Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute for Conflict Prevention & Resolution
VOL. 43 NO. 11 • DECEMBER 2025

ADR Techniques

Sales Research: A Key to Improving Mediator Effectiveness

BY AVA J. ABRAMOWITZ

Some years ago, a construction lawyer sought me out for a mediation. "You'd be the perfect mediator," he said. "You could take the plaintiff to the woodshed and beat some sense into him."

I declined. My refusal wasn't a quirk of personality. Bludgeoning people into submission is not my style. My style is a conscious strategy built on decades of experience negotiating, mediating, and studying how people make decisions.

Although mediation shares principles with negotiation—especially the "Getting to Yes" framework—it is far more complex. Mediation involves not just navigating positions and interests but addressing emotional needs and assessing risks. It's not just playing the odds, and helping people make difficult, often life-altering choices. As style is a matter of choice, to be effective mediators must look beyond traditional negotiation theory.

One surprising yet powerful resource? Sales research.

Why Questions Matter

Behavioral scientist Neil Rackham and his research, as revealed in "The Behaviour of Successful Negotiators," "SPIN Selling," and "Major Account Sales Strategy," transformed my approach. See, respectively, Neil Rackham & John Carlisle, "The Effective Negotiator—Part I: The Behaviour of Successful Negotiators," 2(6) *J. European Industrial Training* (1978) (available at https://bit.ly/4464ACY); Neil Rackham, SPIN Selling (New York: McGraw-Hill Inc. 1988) (In January 2017, *Inc.* magazine listed SPIN as the No. 1 sales writing book, noting that it "is the book that turned selling from an art into a science."), and Neil Rackham, Major Account Sales Strategy (New York: McGraw-Hill Inc. 1989)[Rackham is the author's spouse].

This research was not on low-end retail or consumer sales. Rackham focused on complex, long-cycle sales that involved significant risks and complex choices. He found that successful sales—and successful decision-making—follow a staged process, especially when the sale entails a major, sometimes not well understood, but often high-risk problem to the buyer.

This in turn presented problems to the seller. "How am I to help meet the buyer's needs?" sounds like a negotiation problem and then some, doesn't it?

Make it harder. Now imagine that the Buyer, the person with the problem, has her

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For 20 years, the author taught negotiation at the George Washington University Law School in Washington, D.C. She has been mediating for nearly 40 years for the Federal District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia. She is the author of Architect's Essentials of Negotiation (2nd ed. John Wiley & Sons Inc. 2009), and articles on risk management, negotiation, persuasion, sales, and mediation. The articles include "Why Reinvent The Wheel? Tapping Consultative Selling Research To Expand Mediator Effectiveness," 24 *Cardozo J. of Conflict Resolution* 121 (2022) (available at https://bit.ly/3SO3pD6); "How Collaborative Negotiators Settle Without Upending the Table," 14 *J. Am. Col. Of Constr. L.* 2 (2020), and "Modern Consultative Sales Theory," in Negotiation Essentials For Lawyers (American Bar Association 2019). She can be contacted at avaesq@gmail.com.

ADR Brief

Prevention Words: Keynotes from New York's 2025 Mediation Settlement Day

The 32nd annual New York Mediation Settlement Day in late October honored two veterans from different areas of conflict resolution practice, both of whom emphasized the benefits of prevention as an essential component of alternative dispute resolution.

Lisa Courtney and Duncan MacKay were recipients of the annual Chuck Newman Award, which recognizes individuals who have made a meaningful impact on the field of alternative dispute resolution.

Courtney is Director of Alternative Dispute Resolution for the New York state Unified Court System, and MacKay is Deputy General Counsel & Chief Compliance Officer at Eversource Energy, a Fortune 500 and Standard & Poor's 500 energy company, which has headquarters in Hartford, Conn., and Boston.

The award was named in honor of Newman, a veteran New York mediator, after his 2022 passing. He was a president of the Greater New York Chapter of the Association of Conflict Resolution, which has presented a Mediation Settlement Day ADR leadership award since 2018. Before then, Mediation Settlement Day, a free annual event that highlights the importance and value of conflict resolution, was sponsored by the New York State Unified Court System, FINRA and the New York City Bar Association's ADR Committee.

ACR-GNY's Mediation Settlement Day webpage, which includes two decades of honorees, can be found at www.acrgny.org/MSD. The Oct. 29 awards were presented at a reception hosted by the American Arbitration Association in its New York City office.

