandatory arbitration clauses in shareholder agreements broadly. See Lawrence Thacker & Mark Veneziano, "Mitigating Class Action Risks with Effective Arbitration Clauses and Class Action Waivers: A Guide for Canadian Corporations," 9(1) *Class Action Defence Quarterly* 1 (September 2014) (available at https://bit.ly/4n887Jh) .

In *Woolcock v. Bushert*, (2004) 192 O.A.C. 16 (CA) (available at https://bit.ly/4mkSrku), the Ontario Court of Appeal stayed an oppression action, finding the clause covered all related claims. Furthermore, in *3-Sigma Consulting Inc. v. Ostara Nutrient Recovery Technologies Inc.*, 2023 BCSC 100 (available at https://bit.ly/4nac8gk), the British Columbia Supreme Court held that such clauses could, in some circumstances, extend to non-signatories and stayed the proceedings for the arbitral tribunal to determine jurisdiction.

Some Canadian courts and scholars, however, have shared U.S. concerns about procedural fairness in mandatory arbitration. They argue it can disadvantage individuals dealing with large corporations. See Theodore Milosevic, "What Makes a Consumer? Mandatory Arbitration Clauses and Free Digital Services in Canada," 75(1) *U. Toronto Fac. L. Rev.* 9, 14 (2017) (available at https://bit.ly/3VSDVFR).

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Corporate ADR

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In *Griffin v Dell Canada Inc.*, 2010 ONCA 29 (CANLII) at para. 30 (available at https://bit.ly/486p2Yb), Justice Robert J. Sharpe of the Ontario Court of Appeal warned of "arbitrator bias in favor of the dominant and repeat-player corporate client" and described arbitration as "nothing more than a guise to avoid liability for widespread low-value wrongs" that would only be viable as class actions.

Brazil: Brazil has one of the most permissive regimes for mandatory arbitration in shareholder disputes. See Patricia Gil Lemstra & Joseph A. McCahery, "Mandatory Arbitration of Intra-Corporate Disputes in Brazil: A Beacon of Light for Shareholder Litigation?" *Cambridge U. Press* 93, 94 (2021) (available at https://bit.ly/46ldZrj).

The Brazilian Company Law permits articles of incorporation to contain mandatory arbitration clauses and even mandates them for companies to be listed in the local listing segment with the highest standards of corporate governance. See "Private Enforcement of Shareholder Rights: A comparison of selected jurisdictions and policy alternatives for Brazil," OECD 14 (2020) (available at https://bit.ly/46rZEtc). This requirement aims to foster a more attractive securities market to address Brazil's judicial defects, including its low efficiency and limited commercial knowledge among judges.

Brazil's openness toward mandatory intra-corporate arbitration has garnered support from local and international investors. Arbitration's popularity has surged in Brazil, with the value of arbitration increasing to BRL 88.3 billion in 2018 from BRL 2.8 billion in 2010. Surveys suggest that most Brazilian companies and institutional investors prefer arbitration over litigation for resolving intra-corporate dispute. This popularity signals the potential of structured mandatory arbitration governance models, where investors knowingly purchase shares of companies with arbitration clauses.

United Kingdom: Unlike the United States, the United Kingdom does not consider courts as the primary forum to provide protection and redress for investors. Instead, the United Kingdom has different infrastructure to resolve disputes.

For example, the U.K. Takeover Panel handles takeover disputes, and the Financial Services Ombudsman resolves disputes between consumer investors and brokers. The non-statutory nature of the U.K. Corporate Governance Code also provides flexibility to companies. As the U.K. has not adopted the U.S. class action-led corporate governance, arbitration is less likely to deprive its shareholders of benefits from class actions, a policy concern heavily emphasized in the U.S. perspective.

While the English law allows shareholders to resolve intra-corporate disputes through arbitration, this mechanism is rarely used among listed companies. See John Armour, Bernard Black, Brian Cheffins, & Richard Nolan "Private Enforcement of Corporate Law: An Empirical Comparison of the US and UK," 6 *J. of Empirical Legal Studies* 687 (2009). Some argue that combining arbitration with the United Kingdom's soft-law and market sanction approach could further the "corporate governance objective of management accountability" while alleviating some negative effects of litigation.

Arbitration can be a way of rectifying the wrong through a governance settlement if the clauses are carefully integrated into the company's charter, reinforcing the charter's role as a binding instrument for shareholders to privately sort their affairs.

Singapore and Hong Kong: Singapore has become a leading arbitration hub, with the Singapore International Arbitration Centre among the most preferred globally. See Quentin Loh, "The Limits of Arbitration," 1(1) *McGill Journal of Dispute Resolution* 66, 88 (2014) (available at https://canlii.ca/t/27sw). Courts take a pro-arbitration approach, as seen in *BMO v. BMP* [2017] SGHC at para 51 (available at https://bit.ly/3KryivQ), where the High Court held that arbitration agreements should be "generously construed" to cover all claims unless there is good reason otherwise.

A key area of debate is arbitrability. In *Silica Investors Limited v Tomolugen Holdings Limited and others*, [2014] SGHC 101 at para 113 (available at https://bit.ly/3VoQqZF), the High Court found that a minority oppression action under section 216 of the Companies Act is not automatically non-arbitrable, even with statutory relief. Singapore's experience recognizes that arbitration has limits, and the focus should be on clearly defining those boundaries.

Hong Kong is also favorable toward arbitration. Its Arbitration Ordinance is among the most modern in the world, emphasizing party autonomy and minimal court intervention. See Philipp Hanusch, "Hong Kong Arbitration as an Ideal Mechanism for Resolving Crypto-Disputes," *Global Arbitration News,* Baker Mackenzie blog (Sept. 19, 2024) (available at https://bit.ly/3VqKXBF).

> The SEC recently voted 3-1 to lift its unwritten ban on mandatory shareholder arbitration in public securities offerings.

This pro-arbitration stance grew out of Hong Kong's economic expansion, when the government promoted ADR to ease the burden of costly, lengthy court proceedings. As a result, ADR and court-based shareholder disputes often operate in tandem, with courts frequently encouraging ADR before adjudication.

Scholars, however, caution against overreliance, noting that the threat of cost sanctions for refusing ADR can pressure shareholders into an additional expensive step in already protracted disputes. Hong Kong's experience shows that even in a jurisdiction with a well-developed arbitration system, realizing the benefits of both arbitration and litigation requires careful balance.

Designing Shareholder Arbitration

Experiences from other jurisdictions show that arbitration in shareholder disputes can offer clear benefits and, when properly structured, a flexible forum for resolution.

Rather than dismissing its potential, critiques of its weaknesses can guide reform. Key proposals for strengthening shareholder arbitration include designing "accountability-sensitive" processes, enhancing the role of institutions, and reframing the debate from litigation versus arbitration to how the two can complement each other.

(1) "Accountability-sensitive" arbitration: Strengthening arbitration's role in corporate governance requires building in mechanisms that preserve board accountability. An accountability-sensitive arbitration process would address the lack of information output that limits arbitration's ability to deter misconduct through reputational and market pressure.

One solution is to require arbitrators to issue publicly accessible "explained awards" that detail the misconduct, including who did what, when, and why it was wrong, similar to court judgments.

While arbitration need not match litigation's volume of information, a more deliberate balance between efficiency and disclosure could strengthen its role in shareholder protection and corporate governance. See George Fowler, "Mandatory Arbitration Clauses for Shareholders: An Efficient Solution or an Unconscionable Change?" 2019(2) *J. Disp. Resol.* 181, 186 (2019) (available at https://bit.ly/48nBXEY).

Furthermore, arbitration clauses can include safeguards to address concerns about limiting access to justice or imposing a biased process. These may provide procedural protections to ensure impartial arbitrator selection or exclude certain disputes where shareholder rights are most vulnerable, such as fraud, breach of fiduciary duty, or high-value claims.

In jurisdictions like Canada, where arbitration clauses are interpreted broadly to include tort claims such as fraudulent misrepresentation, limiting arbitrability helps clarify the agreement between the corporation and shareholders. See *Haas v. Gunasekaram*, 2016 ONCA 744 at paras 34–35 (available at https://bit.ly/3K2g2cy).

Other options include allowing a dispute to proceed in court with the consent of a specified percentage of shares. When tailored collaboratively, arbitration clauses can be refined to balance cost-efficiency with accountability.

(2) Role of institutions: Strengthening accountability-sensitive arbitration also depends on the active involvement of institutions that set norms and build investor confidence.

In the United States, regulators such as the Securities and Exchange Commission, FINRA, and the stock exchanges already oversee shareholder disputes and have an interest in balancing market efficiency with board accountability. These bodies could establish guidelines for mandatory arbitration clauses, for example, by requiring public disclosure of proceedings or decisions. See Robert J. Jackson Jr., "Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration," U.S. Securities and Exchange Commission (Feb. 28, 2018) (available at https://bit.ly/46mKkhr).

FINRA arbitration provides a useful model in the investor–broker context. FINRA offers and oversees the forum but does not decide awards, ensures fairness through a governing Code of Arbitration Procedure, and maintains a roster of qualified arbitrators for party selection. See "Understanding the FINRA Rules of Arbitration: A Comprehensive Guide," Haselkorn and Thibaut (Aug. 3, 2023) (available at https://bit.ly/4ptoku3); "Code of Arbitration Procedure for Customer Disputes," FINRA (available at https://bit.ly/4mtPmih), and FINRA Arbitration: Arbitrator Selection Process for Customer Cases (Claims >$100K) (available at https://bit.ly/3KabQYk).

As corporate arbitration continues to expand, institutional engagement is essential to balance efficiency with investor protection. Yet the ability of the SEC and FINRA to exercise enforcement powers through internal administrative processes now faces significant constraints.

In *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024) (available at http://bit.ly/4psveQd), the U.S. Supreme Court held that cases seeking civil monetary penalties for claims analogous to common law must be heard in federal district courts, recognizing defendants' Seventh Amendment right to a jury trial.

Following *Jarkesy*, a sanctioned broker brought a challenge to the constitutionality of FINRA's disciplinary proceedings, which operate in a manner similar to the SEC's internal hearings. See Kevin LaCroix, "SEC Administrative Proceedings After *SEC v. Jarkesy*," *The D&O Diary* (Sept. 17, 2024) (available at here). The claim was dismissed for lack of subject-matter jurisdiction, leaving FINRA's enforcement powers intact for now. The question of whether *Jarkesy* could extend to FINRA or other arbitration forums remains unresolved. See "FINRA Beats First Post-*Jarkesy* Challenge," *A&O Shearman Blog* (Sept. 17, 2024) (available at here).

(3) Reframing the conversation: Finally, reframing the discussion from "litigation versus arbitration" to "litigation and arbitration" could better serve corporate governance. Arbitration can be an efficient way to limit unmeritorious and costly litigation, but its impact on shareholders and markets depends on how and where it is used. Like litigation, it is a tool best applied under the right conditions.

> The high settlement rate in shareholder securities class actions combined with the higher chance of shareholder litigation being killed in its infancy reduces the overall transparency gap between arbitration and litigation.

U.S. courts have recognized that arbitration does not inherently undermine the substantive rights afforded under the Securities Act of 1933, and Canadian courts have similarly held that it is not inherently oppressive, vexatious, or an abuse of process that justifies overriding party autonomy. As emphasized in the introduction, the focus should be not only on what may be lost in shifting from litigation to arbitration, but also on what can be gained when the process is carefully designed and optimized.

* * *

Mandatory arbitration in shareholder disputes can strengthen, rather than weaken, corporate governance if designed and applied with care. Transparency and shareholder consent are critical, as they influence deterrence, accountability, and trust. Experiences from other jurisdictions show that efficiency and fairness can be balanced and arbitration adapted to the realities of corporate governance.

The task for boards, regulators, and dispute resolution professionals is to create clauses and processes that are transparent, credible, and aligned with investor protection. With the right balance, arbitration can become a trusted and effective part of corporate governance practice.

Court Decisions/Part 2 of 2

N.Y. Convention 'Trap': No Subject Matter Jurisdiction Over Petitions to Vacate Foreign Arbitral Awards

BY PHILIP J. LOREE JR.

The October 2025 *Alternatives* featured Part 1 of this two-part article, which summarizes two recent U.S. Circuit Court of Appeals decisions. See Philip J. Loree Jr., "Two New Jurisdiction Traps: Arbitration Amounts In Controversy, and New York Convention Application," 43 *Alternatives* 141 (October 2025 (available on *Westlaw*).

Part 1 highlighted the first of the two cases that pose subject-matter-jurisdiction-related traps for the unwary—rules governing subject-matter jurisdiction that are somewhat counterintuitive and whose application in each case led to an equally counterintuitive outcome, all to the probable disappointment of at least one apparently unwary litigant. As a friend and colleague with whom I once worked would say: "There but for the grace of God go I."

Part I focused specifically on the Ninth Circuit's amount-in-controversy decision in *Tesla Motors Inc. v. Balan*, 134 F.4th 558 (9th Cir. 2025). The appeals 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. Part 1 drilled down on the *Tesla* decision and what it portends.

This Part II turns to the second U.S. Court of Appeals decision: *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 was so 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, 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—properly had its petition to vacate the award dismissed for lack of subject matter jurisdiction. See slip op. at 9-12, 12-14.

The upshot of the appellate panel's decision is 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.

Let's take a closer look.

Treaty Overview

The New York Convention comes into play in U.S. state and federal courts in three types of post-award proceedings: (a) where a party seeks recognition and enforcement in the U.S. of an award made in the territory of a signatory state, referred to as a "foreign arbitral award[,]" slip op. at 17-18 (citations omitted); (b) when a party seeks recognition or enforcement in the U.S. of an award made in the U.S. that involves one or more foreign parties, "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states[,]" i.e., a "nondomestic award," see slip op. at 18-19 (citations omitted); or (c) a party seeks to vacate or modify a nondomestic award. See Convention, Arts. III-VI; 9 U.S.C. §§ 202, 203, 207, 208; slip op. at 22-25.

On a pre-award basis, the Convention, and its implementing legislation, also requires recognition and enforcement of arbitration agreements falling under the Convention and directs parties to enforce them by motion to compel and the appointment of arbitrators. See Convention, Art. II(1) & II(3); Federal Arbitration Act at 9 U.S.C. §§ 202, 203, 206.

The author is principal of the Loree Law Firm, where he is 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.

Section 203's Role

FAA Section 203 confers federal question subject matter jurisdiction for actions and proceedings falling under the Convention, without regard to the amount at stake. "An action or proceeding falling under the Convention[,]" Section 203 says, "shall be deemed to arise under the laws and treaties of the United States." U.S. federal district courts "shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203.

FAA Section 202 defines agreements and awards that "fall[] under the Convention." 9 U.S.C. § 202. "An arbitration agreement or arbitral award arising out of a legal relationship," says Section 202, "whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. "An agreement or award arising out of such a relationship which is entirely between citizens of the United States[,]" continues Section 202, "shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. …" 9 U.S.C. § 202.

In the Federal Courts

Do the federal courts have subject matter jurisdiction under the Convention over actions or proceedings to vacate awards made in the territory of another signatory state?

Our second subject matter jurisdiction trap for the unwary concerns whether a U.S. district court has, under the Convention and enabling legislation provisions that have been discussed, subject matter jurisdiction over an action or proceeding to vacate an award made in a Convention signatory state other than the U.S.

Note that the provisions so far discussed, especially FAA Sections 202 and 203, are, at least at first glance, pretty broad. For example, an award made in the territory of a signatory state would unquestionably "fall under the Convention," according to Section 202, no?

The answer is "yes," but the Second Circuit in *Molecular Dynamics* informs us that does not mean U.S. federal courts have subject matter jurisdiction to *vacate or modify* that award—they can only enforce the award.

According to *Molecular Dynamics*, a petition to vacate a foreign arbitral award (i.e., one made in the territory of a contracting state other than the one in which recognition and enforcement is sought) is not, under the terms of the Convention, and its enabling legislation, "an *action or proceeding* falling under the Convention" within the meaning of FAA Section 203, the Convention's enabling statute governing subject matter jurisdiction. 9 U.S.C. § 203 (emphasis added); *Molecular Dynamics*, slip op. at 38.

Therefore, held the Second Circuit, U.S. federal courts do not have subject matter jurisdiction to adjudicate a petition to vacate a foreign arbitral award. Slip op. at 38.

The three-judge Ninth Circuit appellate panel supports that holding in a scholarly, well-reasoned opinion authored by Senior Circuit Judge Robert D. Sack, who is joined by Senior Circuit Judge Richard C. Wesley and Circuit Judge Beth Robinson. An overview of the court's decision follows.

Un-Convention-al Wisdom

The subject: In the second of two 'traps for the unwary,' the New York Convention's role on the enforcement of arbitration agreements is refined by a Second Circuit decision.

The rule: No jurisdiction for U.S. courts on vacatur of foreign awards under the Convention.

The practice: It goes to the earliest steps in the deal, on deciding on an arbitration seat in the dispute resolution clause. You'll want one amenable to challenges like the petition in *Molecular Dynamics*—or maybe you won't.

Convention Provisions And Application

With respect to arbitration awards, reasoned the appellate judges, the Convention "shall apply" to two classes of cases. Convention, art. I(1); slip op. at 17-18.

The first is "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal." Convention, art. I(1).

That category includes awards made in a country other than the U.S. for which recognition and enforcement is sought in the U.S. and awards made in the U.S. for which recognition and enforcement is sought in a country other than the U.S. Slip op. at 18 (citation omitted). The Second Circuit refers to awards made in a country other than the U.S.—and which are candidates to be recognized or enforced in the U.S. under the Convention—as "foreign arbitral awards." Slip op. at 18 (citation and quotation omitted).

The second class of cases to which the Convention applies is "to the recognition and enforcement in the United States," slip op. at 18, of "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Convention, art. I(1); see slip op. at 18-19. These "nondomestic arbitral awards" are made in the U.S. but have—as defined more precisely in FAA Section 202—"some significant foreign nexus. …" Slip op. at 19.

The Recognition-and-Enforcement Purpose

"The Convention provides[,]" said the Second Circuit, "that it applies to 'the recognition and enforcement' of foreign arbitral awards, and to nondomestic arbitral awards 'in the State where their recognition and enforcement are sought.'" Slip op. at 19-20 (quoting Convention, art. I(1).

"[I]n other words," the appellate court continued, the Convention "describes the two types of arbitral awards to which it applies by reference to recognition-and-enforcement

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proceedings." Slip op. at 20 (footnote omitted). That, writes Senior Circuit Judge Sack, "is consistent with 'the intended purpose of the treaty,' which is 'to encourage the *recognition and enforcement* of international arbitration awards.'" Slip op. at 20 (citation and quotation omitted; emphasis in original).

Primary v. Secondary Jurisdiction

This recognition and enforcement purpose is subject to the defenses to recognition and enforcement set forth in Convention Article V, the court explained. Convention, art. V.

One of these defenses is particularly important because it delineates a "primary jurisdiction" from a "secondary jurisdiction," a difference that explains why the Convention does not apply to the vacatur of a foreign arbitral award, and why, accordingly, there is no U.S. court subject matter jurisdiction for petitions to vacate such awards.

The key Article V defense is Article V(1)(e), which authorizes courts "to refuse recognition and enforcement of an award where that award 'has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'" Slip op. at 21 (quoting Convention, art V(1)(e)). Based on Article V(1)(e), U.S. courts distinguish between countries having either "primary" or "secondary jurisdiction" over awards. Slip op. at 21.

The country where the award was made (or whose procedural arbitration law governs) has "primary jurisdiction" over it, and "is also sometimes referred to as the 'legal seat' of the arbitration." See slip op. at 21-22, 21 n.9 & 22 n.10. Every other Convention signatory state has "secondary jurisdiction" over that award. Slip op. at 22 (citation omitted).

Providing an example, Sack writes, "if an arbitral award is made in Canada pursuant to Canadian arbitral law, then Canada—and, by extension, its courts—has primary jurisdiction over that award, even if the arbitrator applied, say, Connecticut law to questions of contract interpretation." Slip op. at 22. The Court explained that all other countries party to the Convention have "only secondary jurisdiction over the award." Slip op. at 22.

Who has primary versus secondary jurisdiction materially affects the scope of review a court has over an award, as well as the preclusive effect of the determination resulting from that review. "Article V(1)(e) 'specifically contemplates that the state [having primary jurisdiction] will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.'" Slip op. at 23 (quoting *Yusuf Ahmed Alghanim & Sons v. Toys 'R' Us Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)).

In the case of a nondomestic award, one or more U.S. courts have primary jurisdiction over the award and are free to vacate or modify it under the FAA's domestic provisions in Chapter One. See 9 U.S.C. § 208; slip op. at 23 (citing *Yusuf*, 126 F.3d at 23; *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012)(quotations omitted).

A court with secondary jurisdiction, however, does not have the powers of a court with primary jurisdiction. It cannot vacate or modify the award under its own or another jurisdiction's domestic arbitration law. It "may only *decline to enforce* an arbitral award and may do so based 'only on the limited grounds specified in Article V [of the Convention].'" Slip op. at 23 (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak*, 500 F.3d 111, 115 n.1 (2d Cir. 2007) (emphasis and bracketed text in original)).

In addition to being authorized only to deny recognition and enforcement, the "legal effect" of such a denial "is limited to that [secondary] jurisdiction." Slip op. at 24-25 (citing *Corporación AIC SA v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 884 (11th Cir. 2023)).

But, under Article V(1)(e), "vacatur of an award by the primary jurisdiction 'has legal consequences internationally, as it is a ground on which recognition and enforcement of the vacated award may be refused by a court in a secondary jurisdiction.'" Slip op. at 25 (quoting *Corporación AIC*, 66 F.4th at 883 and citing *Zeiler v. Deitsch*, 500 F.3d 157, 165 n.6 (2d Cir. 2007)).

The Second Circuit explained that the "limitation on the power of courts of secondary jurisdiction necessarily implies a limitation on the parties that appear before them." Slip op. at 25.

Enter our trap for the unwary. …

Parties to a secondary jurisdiction court proceeding are limited to contesting whether the secondary jurisdiction should recognize and enforce the award, but the prevailing arbitration party must "initiate a recognition-and-enforcement action before the losing party may contest the award." Slip op. at 25 (citation omitted).

It is only after the prevailing party seeks recognition and enforcement of the award that the losing party in the arbitration may argue that the Court should deny recognition and enforcement. Slip op. at 25 (citing and quoting *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1263 (11th Cir. 2011), and *Estate of Ke v. Yu*, 105 F.4th 648 (2024)).

"[T]herefore[,]" stated Second Circuit, "[t]he New York Convention … envisions a mostly limited, reactive role for the losing party in an arbitration." Slip op. at 26.

The only exception, explained the panel, is power of the primary jurisdiction court to vacate an award, a power not shared by secondary jurisdiction courts. Article V(1)(3) provides that "an award may be 'set aside or suspended by a competent authority' of the primary jurisdiction." Slip op. at 26 (quoting Convention, art. V(1)(3)).

Article VI effectively implements Article V(1)(3), stating "[i]f an application for the setting aside or suspension of [an] award has been made to a [primary jurisdiction] competent authority[,]" then a secondary jurisdiction competent authority is authorized to stay recognition-and-enforcement proceedings pending adjudication of the vacatur proceeding. Slip op. at 26.

The Court interpreted these provisions "to imply that the losing party may initiate vacatur proceedings in the primary jurisdiction." Slip op. at 26 (footnote omitted). They "admit a discrete carve-out for vacatur proceedings in the primary jurisdiction initiated by the losing party." Slip op. at 27.

Implementing Provisions

FAA Chapter Two implements the Convention, and in determining whether there was subject matter jurisdiction over the motion

to vacate the award, the Court interpreted the FAA and Convention together "to determine how the two sources of law coalesce." Slip op. at 28.