The theme of Mediation Settlement Day 2025 was prevention: "Stop It Before It Starts: The Power of Conflict Prevention." Courtney and MacKay presented successive keynotes on prevention in accepting their awards. Their comments, in the order presented, are adapted below.

Lisa Courtney: I am very honored to receive the Chuck Newman Award. … Chuck was an ADR hero, a pioneer. He believed in the quiet power of prevention—the kind of work that doesn't always make headlines but can change lives. I accept this award on behalf of the many people—mediators, court staff, community partners—who do this work every day, often invisibly, with dedication.

The theme this year—"Stop It Before It Starts"—is both a call to action and a reminder of what's possible.

William Ury, of "Getting to Yes" fame, in his most recent book, "Possible," reminds us that the greatest breakthroughs often come not from reacting to conflict, but from *reimagining the path before it begins*. Prevention is not passive. It's seeing the storm coming before the clouds gather—and *choosing* a different route.

But how do we do that?

We start with *dignity*. Dr. Donna Hicks, an expert on conflict resolution, teaches us that dignity is not earned—it's inherent. When people feel unseen, unheard, or disrespected, conflict takes root. But when we affirm dignity—when we listen, acknowledge, and include—we create conditions for peace before conflict ever arises.

We build *systems* that make dignity a *habit*.

We take small actions to shape culture.

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Alternatives

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ALTERNATIVES TO THE HIGH COST OF LITIGATION, (Online ISSN: 1549-4381), is published monthly, except bimonthly in July/August by the International Institute for Conflict Prevention & Resolution — CPR, 30 East 33rd Street, 6th Floor, New York, N.Y. 10016 — United States, and Juris Net, LLC., 52 Elm St, Huntington, NY 11743—United States.

Information for subscribers: Requests to sign up for a subscription may be sent to alternatives@cpradr.org.

Back issues: Single issues from current and recent volumes are available from publisher CPR Institute and Juris Net. For pricing, e-mail alternatives@cpradr.org.

Publisher: *Alternatives to the High Cost of Litigation* is published by CPR, 30 East 33rd Street, 6th Floor, New York, N.Y. 10016 — United States; +1.212.949.6490; Juris Net, LLC., 52 Elm St, Huntington, N.Y. 11743.

Journal Customer Services: For ordering information, claims and any enquiry concerning your subscription contact alternatives@cpradr.org.

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For submission instructions, subscription and all other information, email alternatives@cpradr.org, or visit www.cpradr.org/alternatives-newsletter.

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ADR Systems

Where Multi-Tiered System Design with Arbitration Fits In Health Care Compliance Disputes, with Case Examples

BY SUNIL AGGARWAL

Health care compliance disputes are increasingly complex, involving high stakes for patients, providers, insurers, and regulators.

A Multi-Tiered Dispute System Design, or MTDSD—incorporating arbitration—offers a structured, escalatory approach to conflict resolution that can be both efficient and equitable.

This article explores MTDSD's theoretical underpinnings, outlines its key components, and illustrates its application through case examples in the health care compliance context. See William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, "Designing an Effective Dispute Resolution System," 4(4) *Negotiation Journal* 413 (1988) (available at https://bit.ly/4o1zN2e).

By weaving in lessons from recent trends in artificial intelligence, data transparency, and patient empowerment, this article brings a modern perspective to the design of health care dispute systems.

The health care sector operates under strict regulatory scrutiny concerning billing practices, patient rights, and data privacy. Disputes in this domain are not only costly but can compromise patient care and institutional trust. See Sharona Hoffman & Andy Podgurski, "Big Bad Data: Law, Public Health, and Biomedical Databases," 41 *J.L. Med. & Ethics* 56 (2013) (available at https://bit.ly/3WqyT3P).

Traditional litigation is adversarial and time-consuming. MTDSD, with arbitration as a culminating step, offers a scalable and strategic approach that maintains compliance integrity while enhancing institutional efficiency.

Moreover, with the rise of digital health records and cross-platform data sharing, MTDSD must account for an evolving ecosystem where disputes may emerge from sources like AI-assisted diagnosis, telemedicine protocols, or decentralized health data exchanges.

The article also identifies gaps in existing legal remedies and emphasizes how MTDSD contributes to resolving disputes in a more patient- and provider-sensitive manner. See Carrie Menkel-Meadow, "Ethics in ADR: The Many 'Cs' of Professional Responsibility and Dispute Resolution," 28 *Fordham Urb. L.J.* 979 (2001) (available at https://bit.ly/3IKnE30).

The author is New Jersey-based with advanced training in dispute systems design. He holds an M.D. in radiology, a J.D., an M.B.A and an LL.M. He worked on this article as an intern with *Alternatives*' publisher, the CPR Institute, earlier this year, while studying for his LL.M. from the University of Missouri School of Law, in Colombia, Mo., where he focused on health law and ADR. He works as a Chief Compliance Officer in health care in New York City.

Theoretical Underpinnings

MTDSD is rooted in dispute systems design theory, which advocates creating multi-layered conflict resolution structures tailored to specific sectors. See Cathy Costantino & Christina Merchant, "Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations" (Jossey-Bass 1996).

In health care, MTDSD supports timeliness, confidentiality, procedural fairness, and proportionality, emphasizing early intervention and fair process. Parallels also exist with Online Dispute Resolution, or ODR, which is gaining traction in telehealth, wearable-technology compliance, and digital claims management.

MTDSD's Components

Each MTDSD tier represents a distinct stage in the dispute resolution process. Accordingly, each tier increases in formality, cost, and legal consequence, allowing parties to explore lower-stakes avenues before committing to binding decisions. See David B. Lipsky, Ronald L. Seeber & Richard D. Fincher, "Emerging Systems for Managing Workplace Conflict" (2003) (available at https://bit.ly/4obMOXs).

Tier 1: Prevention and Early Resolution. The initial tier mechanisms include compliance hotlines, anonymous reporting systems, internal audits, and ombuds services. The goal is early detection and informal resolution. Training and education foster a culture of compliance. Institutions increasingly use predictive analytics to identify compliance risks. See Christopher W. Moore, "The Mediation Process: Practical Strategies for Resolving Conflict" (4th ed., John Wiley & Sons 2014) (available at https://bit.ly/48UxJoB).

Tier 2: Internal Review and Mediation. When early interventions are insufficient, the dispute advances to structured internal processes: formal hearings, facilitated negotiation, or mediation. Internal review panels assess compliance issues through documented evidence and policy interpretation. Some institutions are experimenting with AI-assisted intake to narrow issues before live facilitation. See Morton Deutsch, Peter T. Coleman & Eric C. Marcus, Justice and Conflict, in The Handbook of Conflict Resolution (2d ed. Jossey-Bass 2014)(available at https://bit.ly/3XlnFOu).

Tier 3: Arbitration (Binding or Non-Binding). If resolution is not achieved through the previous tiers, arbitration provides a final, formal method involving neutral subject-matter experts. Depending on agreement, the process may be binding or non-binding.

This tier is especially valuable in complex compliance disputes involving legal interpretation, financial disagreements, or clinical

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credentialing. Arbitration offers the advantage of confidentiality, expedited timelines, and the flexibility to select arbitrators with relevant health care expertise. As arbitration becomes more data-driven, trends like algorithmic decision support and neutral evaluation tools are emerging, raising questions about transparency and ethical safeguards in health care arbitration.

Case Examples

This section demonstrates the practical application of MTDSD through real-world case studies. Each case represents a distinct compliance issue resolved using the tiered dispute system, showcasing MTDSD's adaptability across various legal and operational contexts. These cases are selected not only for their legal relevance but also for their potential to inspire the redesign of future dispute frameworks.

HIPAA Violation Allegation. A patient alleged a hospital disclosed personal health information—PHI—without consent. After initial investigation and failed dialogue, arbitration confirmed a HIPAA violation and awarded damages. This underscores effectiveness in resolving privacy issues. See, generally, U.S. Dept. of Health & Human Services, Office for Civil Rights (2019) (available at www.hhs.gov/ocr/index.html). The case spurred interest in decentralized identity and biometric access controls for PHI.

Reimbursement Dispute Between Insurer and Provider. A provider claimed systematic underpayment for out-of-network services. Internal complaint processes and negotiations failed. Arbitration revealed discrepancies, resulting in retroactive payments and policy reform. See American Arbitration Association, 2020 Annual Report (available at www.adr.org/annual-reports). The insurer later piloted blockchain-based smart contracts to automate claim validation.

Credentialing Dispute. A physician challenged revocation of privileges after peer review. Internal appeals and mediation failed. The arbitrator found procedural shortcomings and partially reinstated privileges—balancing due process with institutional integrity. See Joint Commission, National Patient Safety Goals (2020) (available at https://bit.ly/3JXbS5S). The hospital subsequently deployed an internal AI system to enhance transparency in peer review, with independent ethics oversight.