The key Chapter Two provision is its subject-matter-jurisdiction grant, FAA Section 203. That section provides:

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States … shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Does the Convention Apply?

Was the petition to vacate the Swiss-made foreign arbitral award an action or proceeding falling under the Convention?

The FAA Section 203 question the court had to decide was whether the case before it was "an action that 'fall[s] under the Convention.'" Slip op. at 30 (quoting 9 U.S.C. § 203). The answer was no.

The Convention applies to: (a) the "recognition and enforcement" of foreign arbitral awards made in the territory of a state other than the state where recognition and enforcement is requested; and (b) nondomestic arbitral awards. Slip op. at 30 (citation omitted). The award at issue was a "foreign arbitral award" but not one for which the award challenger sought recognition and enforcement. Slip op. at 31.

Made in Switzerland—not the U.S.—it was not a nondomestic arbitration award from the standpoint of the United States.

The Convention's limited carve-out for vacatur proceedings applies only to nondomestic awards, and then only to proceedings before a "competent authority of the country in which, or under the law of which, that award was made[,]" i.e., the primary jurisdiction. Convention, arts. V(1)(e); see also Convention, art. VI; see slip op. at 32. Here the primary jurisdiction was Switzerland, not the U.S. See slip op. at 32.

The Convention's silence on vacatur of awards falling outside the nondomestic-award, primary jurisdiction carve-out did not warrant expansion of the court's limited jurisdiction. The award challenger argued that the Convention's silence was "permissive, concluding from it that 'parties can designate a single forum for post-award proceedings including vacatur, other than the default primary jurisdiction.'" Slip op. at 32 (quoting Appellants' Brief at 13). The arbitration agreement here expressly deemed New York courts to have exclusive jurisdiction over matters concerning arbitration. Slip op. at 8-9.

But the Second Circuit saw things differently. The Convention's principal goal and purpose is to recognize and enforce arbitration agreements and awards falling under it, not to "provide a vehicle for the second-guessing and invalidation by one jurisdiction of arbitral awards generated in another; it was designed to enhance the portability of awards by streamlining the process by which they could be recognized and enforced abroad." Slip op. at 32-33 (citations and quotations omitted).

Rather than interpreting the "Convention's general silence on vacatur" as "a gap to be filled by domestic law or private contract," it determined that vacatur was "not among the mechanisms that the Convention is designed to regulate." Slip op. at 33.

The Convention referenced only vacatur proceedings that were brought in primary-jurisdiction courts. That further showed "the Convention limits its scope to actions intended to enforce, not invalidate, arbitral awards." Slip op. at 33.

The appeals court said that the Convention does not address the vacatur proceeding the award challenger brought—an application for vacatur made to a court having only secondary jurisdiction. FAA Section 203 confers no jurisdiction over such an action because it is not "[a]n action or proceeding falling under the Convention. …" 9 U.S.C. § 203.

The Convention's text, "which only describes vacatur by a 'competent authority of the country in which, or under the law of which, [an] award was made,' N.Y. Convention, art. V(1)(e)—offers nothing for Petitioners-Appellants' vacatur action to 'fall under.'" Slip op. at 34 (quoting Convention, art. V(1)(e)).

The Second Circuit opinion also rejected the award challenger's argument that FAA Section 202 shows that the Court had subject matter jurisdiction. The portion of Section 202 on which the award challenger relied says, "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial … falls under the Convention." The court acknowledged that "[t]aken out of context, this language might well be read to sweep in the award at issue here, which 'aris[es] out of a legal relationship' and 'is considered as commercial.'"

But construing Section 202 outside a "vacuum," and in conjunction with the Convention, the court read Section 202 as limiting the Convention "to commercial disputes within the classes of recognition and enforcement actions described in Article I(1) or vacatur actions described in Article V(1)(e)." Slip op. at 36.

But Section 202 could not, contrary to the award challenger's contention, expand the scope of the Convention's application to disputes not contemplated by the Convention itself. Slip op. at 36. After all, FAA Chapter 2 was designed to "enforce" the Convention, not expand its scope. Slip op. at 37 (citing 9 U.S.C. § 201).

There is some additional textual support for the opinion's interpretation, albeit support that overlaps with, or is otherwise closely related to what is in the opinion. Section 202, as noted above, defines in a very broad fashion "arbitration agreement[s]" and "arbitral award[s]" that "fall[] under the Convention," as well as "arbitration agreement[s]" and "arbitral award[s]" that do not: "An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. …" 9 U.S.C. § 202.

Section 202 thus effectively defines what awards are nondomestic. The additional textual hook for the Court's well-reasoned interpretation is revealed when FAA Section 202's text is parsed with that of FAA Section 203. While Section 202 refers to "*arbitration agreement[s]*" and "*arbitral award[s]*" that "fall[] under the Convention," FAA Section 203 speaks of "*action[s] and proceeding[s]*" that "fall under the Convention." 9 U.S.C. § 203.

That makes perfect sense, since Section 203 establishes which kinds of cases fall within the court's congressionally conferred,

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Convention-related subject matter jurisdiction. Section 203 was intended to address specific actions and proceedings over which the court has subject matter jurisdiction, not to define generally the types of agreements and awards might be at issue in those actions and proceedings. And, as the Second Circuit points out, the Convention itself, not simply the implementing legislation, describes those actions and proceedings.

The Panel's Decision Summary

Summarizing its decision, the Second Circuit explained that it understood "Chapter 2 of the FAA along with the New York Convention to convey to the federal courts subject-matter jurisdiction over actions to recognize and enforce foreign or nondomestic arbitral awards, and to actions to vacate awards made in or under the laws of the United States that also have some significant foreign nexus, so long as the subject awards arise out of a legal relationship and are commercial in nature." Slip op. at 37.

"Because[,]" stated the appellate panel, "the present action does *not* comport with the 'provisions and … spirit' of the Convention, and because Petitioners-Appellants offer no alternative ground for the exercise of subject matter jurisdiction, we conclude that the district court lacked subject-matter jurisdiction." Slip op. at 37 (quotations and citation omitted; emphasis in the opinion).

The court clarified that it did not decide whether "parties to an international arbitration may, consistent with [the Convention], designate by contract one country as the arbitral seat and another as the venue for vacatur proceedings." Slip op. at 37-38.

It held "instead that the present action—a petition to vacate a foreign arbitral award—does not 'fall under' the Convention, and therefore that 9 U.S.C. § 203 does not supply the necessary grant of subject-matter jurisdiction to the district court." Slip op. at 38.

* * *

The New York Convention can be a powerful tool in post-award litigation, even for challengers of nondomestic awards. The FAA Section 203 subject matter jurisdiction provision helps ensure that those who desire or prefer to litigate international arbitration disputes in the federal courts can do so, provided that the relief sought comports with what the Convention provides.

But if the Convention itself does not contemplate that relief, then the litigant should seek it in a venue that has the subject matter jurisdiction to grant it. And even though the Convention applies in state courts, in situations like that in *Molecular Dynamics*, the only court that may be competent to grant it may be one abroad.

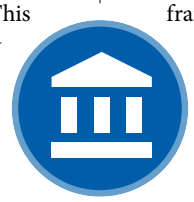
That is something that should be carefully considered and addressed at the pre-contract stage, at which the parties should take great care to ensure that the arbitral seat they select will be a workable one in the event one of the parties seeks to set aside or modify an arbitral award. The choice could make all the difference in the outcome, something the wary will surely appreciate.

Theory Meets Practice

The Art of AI Prompting in Law and Dispute Resolution Practice

BY JOHN LANDE

Artificial intelligence tools are built on large language models. This makes them especially handy for lawyers, mediators, and arbitrators—in this article, practitioners—because language is our stock in trade. Practitioners ask questions, give instructions, interpret meaning, and frame choices.



At its best, AI does the same. Getting good results from AI tools requires similar skills used in legal and dispute resolution practice: role clarity, language precision, audience awareness, and sound judgment.

Like any professional interaction, working effectively with AI begins by asking the right questions. AI tools respond to the questions they receive–just as clients, colleagues, and counterpart lawyers do. The more clearly you define your goals and frame your prompts, the better the results.

This article can help you use AI tools effectively, both to enhance clients' satisfaction and comply with ethical duties.

The author, a longtime *Alternatives* contributor, presents this regular column, "Theory Meets Practice." He is Isidor Loeb Professor Emeritus at the University of Missouri School of Law's Center for the Study of Dispute Resolution in Columbia, Mo. Last year, he received the American Bar Association Section on Dispute Resolution's Award for Outstanding Scholarly Work. See https://bit.ly/3Tq5YuK. His biography page can be found at https://lande.missouri.edu. Thanks to Gary Doernhoefer and Colin Rule for comments on an earlier draft.

AI Is Efficient

Given today's legal and dispute resolution market, you should learn how to use AI effectively and responsibly. You can use it to improve client service and remain competitive in the marketplace. Indeed, you may wonder whether you will be able to do so in the future *without* using AI.

In the past two years, lawyers' AI use has grown substantially, and it is expected to keep growing. According to the ABA's 2024 Legal Technology Survey, about 30% of U.S. law firms now use AI tools, up from 11% in the previous year. An additional 15% said they were seriously considering using AI tools. In firms with more than 100 attorneys, 46%

currently use AI tools.

Most respondents said that the main advantage of using AI is that it saves time and increases efficiency. Almost half the lawyers in the survey believe that AI will become mainstream within three years. Bob Ambrogi, "ABA Tech Survey Finds Growing Adoption of AI in Legal Practice, with Efficiency Gains as Primary Driver," *LawNext.com* (March 7, 2025) (available at https://bit.ly/46ElTwe).

Arbitration practitioners also are using AI for some tasks and more probably will do so in the future. A 2023 survey of 221 international arbitration practitioners found that about 30% have used AI for document review or text formatting. More than half, however, believe that it shouldn't be used for legal submissions (53%) or drafting arbitral awards (62%). Bryan Cave Leighton Paisner LLP, "Annual International Arbitration Survey 2023: AI in IA—The Rise of Machine Learning" (2023) (available at https://bit.ly/3KixqtD).

A 2025 survey of 2,402 arbitration profession respondents found that about half expect increased reliance on AI over the next five years, especially for research, document review, and analytics. While arbitrators seem comfortable using AI for administrative or procedural tasks, there is more resistance where discretion, judgment, or legal reasoning are involved. White & Case & Queen Mary University of London, "2025 International Arbitration Survey: Arbitration and AI" 27 (2025) (available at https://bit.ly/46zUjjE).

I haven't found data on mediators' AI use, but those who work with lawyers will increasingly encounter it. Mediators can also find many valuable ways to use it in their own activities. See, e.g., John Lande, "When AI Comes to the Table: How Tech Tools Will Change ADR," 43 *Alternatives* 107 (July/August 2025) (available on *Westlaw*).

Lawyers Must Know When to Use AI

Using AI isn't merely a matter of increasing effectiveness–it's a matter of legal ethics. The 2024 ABA Formal Ethics Opinion 512 states that "lawyers should become aware of the [general artificial intelligence] tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means."

Indeed, the opinion states that "it is *conceivable that lawyers will eventually have to use them* to competently complete certain tasks for clients." American Bar Association Standing Committee on Ethics and Professional Responsibility, "Formal Opinion 512: Generative Artificial Intelligence Tools" (July 29, 2024) (available at https://bit.ly/46zUECW) (Footnote omitted; emphasis added.)

Lawyers must know what the tools can do, recognize what they cannot, and act accordingly. The ABA Opinion and comparable state rules emphasize that lawyers' duty of competence includes both the selection and supervision of relevant technologies.

For example, lawyers must protect confidentiality when using cloud-based tools, supervise the use of AI-generated content by others in their practice, and verify the accuracy of any outputs submitted to courts or shared with clients.

Write Better AI Prompts To Get Better Results

Choose the Right AI Tool: A brilliant prompt to the wrong tool is a bad prompt.

Use Your Professional Communication Skills: Effective communication techniques with humans can also help you get better AI results.

Follow Up: Probe, refine, and redirect until the AI output serves your goals.

AI and Human Communication

AI tools respond directly to the prompts they receive. Savvy users ask clear questions and give specific directions. That mirrors what practitioners do every day: ask precise questions, give well-defined assignments, and anticipate audience needs.

Practitioners ask purposeful questions in their daily work. For example, they might ask a client, "What are your main concerns?" or ask a colleague, "How likely is it that a judge would agree with that argument?" They also give precise directions such as, "Draft a short summary for the supervising partner." These questions and directions are shaped by shared, often unspoken, expectations about how the conversation will unfold.

AI tools lack that shared context. They take instructions literally. While a human assistant might read your tone, grasp unstated implications, or ask clarifying questions, an AI tool relies solely on what you explicitly state. It can't see your raised eyebrow or hear your tone of voice.

That's why AI tools need users to make the implicit explicit. You should use your communication skills to translate your requests into prompts that AI tools can interpret appropriately.

Choose the Right Tool

Getting good AI responses requires choosing the right tool for the task. A brilliant prompt to the wrong tool is a bad prompt.

General-purpose AI platforms such as ChatGPT, Claude, or Perplexity can generate text, brainstorm strategies, summarize issues, or translate legalese into plain language.

You can get even better results for some tasks by using specialized tools. You might use several different tools to perform various tasks in a single matter. For example, if you're a lawyer preparing for a mediation session, you might need to summarize a deposition or research the most recent case law. You might also predict how a particular judge could rule on an issue or help a client prepare for a difficult conversation. Some tools are particularly well suited for specific tasks. See box on the following page, "Specialized AI Tools."

How to Write Effective Prompts

Prompting is the process of telling the AI tool

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Theory Meets Practice

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what you want. It involves the same logic and precision that practitioners apply in crafting questions, giving instructions, or preparing client guidance. Prompting is a professional skill. Like any skill, it improves with practice.

The basics include identifying your role, task, audience, and preferred format or tone. Here's an example of a well-structured prompt that tells the tool who you are, what you need, and who it's for:

> I'm a mediator preparing for a mediation session in an intellectual property dispute between two large corporations. Draft an email to the lawyers instructing them what to include in a pre-session mediation memo.

You might include other elements, such as specific formats (e.g., bullet lists, scripts, emails), constraints (e.g., keep under 300 words), and relevant background information.

You can also help an AI tool by telling it what *not* to do. This is especially helpful when tools produce overly simplistic, optimistic, or formulaic answers. For example, a lawyer preparing for a mediation session might use the following prompt:

> Draft an email to my client, but don't suggest that compromise is the goal. Just explain the process and encourage preparation.

Instructions like these can steer the tool away from unhelpful defaults and make the responses more useful for your context.

To protect confidentiality, avoid including names or other personally identifying information in your prompts.

These techniques are explained in more depth in John Lande, "Getting the Most from AI Tools: A Practical Guide to Writing Effective Prompts" (May 14, 2025) University of Missouri School of Law Legal Studies Research Paper No. 2025-24 (available at https://bit.ly/46oYVud). That article offers general guidance and specific examples that you can adapt.

Follow-Up Refinement

The greatest benefit of AI tools comes from the dialogue that follows the initial prompts.

This includes not only asking follow-up questions but also recognizing when to reject or revise a response.

You are not obligated to accept what the tool provides. Indeed, some of your best insights come from disagreeing with its first try. Seeing a problematic or off-target answer can help you sharpen your next prompt, clarify what you really want, or uncover an issue you hadn't identified.

Specialized AI Tools

- *Document summarization:* Harvey.ai or CoCounsel Legal.
- *Legal research:* Westlaw Precision or Lexis+AI.
- *E-discovery:* Relativity or Everlaw.
- *Litigation analytics:* Lex Machina or Bloomberg Law Litigation Analytics.
- *Negotiation and mediation support:* RPS Coach or NextLevel Mediation.
- *Arbitration assistance:* Kluwer Arbitration AI Assistant or Jus-AI (Jus Mundi).
- *Drafting documents:* Clearbrief or BriefCatch.

The AI legal technology market is evolving rapidly. Tools mentioned here are a sample of what is available, not an exhaustive catalog. Some AI platforms provide multiple tiers of service, including basic tools for free. You should verify current availability, accuracy, functionality, and costs before relying on any specific platform.

Examples of Follow-up Prompts

Content and Reasoning

- General request: "How can I improve this draft?"
- Ask about assumptions: "What assumptions are used in your analysis?"
- Ask for reasoning: "What legal doctrines support this conclusion?"
- Identify subject: "Focus only on substantive issues, not procedural issues."
- Expand language: "Provide more detail about this issue."
- Condense language: "Condense the main points into a single page."
- Ask for alternatives: "What are other phrases for expressing this idea?"
- Request different perspectives: "Describe how both sides would view this issue."
- Get a reality check: "How might a skeptical judge respond to this argument?"
- Stress-test the conclusion: "What counter-arguments would challenge this conclusion?"
- Test logic: "Are there any internal inconsistencies in this argument?"
- Identify gaps: "What's missing from this analysis that I should consider?"

Audience and Tone

- Define audience: "Express this in a way that a client would understand."
- Adapt to audience: "Reframe this for mediators instead of attorneys."
- Refine tone: "Revise this to sound professional, but still approachable."

Structure and Clarity

- Clarify language: "What do you mean by X?"
- Clarify structure: "Outline the structure of this response in bullet points."
- Improve clarity: "Rewrite this paragraph for clarity and conciseness."

Editing and Constraints

- Copy edit: "Check for typos and grammar errors."
- Define scope: "Answer only from the uploaded materials."
- Tailor to jurisdiction: "Revise this to reflect U.S. law."

Boundaries and Verification

- Require cites: "Cite controlling authority with pinpoint cites. If none, say 'No controlling authority found.'"
- Add safety rails: "If uncertain, don't speculate. Respond 'insufficient basis.'"

It's especially important to ask follow-up questions because AI tools don't provide "the" correct answers. Often, there is no single correct answer. These tools make mistakes, sometimes "hallucinating" completely fabricated information. They generate probabilistic responses and can give different answers to the same prompt.

Follow-up prompts are necessary to move past surface-level outputs. AI tools often default to being "sycophantic," being overly positive, rather than offering realistic or critical perspectives.

You can reduce this problem by giving explicit instructions such as:

- Be candid.
- Challenge weak assumptions.
- Tell me what I am missing.
- Identify possible counterarguments.

These instructions encourage the tool to move beyond surface agreement and offer more realistic, thoughtful input. They help convert an AI tool from a "yes-person" into a trustworthy adviser.

From First Draft To Final Product

Think of the first response as a starting point–a first draft to refine.

Your job is to probe, refine, and improve the output until it suits your purpose. Practitioners already do this in their daily work. They review drafts from colleagues, challenge assumptions, and edit communications for tone or clarity. Follow-up prompting involves the same skills. See the box at the top of the preceding page, "Examples of Follow-up Prompts."

You can ask one tool to evaluate the response of another tool, or use the same prompt in several different AI tools and compare the results. If the responses are similar, you can have more confidence. If the responses differ significantly, that provides clues for further queries.

The techniques for follow-up prompting with AI tools mirror good practices in human interactions. Effective practitioners use these same skills with clients, counterpart lawyers, and judges–asking clarifying questions, probing assumptions, and testing counterarguments. Most people don't do this consistently, however. Refining prompts with AI can function as a training ground for clearer reasoning and critical thinking. The discipline of refining prompts and learning from imperfect answers can help you strengthen your own analytical habits in human conversations.

Prompting Through the Life of a Case

Practitioners and parties can use AI tools before, during, and after a mediation session. Here are examples of prompts that a mediator might use throughout the course of a single case. Because AI tools respond quickly, people can even use them in real time–for example, during breaks in mediation sessions.

Before the Session: Planning and Preparation

- "List topics I should discuss with counsel in pre-session conversations about a commercial case, based on the attached memos they submitted."
- "What are likely to be the most significant issues in this case? In what order should I address them?"
- "Identify logistical and technological steps to prepare for the mediation session."
- "Summarize the main doctrines, principles, and terms of art in this area of law."

During the Session: Engagement and Strategy

- "The plaintiff presents argument X. How can I help him recognize weaknesses with his arguments?"
- "What are both parties' intangible interests in this case? How can I help them factor these interests into their strategies?"
- "All the defendants claim that the other defendants should be liable. How can I help them consider a fair allocation of liability?"
- "Suggest questions I might ask the lawyers to help them re-examine their negotiation strategy without undermining client relationships."
- "The defense counsel is acting unreasonably by doing X. How can I encourage more constructive behavior?"
- "What might be the emotional dynamics underlying the parties' behavior, and how might I respond?"
- "The parties are posturing and repeating entrenched positions. How can I move the process forward?"
- "Based on the exchange of offers, what would be a good bracket or mediator's proposal?"

After the Session: Closure and Reflection

- "Draft a memo summarizing the main points that the parties agreed to."
- "Summarize the key turning points in this case that influenced the parties' movement."
- "What did I do in this case that was effective? What might I have done differently to improve the process or outcome?"

Chaining, Coaching, And Collaboration

In advanced prompting, you can "chain" prompts in a case by using earlier outputs to extend or refine material from prior chats. For an illustration, see the box at left, "Prompting Through the Life of a Case."

You can also use AI tools collaboratively. For example, a lawyer and client might use an AI tool together during a break in a mediation session. A mediator might use AI in private meetings with parties or lawyers to clarify issues, check assumptions, or generate options in real time.

Practitioners may encourage others to use AI tools for organizing their thoughts, exploring options, and identifying overlooked concerns. For example, lawyers may encourage clients to use AI tools to prepare for negotiation or mediation, or to evaluate their choices. Mediators and arbitrators may suggest that counsel and parties use AI to prepare for mediation or arbitration sessions.

Using Your Judgment When Reviewing AI Outputs

Review AI outputs through the lens of your professional judgment. Approach AI with

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Theory Meets Practice

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a healthy mix of openness and skepticism. Treat it as a tool, not as an oracle. You can use it to stimulate ideas, test options, and organize thinking–but you must make the final call.

AI tools cannot assess ethical dilemmas, gauge fairness, or account for human dynamics unless explicitly directed to do so. Even then, they may overlook important nuances in tone, context, or relationships. They may also generate incorrect or fictional information especially when summarizing cases or citing legal authority.

You must decide what to question, trust, and verify. Avoid relying on AI tools for critical decision making. Always verify outputs, safeguard confidentiality, provide appropriate transparency with parties, and follow applicable rules. Exercise particular caution when using AI-generated content in client communications, legal filings, or formal settings.

* * *

AI tools can help you work more effectively, efficiently, and creatively. They should enhance–not replace–your professional judgment and insight.

They are fast, flexible, and capable of producing great value when used wisely. That requires choosing the right tool, writing clear prompts, using thoughtful follow-up, and exercising sound judgment.

Ultimately, the best way to learn how to use AI effectively is to practice using it. For example, you can start by crafting a prompt for your next client memo. AI won't do your work for you–but it can help you do it better, and often much faster.

Back to School on Dispute Management

The Evolution of Negotiation: From Combative to Collaborative

BY KATE VITASEK

After last month's column, "Contractual Clauses: A Critical Role in Avoiding Disputes"(43 *Alternatives* 150 (October 2025) (available on *Westlaw*)), this month I want to pause and focus the dispute prevention work by sharing a perspective on how we negotiate contracts.

I am guessing that, if you are like me, you have several negotiation books on your bookshelf. My bookshelf has at least a dozen negotiation books, including "Start with No;" "Getting to Yes," and (my own co-author) "Getting to We." It seems the older the books, the more they tend to focus on the deal ("Trump: The Art of the Deal") and the gamesmanship in how we negotiate ("The Negotiation Game: How to Get What You Want").