Benefits and Challenges

Benefits. MTDSD reduces the burden of litigation, enhances efficiency, and preserves professional relationships. Arbitration allows for confidential and expert-driven decisions. The system supports proactive conflict resolution, reducing systemic risks and enhancing compliance culture. The layered structure of MTDSD also ensures procedural justice by giving each party multiple opportunities to voice concerns and reach resolution. Thomas J. Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution,'" 1 *J. of Empirical Legal Studies* 843 (available at https://bit.ly/4h1mtJb).

With the integration of technology and patient-centric tools, institutions can gather feedback from dispute participants to continuously improve outcomes.

Challenges. Despite its benefits, MTDSD can raise concerns regarding arbitrator neutrality, enforceability of decisions, and transparency. If poorly implemented, it may become a barrier to justice. Ensuring fairness, standardization, and oversight is essential to maintain trust in the system. H. Jay Folberg & Joshua D. Rosenberg, "Alternative Dispute Resolution: An Empirical Analysis," 46 *Stanford L. Rev.* 1487 (1994) (available at https://bit.ly/46ZGbjO).

Additional challenges include inconsistent arbitration clauses across contracts, lack of public access to arbitration outcomes, and limited awareness of available dispute resolution options among patients and providers. Furthermore, as technology is increasingly embedded in dispute processes, there is a growing need for ethical guidelines around algorithmic bias, data security, and AI transparency.

Implementation And Recommendations

To optimize the effectiveness of Multi-Tiered Dispute System Design in health care settings, several strategic recommendations should be considered. These measures aim to enhance system credibility, transparency, fairness, and efficiency. Each recommendation is accompanied by practical examples to illustrate its real-world applicability in day-to-day health care environments.

Adopt Standardized Protocols Across Institutions. Implementing uniform dispute resolution protocols across health care institutions helps promote fairness and predictability. Standardization ensures that similar cases are treated similarly, regardless of the provider, region, or patient background. These protocols should define procedures, timelines, documentation standards, and escalation mechanisms based on legal and ethical best practices.

Example:
A hospital network adopts a consistent patient grievance protocol across all branches. When a patient reports unexpected charges, they receive standardized communication detailing the review process, response time, and next steps. Whether the patient is in a rural clinic or an urban hospital, the protocol is the same, enhancing procedural fairness and reducing confusion.

Provide Continuing Training for Compliance Professionals, Arbitrators, and Mediators. Continuing education is vital to maintain quality and relevance in dispute resolution. Professionals involved in MTDSD must stay informed on legal developments, health care ethics, communication strategies, and emerging issues such as AI usage or telehealth-related conflicts.

Example:
A health care arbitration body conducts quarterly webinars on topics such as HIPAA compliance, unconscious bias, and trauma-informed care. Mediators participate in simulation exercises addressing cases involving vulnerable populations, such as non-native speakers or patients with disabilities. This equips them to handle cases more empathetically and competently.

Use Technology to Manage and Monitor Disputes Through Secure, Centralized Platforms. Digital platforms can streamline MTDSD operations by offering real-time tracking, secure data management, and better communication. A centralized system also enables administrators to monitor trends, manage caseloads, and automate routine tasks, such as status updates or reminders.

Example:
A hospital launches a secure online dispute resolution platform where patients can file complaints, check progress, and upload documentation. The system automatically flags unresolved cases, triggers staff alerts, and generates monthly analytics reports. Patients benefit from increased transparency, while administrators gain valuable oversight.

Engage Stakeholders in System Design. Inclusive system design enhances legitimacy and responsiveness. Stakeholder engagement, including patients, health care providers, legal advisers, and regulators, ensures the MTDSD framework reflects the diverse needs and experiences of its users. This approach fosters buy-in and identifies barriers early in the design process.

Example:
A state health agency forms an advisory group that includes patients, nurses, and legal experts to co-design a new complaint intake system. Based on patient feedback, the team adds a feature allowing users to request a phone call rather than complete forms online. This makes the platform more accessible to older adults and individuals with limited digital literacy.

Establish Independent Oversight Bodies. Independent oversight is essential for promoting accountability, continuous improvement, and public trust. Oversight bodies should monitor case outcomes, conduct evaluations, publish reports, and issue guidance. They must operate autonomously from the institutions involved in the dispute resolution process.

Example:
An independent health accountability organization publishes an annual report analyzing dispute resolution data from multiple hospitals. The report highlights systemic issues—such as high rates of billing complaints—and recommends targeted improvements. Public transparency fosters institutional accountability and helps inform policy adjustments.