Columnist Kate Vitasek is the author of this monthly *Alternatives* column, Back to School on Dispute Management. She is a Distinguished Fellow in the Global Supply Chain Institute at the Haslam College of Business at the University of Tennessee in Knoxville, Tenn. Her university webpage can be found at https://haslam.utk.edu/people/profile/kate-vitasek/. She is co-author of Preventing the Dispute Before It Happens: Proven Mechanisms for Fostering Better Business Relationships, published December 2024, by the American Bar Association (available at https://bit.ly/42cThcS).

This got me thinking about how negotiation strategies have evolved throughout the years which led me to classify the evolution into five distinct phases.

Machiavellian Influence

Early negotiation concepts were anchored by an influential figure: Niccolò Machiavelli. The Italian philosopher and writer penned "The Prince" around 1512—a widely popular book that has become "one of the most important texts relevant and apocryphal to the nature of negotiation practice to the present day," according to Robert Benjamin, a longtime practicing mediator. See Robert Benjamin, "The Natural History of Negotiation and Mediation: The Evolution of Negotiative Behaviors, Rituals, and Approaches," *Mediate.com* (Oct. 15, 2024) (available at https://bit.ly/46Jr5in).

As Benjamin wrote, Machiavelli's "writing offered a foundation for the discussion of leadership, decision-making, and the exercise of power in every century thereafter." Case in point? The phrase "the ends justify the means," a concept attributed to Machiavelli.

Benjamin illustrates just how profound Machiavelli's influence was by sharing an example from Shakespeare's play, The Merchant of Venice, which centers on a loan deal gone awry between a wealthy Venetian merchant and the Jewish moneylender Shylock. In the play, Shylock seeks to collect "his pound of flesh" under the terms of the agreement. Benjamin points to the reference to signify "the fierceness of negotiations during this period."

Machiavelli's influence on negotiations has endured for centuries.

While today's business negotiators no longer need to resort to collecting pounds of flesh, I agree with Benjamin that the power-based negotiations mindset still influences how many businesspeople negotiate.

Let's fast-forward to the mid-to-late 20th century and see how negotiation experts began to codify power-based negotiation tactics in popular books.

Modern Competitive Classics

The 1970s-1990s can be best described as the era of competitive classics in negotiation books, with power, leverage, and brinkmanship as core themes. This period laid the foundation for negotiation as a business skill.

One of the most notable negotiation experts of this era was Chester L. Karrass, creator of the famous "Effective Negotiating" seminars, who focused heavily on positional tactics, concessions and hard bargaining. Karrass's book, "The Negotiation Game: How to Get What You Want" (1970), focuses on teaching negotiation tactics to help companies win more. This was followed in 1987 by "Trump: The Art of the Deal," which emphasized leverage, toughness, and projecting strength as negotiation tools. Donald J. Trump & Tony Schwartz, "Trump: The Art of the Deal" (1st ed. Random House (1987)).

These three decades codified power-based tactics such anchoring with extreme opening high/low positions, making slow concessions, concealing information, and aiming to win more than your counterpart, which were taught as the gold standard tactics.

The result? The *classic competitive approach* is still seen in procurement, sales, and legal negotiations today and often remains the instinctive style in adversarial, one-off, or high-stakes contexts. For example, Roger Dawson popularized tactical, competitive negotiation through "Secrets of Power Negotiating" and training programs in 1990 (First ed., Career Press, 1990), while Jim Camp advocated for a "Start with No" philosophy—emphasizing control, discipline, and leverage in 2002. Jim Camp, "Start with No: The Negotiating Tools That the Pros Don't Want You to Know" (1st ed., Crown Business 2002). Indeed, even Machiavelli himself was cited in a translation of "The Prince" in a 2003 Penguin Classic book.

An iconic example of the power-based approach in action is the 1979-1980 Chrysler bailout. Chrysler was near bankruptcy when CEO Lee Iacocca negotiated with the U.S. government for a $1.5 billion loan guarantee. Iacocca used brinkmanship—threatening collapse—and demanded extraordinary concessions from unions, banks and suppliers. Chrysler got its bailout, unions made deep concessions, and the company recovered. "Examining Chrysler's 1979 Rescue." *All Things Considered* (*NPR*) (Nov. 12, 2008) (available at https://bit.ly/46OiY4b).

From Competitive to Interest-Based Negotiations

With Chrysler's success, why would anyone want to change their approach?

But a subtle shift began to happen after Roger Fisher founded the Harvard Negotiation Project in 1979 with the goal to develop practical theories and tools to help parties resolve disputes constructively. This period laid the foundation where negotiation was started to be seen as a science and not just a skill.

As part of his research, Fisher teamed with William Ury to pen "Getting to Yes: Negotiating Agreement Without Giving In" (Penguin Books, 1981). The book became the cornerstone of the "principled negotiation" approach, which teaches four key concepts: separate people from the problem, focus on interests rather than positions, generate creative solutions/options, and use objective criteria.

Following the book's publication in 1981, the concept of principled negotiation gained traction. It led to the development of the Harvard Mediation Program (for legal disputes) in 1981 and the Program on Negotiation (PON) at Harvard Law School, which was founded in 1983 to include faculty from Harvard, MIT, and Tufts.

Getting to Yes remains one of the best-selling business/management books of all time.

As Fisher and Ury's ideas gained traction, the concept of "interest-based" negotiation emerged, emphasizing the move beyond positions to uncover interests. Many of these approaches drew heavily from *Getting to Yes* but generalized it beyond the original four principles espoused by Fisher and Ury. The concept was well received as a leading practice in labor–management negotiations.

Today, the term "Interest-Based Negotiation" is typically thought of as a general philosophy that encompasses a broad category of approaches that prioritize underlying interests, whereas the term "Principled Negotiation" refers to the specific model developed at Harvard.

One of the most well-known examples of principles-based negotiations is the Camp David Accords, which took place in 1978 and 1979. U.S. President Jimmy Carter mediated between Egypt (Anwar Sadat) and Israel (Menachem Begin) to end decades of conflict. Carter applied Fisher & Ury's principles: focus on interests (peace, security, recognition) rather than rigid positions (territory lines). He also reframed the talks around shared goals, separating personal animosity from substantive issues. "Camp David Accords and the Arab-Israeli Peace Process." Milestones in the History of U.S. Foreign Relations, Office of the Historian, U.S. State Department (available at https://bit.ly/46H6POp).

The result? Egypt recognized Israel; Israel withdrew from the Sinai Peninsula. The peace treaty largely held for decades, unprecedented in the region.

From Interest-Based to Collaborative/Trust-Based Approaches

The 2000s brought significant trends such as globalization, cross-cultural deals, and joint ventures, which demanded cooperation and the use of more trust-based approaches, and with it, continued changes in negotiation tactics.

Roger Fisher and many other thought leaders in the art, science and practice of negotiating and complex deal-making began to expand on interest-based negotiations to improve on the concept. For example, Fisher teamed with Daniel Shapiro and penned the book "Beyond Reason: Using Emotions as You Negotiate" (Viking 2005), which added emotional intelligence to the interest-based framework.

Other books include "3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals" (David Lax & James Sebenius (2006); "Negotiation Analysis: The Science and Art of Collaborative Decision Making" (Howard Raiffa (2007); and "Getting to

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Prevention Talk

The basics: Dispute management relies on negotiation. That doesn't simply happen on its own.

The practices: Understanding the bases of negotiation techniques will make you more effective.

Communication results: This isn't only about resolving disputes. You know that early open dialogue—before committing to contract—is a step to avoiding informal and formal conflict. This column will help you establish that practice.

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We: Negotiating Agreements for Highly Collaborative Business Relationships" (Jeanette Nyden, Kate Vitasek and David Frydlinger (2013).

A core theme emerged: build trust and relationships, expand the pie, and optimize for long-term value.

One of the best-known examples of a collaborative approach to optimizing value creation, as opposed to negotiating based on principles, comes from the Boeing-Southwest Airlines 737 deal of the early 2000s.

Southwest Airlines sought fuel-efficient planes to reduce costs, while Boeing required long-term buyers for its new 737 fleet. Boeing wanted guaranteed orders; Southwest needed efficiency and price stability. Both sides shared interests transparently and structured a long-term relationship deal that created value for both parties. "Boeing Lands Big Order from Southwest Air." *Chicago Tribune* (June 30) (available at https://bit.ly/46JfGyW).

The result? Southwest locked in one of the industry's lowest cost structures and Boeing secured a loyal anchor customer, boosting the 737 program's success. The lesson? Collaborative negotiation creates sustainable, long-term wins where trust and relationships matter as much as price.

Emerging Approach: Adaptive/Systemic Negotiation

Given the success of collaborative approaches, why would anyone want to change their approach?

This is a question that spawned my own research at the University of Tennessee. Why were successful deals such as the Camp David Accords getting to yes, only to fall apart years later? Or why were the tables now turned on Chrysler (not part of Stellantis) as the United Autoworkers Union demanded to get even with unprecedented concessions from the last union negotiation? Or was Southwest Airlines misguided for putting all its eggs in one basket with Boeing, rather than diversifying its fleet?

What has evolved is the start of a subtle movement that recognizes that negotiations now occur in complex ecosystems (supply chains, global networks, stakeholder communities) where sustainability, ethics, and resilience matter as much as price or relationships.

Core themes include:

- Emphasizing adaptive resilience, building agreements that can flex and endure in volatile environments (pandemics, climate shocks, and geopolitical risk).
- Thinking of negotiation as system design: balancing economic, social, and environmental interests.
- Using integrated teams to co-create the most optimal solution which includes engaging multiple stakeholders such as regulators, communities, and NGOs.

Work by scholars like Erica Ariel Fox (Winning from Within), Erik van de Loo (systemic leadership) and my own work on the Vested business model (see www.vestedway.com/what-is-vested) are pushing a paradigm shift from one of "negotiating" to one of "architecting" agreements that reshape negotiation into a discipline of "value stewardship"—not just creating and dividing value, but safeguarding ecosystems for long-term resilience. Erica Ariel Fox, Winning from Within: A Breakthrough Method for Leading, Living, and Lasting Change (HarperBusiness 2013).

My research, for example, launched a concept known as Vested Outsourcing (or later Vested for short), which has been adopted by more than 150 organizations, including Dell, Intel, BP, JLL, and the Canadian government. The goal is to "architect" a flexible contract framework using Five Rules and 10 contractual elements.

In 2019, I teamed with David Frydlinger (a Swedish Attorney) and Harvard's Oliver Hart (an economist and a Nobel Laureate in economics) to write "A New Approach to Contracts," *Harvard Business Review* (September-October 2019) (available at https://bit.ly/4mEWnwL). In the article we put forward the notion of using a formal relational contract that specifies mutual goals and establishes governance structures to keep the parties' expectations and interests aligned over the long term.

David Frydlinger and I expanded on the article in the book "Contracting in the New Economy: Using Relational Contracts to Boost Trust and Collaboration in Strategic Business Relationships" (Palgrave Macmillan, 2021).

We define a formal relational contract as

> A legally enforceable written contract establishing a commercial partnership within a flexible contractual framework based on social norms and jointly defined objectives, prioritizing a relationship with continuous alignment of interests before the commercial transactions.

Formal relational contracts are designed from the outset to foster trust and collaboration. They are especially useful for highly complex relationships in which it is impossible to predict every what-if scenario. Today I have captured 25 case studies showcasing how organizations are making the shift from "negotiating" to collaboratively architecting Vested agreements.

The article highlights how the Vancouver Island Health Authority (see www.islandhealth.ca) and South Island Hospitalists (see https://si-hi.ca; a group of physicians specializing in the care of patients with the most complex medical issues at the authority's two largest hospitals) made the shift to a formal relational contract.

The contract includes shared goals and objectives, guiding principles, and robust relationship-management processes, which spell out how the parties will work through issues as they

1970s **Today**

Style	Positional / Competitive Bargaining ("Win–Lose")	Interest-Based / Principled Negotiation ("Win–Win")	Collaborative / Trust-Based Negotiation ("Value Creation")	Adaptive / Systemic Negotiation (Relationship-Oriented-Flexible Framework)
Quick Framework for Choosing a Style	Good for transactional, one-off negotiations where relationship does not matter.	Good for continuing relationships where fairness matters and which are well-suited for dispute resolution.	Good for long-term, multi-issue, and trust-based relationships where trust and value matter.	Good for complex and long-term relationships that require adaptability. Well-suited for preventing disputes.
In What Circumstance Is Each Style Most Appropriate?	• *One-shot transactions* where the relationship is not important (e.g., buying/selling a car, procurement bidding). • *High-stakes, zero-sum deals* where value cannot easily be expanded (e.g., price-only negotiations, financial settlements). • *When you hold strong leverage* and the other side has limited options.	• *Disputes or conflicts* where both sides need a fair, lasting resolution (e.g., labor disputes, peace accords, community issues). • *Situations with repeat interactions* where fairness and sustainability matter (e.g., supplier contracts, workplace negotiations).	• *Longer-term relationships* where trust and continuing collaboration are critical. • *Multi-issue negotiations* where trade-offs can expand the pie (e.g., price + delivery + service + innovation). • *Global or cross-cultural deals* where reputation, adaptability, and relationship equity drive success.	• *Complex and long-term relationships* that require adaptability (e.g., strategic alliances, joint ventures, sole source customer-supplier partnerships). • *Dependency* is high and the cost of switching is high. • *Preventing disputes* is important.
Why?	Competitive tactics maximize short-term gain but risk damaging trust, making them best in transactional or adversarial contexts.	Interest-based negotiation uncovers hidden value and preserves relationships by focusing on fairness and mutual benefit.	Collaborative approaches promote transparency and deepen trust which maximize joint gains.	Co-developed flexible contract frameworks promote system-wide "rules" which build sustainable agreements that endure over time. Can be combined with outcome-based "value" approaches which drive innovation.

arise. The guiding principles contractually commit the parties to adhere to proven social norms (e.g., treating each other with honesty and in an equitable manner), which ensure that the parties will refrain from short-term opportunism.

The contract is not something the parties simply put in a drawer and pull out when something goes wrong; rather, they view it as a playbook for working through issues fairly and flexibly.

Does it really work? We profiled their success in the *HBR* article mentioned above. But the true test came after the Covid-19 pandemic hit and we revisited how the relationship held up. In a follow-up *HBR* article (David Frydlinger, Oliver Hart, & Kate Vitasek, "An Innovative Way to Prevent Adversarial Supplier Relationships," *Harvard Business Review* (Oct. 8, 2020) (available at https://bit.ly/48AKK6z)), we interviewed both Island Health administrators and the hospitalists to see how they had fared during the pandemic.

Specifically, were they living into the intentions and guiding principles they put in place as part of their formal relational contract? Did the mechanisms established in their contract help them work through the issues raised by the pandemic in a fair and flexible manner?

They told us that when the pandemic hit their region in March 2020, the Island Health system was suddenly faced with a significant change in its patient mix. The total patient count dropped 60% as the health system postponed elective or non-urgent procedures to mitigate the spread of Covid-19. Even though the physicians needed to manage fewer cases, those patients were higher risk, on average, than those they handled in normal times.

The impact on the budget and workload was drastic. The existing scheduling formulas did not work in the new environment; questions such as who would get to work which hours and who would have to work in the new high-risk Covid-19 ward were front and center.

Rather than turn to classical us-versus-them negotiations, they used their shared vision and guiding principles to address the challenges: the sudden drop in the hospitalist hours that the health system required and keeping hospitalists safe and employed so they would be able to respond to future needs. In accordance with a guiding principle concerning autonomy, the hospitalists took responsibility for tackling this scheduling challenge.

Their solution: Every hospitalist would reduce their hours, but no hospitalist would lose their job. Part of the process included banking hours, which could be used, for example, if a fall Covid-19 surge occurred. In addition, the parties expedited the implementation of a new program they had been planning before the pandemic, which entailed hospitalists seeing patients in their homes. Such innovations and flexibility would never have been possible under their previous conventional contract, the parties said.

Glenn Gallins, the attorney representing South Island Hospitalists and a law professor

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Dispute Management

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at the University of Victoria, offers the following advice when it comes to embracing formal relational contracts: "The focus on negotiating the foundation of the relationship first is brilliant. But the real power is it threads all the way down to core decisions on how the parties would work."

One interesting aspect of my research is that we actively measure relationship health in relationships such as those between Island Health and the Hospitalists. The results are stunning. Prior to making the shift to Vested and applying formal relational contracting, the parties described their relationship as "adversarial," "transactional," "opaque," and even "toxic." Just 18 months after going through the Vested methodology and collaboratively restructuring their contract, they described the relationship as "collaborative," "trusting," and even "innovative."

But what is even more impressive is that the parties kept a collaborative spirit during the height of the Covid-19 pandemic. On page 178 is a word cloud of the adjectives team members use to describe the relationship prior to 2016 and after Vested (2018), and how they sustained relationship health well into the pandemic (2021).

The Bottom Line

In a business world where strategic, long-term relationships are critical to competitive advantage, leaders have no choice but to overturn the status quo.

While it may be tempting to use short-term, power-based approaches, I challenge you to pause and rethink what you are getting to. If you are engaging in a one-shot deal (e.g., visiting the flea market or negotiating for a used car), short-term approaches where you aim to get the best deal might be appropriate.

Alternatively, if you are simply trying to get to yes and get a transactional contract signed, interest-based negotiations are likely a great approach. But for those involved in longer-term relationships where the relationship is essential, consider adopting more collaborative approaches or making the shift to using formal relational contracting, which creates a flexible contract framework.

To help you make the decision, I have compiled a simple table, on page 179, that highlights each approach and when each approach might be a good fit.

Worldly Perspectives

How Cyprus Will Transition from Adversarial Instinct to Cooperative ADR

BY GIUSEPPE DE PALO & MARY B. TREVOR

Mediation has deep cultural and historical roots in Cyprus.

Long before formal legal structures were established, Cypriot communities practiced mediation-like forms of conflict resolution. Disputes were typically addressed within extended family units and religious councils, or by community elders, which facilitated dialogue and compromise.

During their colonial rule (1878–1960), the British introduced common law and formalized court systems. But they also relied on local authorities such as mukhtars—village heads—to continue their practices, albeit without formal legal recognition or enforceability.

The Republic of Cyprus, established in 1960, retained many features of British common law. Without legitimacy in the legal system, informal dispute resolution gradually lost ground. Courts came to be seen as the default—and often the only—forum for conflict resolution, resulting in a culture of litigation and adversarial engagement.

General Legal Framework

Legal status came to mediation in 2012 when Cyprus transposed the European Union's Directive 2008/52/EC on mediation in civil and commercial matters by enacting Law 159(I)/2012, referred to here as the Mediation Law (available at https://bit.ly/483sUJn). The Mediation Law defines mediation and establishes the fundamental principles of confidentiality, neutrality, and party autonomy.

Legal compliance with the Directive was not, however, followed by cultural integration among members the public, the bar, or the judiciary. While several professional organisations—most notably the Cyprus Chamber of Commerce and Industry ("CCCI"), the Cyprus Scientific and Technical Chamber ("ETEK"), and the Cyprus Arbitration & Mediation Centre ("CAMC")—have developed their own registers of accredited mediators, the number of mediations has remained low.

Recent reforms, however, could create an opportune moment for a substantive "reboot" of mediation in Cyprus. On Sept. 1, 2023, the new Civil Procedural Rules (referred to here as the CPR) came into force. (Available at https://bit.ly/4pOHCKG.) The CPR now promote the use of alternative dispute resolution, as described below.

In addition, in early 2025, the Council of Ministers approved amendments to the Mediation Law that would introduce mandatory pre-litigation mediation for civil claims below €10,000 and otherwise address oversight of the

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, a large-scale study directed by De Palo for DTC, aims to provide policymakers with scientific, data-driven evidence to guide policy recommendations for achieving 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 Polina Nesterenko; see the accompanying Background and Acknowledgments box on page 182.

profession. As of this writing, the amendments await House of Representatives approval.

Civil and Commercial Mediation

The Mediation Law applies to both domestic and cross-border civil and commercial disputes. Article 2 defines mediation as a voluntary process in which a neutral third party assists disputing parties to reach a settlement and excludes disputes involving criminal matters, public administration, and family cases not specifically authorized by other legislation.

Mediation may be initiated by the parties' agreement before legal proceedings; during legal proceedings by mutual consent or judicial recommendation; or pursuant to a contractual clause requiring pre-litigation mediation.

Confidentiality and privilege: Article 18 prohibits the parties, the mediator, or any third-party participant from disclosing any information arising during mediation. Confidentiality extends to all oral statements, written submissions, and records produced for the purposes of the mediation.

The law also allows disclosure when required by overriding public policy considerations; to implement or enforce a mediated agreement; and to protect the best interests of children, prevent harm to the physical or psychological integrity of a person, and prevent criminal acts.

While consistent with international standards, as recognized by a majority of *Rebooting* study respondents, the lack of case law interpreting these provisions has led to uncertainty in their application. (See the authors' credit line and Background and Acknowledgments box opposite for details on the *Rebooting Mediation Project*.) Cypriot legal professionals often err on the side of caution, discouraging parties from relying too heavily on confidentiality when parallel proceedings (e.g., civil suits or regulatory reviews) are anticipated.

Enforceability: Article 32 permits the parties to submit a mediated settlement agreement to the District Court, either jointly or unilaterally, for partial or full ratification that will make it enforceable as a court judgment. The express consent of all parties must be clearly demonstrated. Judicial discretion, as well as the lack of standardized forms or submission protocols, can result in inconsistent judicial handling.

The court may refuse enforcement if it finds the content to be contrary to law or if the subject matter falls outside the legal scope of mediation. A refusal to enforce is subject to appeal.

In practice, only a minority of mediated settlements are submitted for judicial approval. Several factors contribute to this low rate: lack of awareness among users, reluctance to incur court-related costs, and the uncertainty of the process. *Rebooting* study respondents underscored this uncertainty, providing inconsistent responses when asked about means of enforcement.

Seeking Uptake

This month's Worldly Perspectives jurisdiction: Cyprus.

The state of practice: Infrastructure is in place, but. …

The state of the prospects: That infrastructure is questioned by the market, which apparently is short on data, monitoring, and reporting.

Stakeholders have long argued that Article 32's express consent requirement allows for obstruction and weakens user confidence in the finality of the process. This deficiency has long been recognized, both at the EU level and internationally, as a key impediment to the broader success of mediation in Cyprus.

Statute of limitations: Under the Limitation Law (Law 66(I)/2012), Section 13(d), proper initiation of civil claim mediation suspends the limitation period for the mediation's duration. (Available at https://bit.ly/4nA4snU.) An agreement between the parties will not suspend limitation periods. Under the Mediation Law, Article 27(2), if mediation fails, the limitation period resumes running from the date the mediation ends.

In practice, the Section 13 safeguard is often underused due to poor documentation. Mediators frequently fail to issue formal notices confirming the start and end of mediation, and no central register exists to verify the suspension period. As a result, courts may require additional proof of its proper suspension.

Duration and statutory fees: Cypriot legislation does not address the duration and scheduling of mediation, which are instead determined by the conflict's nature and complexity, the discretion of the parties, and the mediator involved. *Rebooting* study responses about mediation duration varied, with a total of 80% falling somewhere within the 30–90-day range.

Nor does Cyprus regulate fees for mediation services. Certain pilot projects and court-related schemes provide access to mediation without cost, but such initiatives remain relatively undeveloped and not universally accessible.

The Demand Side

Recourse by statutory measures: The 2023 CPR now promote the use of ADR mechanisms such as mediation. There is, however, a lack of documented cases or official reports demonstrating regular enforcement of the CPR provisions.

Under the CPR, courts are responsible for managing cases efficiently, including promoting party use of ADR (CPR 1.5(2)(e)). The parties also have obligations. Before initiating legal proceedings, the claimant must formally notify the opposing party.