Promote Ethical AI Use and Patient-Informed Transparency Tools. As artificial intelligence becomes more common in MTDSD, its use must align with ethical principles such as fairness, accountability, and transparency. Patients should understand when and how AI is involved and have the option to opt for human review when necessary.

Example:
A health care insurer introduces an AI chatbot to handle preliminary complaints. The interface includes an option labeled, "Why was this recommended?" which provides a plain-language explanation of the AI's decision-making process. Patients may also request to speak directly with a human mediator. These foster trust and empower patients in the resolution process.

Conduct Regular System Reviews and Adaptive Updates. Dispute systems must evolve in response to legal, technological, and societal changes. Institutions should commit to periodic reviews of MTDSD frameworks to evaluate performance, gather user feedback, and implement necessary updates.

Example:
A health care provider conducts annual reviews of its MTDSD policies. During a review, staff identify that patients often struggle with legal jargon in mediation letters. In response, they launch a plain-language initiative and revise communication templates. This improves clarity and resolution rates while enhancing patient satisfaction.

* * *

A well-functioning MTDSD in health care must be dynamic, transparent, and equitable.

By adopting standardized procedures, investing in professional training, embracing secure technology, engaging stakeholders, establishing oversight, and promoting ethical innovation, institutions can create a dispute resolution system that not only resolves conflicts efficiently but also builds lasting trust. Regular review cycles ensure the system remains responsive to evolving needs and challenges, positioning it as a vital component of a patient-centered health care ecosystem.

> This article applies the principles of dispute system design to the complex regulatory and operational environment of health care.

MTDSD with arbitration offers a robust mechanism for resolving health care compliance disputes. Its tiered structure ensures proportionality and fosters early resolution, while arbitration secures binding outcomes when necessary. The framework balances legal compliance with ethical and operational realities, promoting justice and institutional accountability.

As health care systems continue to digitize and diversify, the future of dispute resolution must embrace innovation, inclusivity, and continual adaptation. Continued evolution of MTDSD should aim at increased transparency, consistent standards, and enhanced user trust. The future of health care dispute resolution lies in collaborative system design, continuous improvement, and a shared commitment to fairness and integrity.

International ADR

Privacy and Confidentiality–An English view

BY ADAM SAMUEL

Privacy and confidentiality appear in almost every traditional discussion of arbitration and similar processes. In recent years, though, the exceptions have sometimes threatened to overwhelm the rule. In this, English law plays a peculiar role. For some unknown reason, it seems to have more published court decisions on the application of and exceptions to these rules than any other country. As a result, it may end up establishing the position well beyond its borders.

English law starts from the position that documents disclosed, pleadings, witness statements, transcripts cannot be used in other proceedings involving third parties, and parties cannot publish "private matters" which are the subject of the arbitration.

In the Beginning

The first examination is development of a right to arbitration privacy … or is it really confidentiality?

In the beginning of the modern practice evolution, there is the Court of Appeal decision in *Dolling-Baker v. Merrett,* [1990] 1 WLR 1205 (available at https://bit.ly/3W1Njr3), which involved a failed attempt in a reinsurance court claim to obtain all the documents relating to an arbitration between a different claimant and the same reinsurer. The court found an implied obligation on both arbitration parties:

> not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court.

The High Court—the three-division, senior U.K. court that hears cases of first instance as well as appeals and sits below the U.K. Supreme Court and above lower courts—applied *Dolling-Baker* in three cases.

In *Hassneh Insurance Co. v. Mew*, [1993] 2 Lloyd's Rep 243, Mr. Justice Colman granted an injunction to an insurer to preclude the disclosure of all the reasons for an award, pleadings and witness statements and transcripts from an arbitration in which the insured had largely been unsuccessful.

The policyholder wanted to use the material in litigation against its broker. Although the policyholder could use the actual award which was a pre-condition of the claim, the judge suggested that any other arbitration work product should be on the discovery list. Its holder should invite the other party to the original case to consent to disclosure and without it refuse to allow inspection without a court order.

Insurance Co. v. Lloyd's Syndicate, [1995] Lloyds Rep 272, involved Mr. Justice Colman again blocking disclosure this time of an award that an insurer had obtained against a lead underwriter reinsurer.

Without a "leading underwriter clause," the other insurers were not bound by the arbitrator's decision although traditionally would honor it. The judge required the award to be a "necessary element in the establishment of the party's legal right against the stranger."