Where relevant, this notification must indicate the claimant's willingness to explore mediation or another ADR route (CPR Part II, Form III, section 2(f)). The recipient must respond by stating its openness to resolution through mediation or similar methods.

Courts may sanction a party's failure to comply with pre-action protocols at any stage, typically by awarding costs. (CPR 3.9(2)(d) and 3.10(1)). Just over 85% of *Rebooting* study respondents reported a complete lack of economic incentives for mediation, however, suggesting a possible lack of recognition of sanction avoidance as an incentive.

A notable case exemplifying the consequences of underutilizing ADR is *C. Roushas Trading and Developments Ltd v Michali Mosaikou*, (2016) 1 JSC 2178 (available at https://bit.ly/4mDlShX). The dispute concerned a relatively small financial claim ultimately appealed to the Supreme Court. The legal costs incurred during the appeal process substantially exceeded the original disputed amount. In its judgment, the Supreme Court underscored the shared responsibility of both parties and their legal representatives to

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diligently pursue an amicable settlement or to consider referral to ADR mechanisms.

Recourse by judicial referral: Mediation Law Article 15(1) permits a judge to recommend mediation at any stage of the proceedings or consider a mediation request by one or more parties. The court may then, considering all circumstances, adjourn the proceedings so mediation can proceed. If any party does not agree to mediation, court proceedings will continue.

Article 15 imposes no obligation, and in practice, judicial referral remains discretionary and inconsistent.

The court's adjournment order must include the mediation's duration, which may not exceed three months unless the court later grants an extension request itself not to exceed three months. When the mediation ends, the parties must inform the court of the procedure followed and the outcome. The court may, on its own initiative or at the request of any party, terminate the mediation before the specified time expires. This decision is not subject to appeal.

No publicly available statistical data tracks the frequency of judicial referrals to mediation. This evidentiary gap highlights the absence of judicial transparency and the need for a formal reporting framework to assess the practical impact of recent mediation reforms.

Recourse by contract clause: Contractual mediation clauses are increasingly included in commercial agreements, particularly in sectors such as construction, insurance, and professional services. Such clauses typically follow a sequence of negotiation to mediation to arbitration or litigation.

Mediation clause enforcement, however, remains limited and inconsistent. Current legislation does not address the procedural consequences of breaching a mediation clause by initiating litigation. Furthermore, prevailing judicial interpretation is that mediation cannot be mandated absent specific statutory provision (although some courts may consider non-compliance with mediation clauses when addressing cost allocation). This interpretation limits the effectiveness of mediation clauses in practice and discourages parties from relying on them.

In contrast, arbitration clauses—particularly in construction contracts—are widely accepted and routinely enforced by Cypriot courts pursuant to statutory provisions empowering them to do so. There have been calls for legislative reform aimed at similarly requiring courts to give effect to clearly worded ADR clauses.

Recourse by voluntary agreement: Voluntary mediation based on party agreement is a common practice, especially in areas such as real estate transactions, family businesses, and commercial partnerships, where maintaining cooperation is crucial. Nevertheless, despite the existence of such agreements, actual mediation use remains inconsistent in practice.

Mediation Law Article 13(2) expressly imposes a duty on advocates to inform their clients of the possibility of mediation for resolving disputes eligible under the law. But just over 85% of *Rebooting* study respondents indicated that there is "no duty to inform," showing, at least, a lack of awareness.

Mediation's Supply Side

Under Mediation Law Article 5, individuals wishing to practice as mediators in Cyprus must undergo accredited training and be registered with the Ministry of Justice and Public Order. The law stipulates a minimum of 40 hours of training, covering core competencies such as negotiation, communication, ethics, legal framework, and mediation techniques. Beyond this basic threshold, there is currently no national accreditation authority or unified curriculum across training providers.

Accreditation responsibilities devolve to several professional bodies. The CAMC, ETEK, and CCCI each maintain their own registers of mediators. While ETEK and CCCI provide training programs, CAMC's trainings are conducted under the auspices of the Cyprus Bar Association. These programs vary in scope, methodology, and assessment standards. Absent central oversight, qualifications are not always comparable.

The Mediation Law does not establish a national ethics code, formal disciplinary body, or unified complaints mechanism. Each authorized training body or accrediting institution may adopt its own ethical guidelines, but institutional enforcement is fragmented and inconsistent. Currently, there is neither a national disciplinary board nor a publicly accessible register of complaints, sanctions, or disqualifications imposed on mediators.

Mediation Law Article 10(7) does provide that mediators be guided by the European Code of Conduct for Mediators**.** And over 85% of *Rebooting* study respondents indicated that mediator standards are "acceptable" or "strong." But without a central supervisory authority, the practical implementation and enforcement of these standards remain weak.

This lack of systematic regulation has given rise to concerns within the professional and judicial community. A 2023 survey by the University of Nicosia School of Law revealed that 63% of respondents—including lawyers, judges, and mediation users—expressed dissatisfaction with the absence of visible quality assurance, especially in relation to post-training evaluation and oversight mechanisms.

Overall, parties have limited recourse for mediator misconduct. Several stakeholders have

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's 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 Cyprus column relies on data from the project.

This month's column was prepared in collaboration with Polina Nesterenko, who is a lawyer, mediator, and trainer based in Cyprus. She holds a Ph.D. in Law and an LL.M. in Mediation, and she is a certified AML Compliance Officer with the Cyprus Bar Association. She is also accredited as a mediator in commercial disputes by the Cyprus Chamber of Commerce and Industry.

Nesterenko is a member of the Organizing Committee of the International Academy of Dispute Resolution. An experienced teacher and trainer, she serves as a visiting lecturer at KROK University (Kyiv) and as a trainer with Center8 (Cyprus), where she delivers programs on mediation, negotiation, and compliance.

proposed adoption of a unified, binding Code of Conduct, aligned with the European codes for mediators and for mediation providers.

Mediation Market Statistics

Size of the market: Reliable and comprehensive data on the civil and commercial mediation market remain limited. To date, no centralized national registry exists to systematically record the number of mediations conducted annually, nor are official statistics routinely published by public authorities such as the Ministry of Justice or the Cyprus Bar Association.

More than 80% of *Rebooting* study respondents estimated that fewer than 1,000 mediations take place annually in Cyprus, which would constitute a minimal fraction of contested civil and commercial claims handled annually by the courts. Furthermore, when asked if they agreed that Cyprus exhibits a "balanced relationship between mediation and judicial proceedings," more than 90% of respondents disagreed (20%) or strongly disagreed (72%).

The absence of transparent data further complicates matters. Unlike in litigation, where court records provide metrics and case outcomes, mediation remains opaque. While confidentiality is important, anonymized, aggregated data (e.g., number of cases, settlement rates) would help inform users and enhance institutional legitimacy.

Mode of mediation: Although the Mediation Law does not expressly regulate online mediation, Article 18(3) provides for its use so long as all procedural safeguards and confidentiality obligations are maintained.

Although the use of remote platforms increased significantly during the pandemic period, this shift has not been sustained. A preference for face-to-face processes currently appears to dominate, with more than 95% of *Rebooting* respondents stating that online mediation is "used but only minimally."

Settlement rates: There are currently no publicly available statistical data on settlement rates in mediation. Neither the Ministry of Justice nor professional bodies publish comprehensive figures tracking mediated disputes or outcomes.

Costs: With no statutory regulation of mediation fees in Cyprus, the cost of mediation remains variable, influenced by the nature of the dispute, the amount in controversy, the mediation center engaged, and the experience of the mediator. Overall, *Rebooting* study respondent estimates suggested a moderate average cost, with a clear concentration around the €500–€1,500 range. Institutional costs vary, with rates published by each institution.

Market practice does tend toward affordable rates—especially in comparison to litigation costs. But pricing models between public and private mediation mechanisms diverge, indicating a need for further harmonization and transparency.

Number of mediators: Under the Mediation Law, Cyprus maintains an official registry of accredited mediators. But reliable data on mediator engagement remains elusive. According to the Ministry of Justice and Public Order, 211 mediators are currently registered for civil disputes and 482 for commercial disputes, yielding a total of 693. Accreditation alone, however, does not reflect actual participation in the mediation market, with informal reports suggesting that fewer than one-quarter of registered mediators regularly deliver mediation services. This disparity likely stems from a combination of underdeveloped demand, limited court referrals, and inconsistent use of mediation clauses in commercial agreements.

Recently, the number of training providers offering mediation certification has increased, potentially contributing to a mediator oversupply. *Rebooting* study respondents echoed this concern, with a majority (72%) observing that the supply appears to exceed current demand. Without systematic data collection and monitoring, however, the true extent of market saturation remains difficult to quantify.

Key Development Challenges

One of the most pressing and persistent structural deficiencies in the Cypriot mediation landscape is the near-total absence of systematic data collection, monitoring, and publication, resulting in a lack of reliable mechanisms to track the frequency, nature, duration, or outcomes of mediation proceedings across the country.

Currently, none of the principal institutional stakeholders is legally mandated to submit performance reports or disclose mediation activity metrics to public authorities. Moreover, mediators registered under the Mediation Law are not subject to any formal obligation to report even basic operational information such as number of cases handled, settlement rates, sectoral distribution, or participant feedback. This absence of statutory reporting requirements severely limits both the transparency and credibility of the mediation sector.

The lack of data also impairs the ability of the judiciary, policymakers, and researchers to conduct meaningful evaluations of the effectiveness, efficiency, or accessibility of mediation services. This absence undermines public and professional confidence in the system's relevance and reliability.

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Clarification & Correction

In last month's *Worldly Perspectives* column, "Portugal's Mediation Infrastructure Looks to Build Demand and Use," 43 *Alternatives* 146 (October 2025) (available on *Westlaw*), co-authors Giuseppe De Palo and Mary Trevor, who collaborated with Cátia Marques Cebola and Ana Maria Maia Gonçalves, want to clarify that 2001 was considered as a turning point in the implementation of conflict mediation, marked by the establishment of the public system within the Justices of the Peace. Furthermore, they note that at this moment, the only mediation center known to be in development is at the Faculty of Law of the Porto School of the Portuguese Catholic University, in partnership with the Instituto de Certificação e Formação de Mediadores Lusófonos, a nonprofit that serves as a Portuguese provider for International Mediation Institute certification. They also note that registration on the Portugal Ministry of Justice's list of private mediators is not mandatory. As a result, the exact number of mediators practicing in the country is unknown; the ICFML trains at least 40 new mediators each year. Finally, while some of the Rebooting Mediation Project study respondents suggested that mandatory mediation or mandatory information sessions should be introduced in Portugal, the authors do not agree. Instead, the authors believe that mediation should remain voluntary, and that other incentives should be created instead.

In addition, the October page 147 Background and Acknowledgments sidebar incorrectly referred to Ireland instead of Portugal. *Alternatives* apologize for the error.

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Mediation in Cyprus has evolved from a peripheral cultural practice to a legislatively recognized mechanism but remains underused and institutionally fragmented. Judicial referrals are rare, lawyer resistance persists, and public awareness is extremely low.

The mediation sector itself suffers from inconsistent training standards as well as limited and decentralized oversight and data collection.

To address these challenges, a multipronged strategy is needed. Courts should regularly mandate early mediation information sessions, sanction parties unjustifiably refusing to mediate, and document mediation referrals to facilitate transparency and performance evaluation. The legal profession should mandate continuing legal education ADR training and introduce financial incentives to encourage lawyer participation in mediation.

Institutionally, the Ministry of Justice should establish a National Mediation Authority, coordinated with professional associations, to manage mediator oversight. Infrastructure development is also critical: a searchable national online mediation portal must be created, alongside regionally available mediation centers. Legal and technical standards should be adopted for online mediation.

Public awareness campaigns and pilot programs in schools should help normalize mediation from an early stage. Mediation should be made financially accessible through, e.g., legal aid, subsidies, or voucher systems.

Above all, Cyprus must recognize that transitioning from institutionalized adversarial instincts to cooperative dispute resolution requires long-term political will, sustained investment, and a fundamental shift in how conflict is understood and addressed within society.

ADR Techniques

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genuine accountability, it becomes a liability, not an asset.

Commercial Disputes' Higher Stakes

In personal relationships, a lack of genuine apology can strain ties or cause lingering bitterness.

In corporate settings, the costs are far more tangible: litigation, arbitration, lost contracts, damaged reputations, and plummeting employee morale.

Business professionals, particularly in high-stakes negotiations or disputes, often fear that offering an apology will be perceived as an admission of liability or weakness. This fear leads to non-apologies: "I'm sorry you felt that way"; "I regret the inconvenience"; or the worst offender: "I'm sorry, but…" —which effectively negates the apology altogether.

Yet the cost of *not* apologizing can be even more severe. When people feel wronged—whether they're employees passed over for promotion, clients who received a defective product, or partners who believe you violated a contract—they often want acknowledgment of harm before they're willing to discuss resolutions.

That acknowledgment often takes the form of an apology. Without it, parties may dig in their heels, entrench in their positions, and escalate the dispute into full-blown litigation.

Why Apologies Fail

1. *They Come Across as Disingenuous.* In corporate settings, people are acutely aware of branding, politics, and liability. When an apology is forced—by management, public relations teams, or legal counsel—it's easy to sense. The result: lost trust and resentment.
2. *They Lack Accountability.* A common mistake is to apologize for the other person's feelings, rather than for one's own actions. An example: "I'm sorry you're upset" places the onus on the other party instead of owning up to the mistake. It doesn't address the root issue.
3. *They're Merely Transactional.* In business, time is money, and disputes can be disruptive. A quick "sorry" might temporarily halt tensions, but if the other side senses you're just checking a box, it can backfire. The conflict remains unresolved, and parties may eventually seek legal recourse.
4. *They Often Include the Word "But."* As soon as you say, "I'm sorry, but …" you've negated the apology by offering a justification or defense. That's not an admission of responsibility; it's an attempt to shift blame.
5. *They Don't Lead to Any Behavior Change or Remedy.* A genuine apology acknowledges harm and offers a path toward repair, whether by changing policies, offering compensation, or adjusting one's approach. Half-hearted apologies often omit that critical step.

A Practical Blueprint

So how do you craft an apology that effectively addresses the harm and reduces the risk of litigation or arbitration? Consider the following blueprint:

1. *Acknowledge the Harm Clearly and Specifically.*
   - What happened? Name it directly. Instead of "I'm sorry for what happened," say, "I'm sorry we overlooked the contract clause that caused you financial loss."
   - This specificity demonstrates that you understand the details and seriousness of the issue.
2. *Take Accountability for Your Role—No More, No Less.*
   - Apologies fail when they attempt to gloss over responsibility or blame the other side. Own up to what your organization or you personally did wrong.
   - Stick to your sphere of control. Don't apologize for aspects outside your purview, but do acknowledge how they may have contributed.
3. *Express Genuine Remorse (and Avoid the "But").*
   - Drop phrases like "I'm sorry you felt upset." Instead, say "I'm sorry our actions caused you distress. That wasn't our intention, and we recognize the impact it had."

- This step requires vulnerability. In a high-stakes business context, it may feel uncomfortable, but it's essential to restoring trust.

4. *Offer a Tangible Path to Remedy or Prevent Future Harm.*
   - An apology without a solution is empty. Propose a concrete step: a product replacement, a policy change, a structured payment plan, or a new communication protocol.
   - Show how you're committed to preventing a repeat occurrence. This can significantly reduce the drive toward litigation because the other side sees you taking proactive measures.
5. *Allow the Other Party Space to Respond.*
   - A genuine apology is not about controlling the other party's reaction. They may remain angry or skeptical. Give them space to express their feelings, ask questions, or propose changes.
   - This open dialogue often prevents misunderstandings from festering into larger legal disputes.
6. *Document the Resolution.*
   - After making an apology and offering a solution, follow up with an email or meeting recap. This documentation can be invaluable if any misunderstandings arise later.
   - A friendly, written account also reassures the injured party that you're serious and transparent.

The Preventive Effects

Apologies are powerful precisely because they speak to core human needs for respect, validation, and fairness. In commercial disputes, these intangible factors can weigh just as heavily as contractual clauses. Here's how apologies often stop a conflict from escalating:

1. *They Defuse Emotional Escalation.* People decide to pursue legal action for a variety of reasons—often not purely monetary. Anger, betrayal, and frustration fuel lawsuits. A genuine apology addresses these emotions, making it less likely the other side will seek legal revenge.
2. *They Rebuild Trust and Preserve Relationships.* In many business contexts—joint ventures, supplier-buyer relationships, or partner contracts—parties must continue working together, or at least maintain professional ties. An apology can preserve the relationship, saving time, money, and hassle down the line.
3. *They Encourage Open Dialogue and Creative Problem-Solving.* When an apology sets the stage for honest communication, both sides may be more willing to explore mutually beneficial outcomes. This can lead to settlements, contract renegotiations, or alternative dispute resolution methods (like mediation) that sidestep formal litigation or arbitration.
4. *They Mitigate Reputation Damage.* Lawsuits can become public, tarnishing reputations. An apology offered at the right time can contain negative publicity, showing stakeholders and the public that the organization takes accountability. This is particularly true in the age of social media, where corporate missteps can rapidly go viral.
5. *They Show Good Faith in Negotiations.* Courts and arbitrators often look favorably upon parties who demonstrate willingness to resolve issues amicably. A well-timed apology can be seen as a strong sign of good faith, potentially influencing outcomes if the dispute moves forward.

Business Sorrow

The need: An apology may be essential for commercial dispute resolution.

The technique: It's hard to move to tactic from emotion. The effort is prone to backfire. Be careful. This article explains how to do it.

The methodology: Apology is about authenticity, which is hard to convey where the purpose is efficiency. The latter depends on the former.

Conflict Coaching's Contribution

Where does conflict coaching fit into all this? Corporate attorneys and general counsel often find themselves juggling legal strategy with client relations. They aim to protect the organization from liability, but also maintain crucial partnerships, client satisfaction, and employee morale. Conflict coaching provides a holistic approach to navigating disputes by:

1. *Equipping Leaders with Communication Skills.* A conflict coach trains executives, managers, and in-house counsel to handle tense situations proactively—teaching them how to craft genuine apologies before problems spiral out of control.
2. *Identifying Underlying Interests and Emotions.* While lawyers focus on facts and evidence, conflict coaches look at the interpersonal and emotional dynamics fueling the dispute. This dual perspective can lead to more comprehensive resolutions.
3. *Supporting a Preventive, Not Just Reactive, Mindset.* Rather than waiting for conflicts to escalate to a courtroom, a conflict coach encourages early intervention. They help craft strategies for acknowledging mistakes, addressing grievances, and apologizing effectively.
4. *Bridging the Gap Between Legal and Human Concerns.* Legal counsel often has to manage risks, disclaimers, and potential liabilities. Conflict coaches help reframe apologies so that they're neither empty nor dangerously confessional. The goal: maintain authenticity without inadvertently accepting unwarranted blame.
5. *Enhancing Corporate Culture.* A healthy corporate environment is one in which leaders are not afraid to admit mistakes and employees feel safe voicing concerns. By mainstreaming conflict coaching, organizations send a strong message about openness, accountability, and respect.

Common Objections

Even with a strong blueprint, many leaders—and attorneys—hesitate to apologize in

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ADR Techniques

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commercial settings. Here are the top objections and how to respond:

1. *"We'll Look Weak."* *Response:* Showing genuine accountability isn't weakness; it's strategic strength. It can build goodwill and often nips escalating conflict in the bud.
2. *"It Could Be Used Against Us Legally."* *Response:* Some jurisdictions offer "apology laws" or safe harbors that protect apologies from being used as admissions of liability. Even where such laws do not exist, a carefully worded apology that focuses on empathy, impact, and solutions—rather than explicit admissions—can minimize the legal risk while maximizing trust-building.
3. *"The Other Side Will Demand More."* *Response:* An apology can indeed open dialogue, which may lead to negotiating solutions. But that's precisely the point: a collaborative approach is often cheaper and less time-consuming than drawn-out litigation.
4. *"It Won't Solve the Real Issue."* *Response:* True, an apology alone doesn't fix contractual breaches or financial losses. But it lays the groundwork for collaborative solutions and de-escalates emotional tensions that often derail negotiations.

Organizational Integration

To truly harness the power of apologies for minimizing litigation, organizations can take the following steps:

1. *Train Managers and Leaders.* Integrate conflict-resolution and apology training into leadership development. The more leaders understand how to apologize effectively, the less likely minor disputes will snowball.
2. *Establish Conflict-Resolution Protocols.* Encourage employees to address conflicts early, rather than ignoring them or escalating them unnecessarily. Outline clear steps, including the possibility of facilitated apologies when appropriate.
3. *Consult with Conflict Coaches and Mediators.* Bring in professionals who specialize in conflict dynamics—especially for high-stakes negotiations or potential legal disputes. Their expertise can guide your team in crafting apologies that resonate without overstepping legal boundaries.
4. *Create a Culture of Accountability.* Celebrate examples of employees or leaders who took ownership of a mistake and offered genuine apologies. Over time, this fosters an environment where vulnerability is seen as strength, not weakness.
5. *Revisit and Revise Policies.* Corporate policies around dispute resolution, client relations, and vendor management should explicitly highlight the value of honest, timely communication. This includes the strategic use of apologies.

* * *

In many ways, apologies are the unsung heroes of commercial dispute resolution. They bring a human element into high-stakes corporate conflicts—an element that, when properly leveraged, can be the difference between an explosive lawsuit and a quiet settlement, or between a broken partnership and a strengthened one.

Like any tool, however, apologies must be used carefully and authentically. Forced or poorly timed statements can create more damage. But when constructed with genuine remorse, clear acknowledgment of harm, and a sincere commitment to repair—apologies can be a linchpin in preventing litigation or arbitration. They remind all parties that behind every contract, every negotiation, and every lawsuit, are real people seeking respect, dignity, and solutions.

In my experience as a conflict coach, mediator, and trainer, I've seen how a single well-placed apology can shift the entire trajectory of a dispute. It can turn anger into dialogue, skepticism into collaboration, and potential legal battles into opportunities for meaningful resolution.

> In a high-stakes business context, an apology may feel uncomfortable, but it's necessary for restoring trust.

If corporate leaders and counsel integrate conflict coaching and genuine apologies into their toolkit, they'll not only minimize risk but also foster a culture of accountability and trust—key ingredients for long-term commercial success.

By choosing to see the human face behind every lawsuit, and offering heartfelt acknowledgment when mistakes arise, organizations take a bold step toward a more resilient, empathetic, and litigation-proof future.

CPR News

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sponsorship opportunities, can be found on CPR's website at www.cpradr.org/events/2025-cpr-africa-arbitration-day—new-york-conference.

The program is organized by the 2025 CPR AAD-NY Steering Committee, which is chaired by Nawi Ukabiala, a New York-based senior associate in the International Dispute Resolution Group at Debevoise & Plimpton. The CPR Institute's Knar Nahikian, who is Vice President for Global Initiatives, is the staff liaison. A list of the steering committee members can be found at the link above.

This is the third CPR AAD-NY event. Videos of the two panels from the 2024 Africa Arbitration Day-New York can both be found on the event page, here, as well as on the CPR YouTube Channel at www.youtube.com/@CPRInstituteOnline. For more, see Stephanie Argueta, "CPR News: Highlights from CPR's Africa Arbitration Day-New York," 43 *Alternatives* 18 (February 2025) (available on *Westlaw*).

Video recordings for panel presentations at the inaugural Dec. 8, 2023, CPR AAD-NY event, can be found here. For more on the 2023 program, see Naomie Malumba, "Pressing Issues and Emerging Trends at Africa Arbitration Day-New York," 42 *Alternatives* 124 (September 2024) (available on *Westlaw*).