London & Leeds Estates Ltd. v. Paribas Ltd. (No. 2), [1995] 1 EGLR 102 (available at https://bit.ly/4nKWk3Q), QBD made it clear that the court will subpoena the records of a party's expert witness's evidence in a prior arbitration where it appears to contradict evidence currently being presented. This does not apply where the disparity is not "manifest."

In an unsurprising later case, *E v. C*, the Lands Tribunal for Northern Ireland declined to allow the use of an out-of-date valuation of a different property presented in an arbitration to be used in court, notwithstanding the consent of the tenant in the earlier case.

Up in the Air

So is there a right to privacy and confidentiality and if so, what is it?

The Australian High Court, the nation's Supreme Court, threw this subject up in the air in *Esso Australia Resources Ltd. v. Plowman (Minister for Energy and Minerals),* 128 ALR 391 (1995) (available at https://bit.ly/4qc3YG5). The majority found that there was no general principle of confidentiality in arbitration, although a right to privacy could make disseminating private material from the proceedings unlawful without good reason.

The case concerned the price that Esso would charge two public bodies for energy to be supplied to the public. The state government had a statutory right to the relevant information from one of the parties and the other had a public duty to account for its pricing activities.

So this case fit the "legal obligation" and "public interest" exceptions to confidentiality. In 2016, the Australian International Arbitration Act imposed a confidentiality obligation in cases within the UNCITRAL Model Law. The result would have been the same, however, even under the Australian statute (section 23D(9)).

The author is an attorney and a barrister in London. He is a neutral and is on the panels of the World Intellectual Property Organization and Hong Kong International Arbitration Centre. His website containing his full background is www.adamsamuel.com. This semi-monthly *Alternatives* feature, "A Note from the U.K.," provides an examination of conflict resolution practices and processes from London. This column is adapted from columnist Samuel's Oct.16 presentation at the New York International Arbitration Club.

An English Doctrine

The Court of Appeal in *Ali Shipping Corp. v. Shipyard Trogir*, [1999] 1 WLR 314 (available at https://bit.ly/4761kZD), was faced with an attempt to use a comment in an arbitration award of damages for failure to build a ship in subsequent cases brought against three of the original claimant's sister companies.

The original arbitrator had rejected an argument that, since the four businesses were essentially the same, the failure of the three other companies to make the first payment for their ships was no defense. The shipyard wanted to use his conclusion that the other companies had not made that payment.

The shipyard Trogir listed the award and reasons, written submissions of Ali, and transcripts of Ali's witnesses' oral evidence as material for discovery in its nonpayment claim against the three sister companies. The award could not act as an issue estoppel against the other purchasers of ships and, therefore, it and the other documents were irrelevant to the second to fourth arbitrations unless the witnesses in the case gave contradictory evidence.

The Privy Council on an appeal from Bermuda in *Associated Electric & Gas Ins. Servs. Ltd. v. European Reinsurance Co. of Zurich (Bermuda)*, [2003] UKPC 11 (available at https://bit.ly/4n8MWWC), reached a different result. There, Aegis reinsured risks with European Re; two arbitrations involving crucially the same parties took place on the interpretation of the contract. European Re wanted to use the favorable award in the first case in the second matter, to make a much more promising issue estoppel claim.

The Privy Council, made up of judges who actually sat in what was then the U.K.'s Supreme Court, allowed this. Lord Hobhouse distinguished the award from the material obtained in an arbitration. He noted that an award could have to be referred to for accounting purposes and for enforcing the rights that the award confers, here to claim on its insurance and to claim an issue estoppel against the same reinsurer.

Emmott's Basis of Modern English Law

Early on in what remains a continuing dispute, the U.K. Court of Appeal laid down in *Emmott v. Michael Wilson and Partners Ltd.* [2008] EWCA Civ. 184 (available at https://bit.ly/47oaqlU), the basic structure of the English position, confirming confidentiality exceptions that the Court of Appeal had mentioned in *Ali Shipping*.

In 2001, two solicitors agreed to create a company, MWP, to provide legal services in Kazakhstan. In 2006, Emmott left, taking with him two MWP staffers. There was an arbitration in London, backed up by English Court applications for search and freezing orders. MWP also brought claims in the British Virgin Islands and New South Wales alleging that the new company and the three departed individuals either were involved in joint-wrongdoing or had accessory liability for Emmott's breach.

Keeping It Quiet

Arbitration's selling point: It's not public.

Arbitration's reality: It often is public.

Arbitration's U.K. reality: Court decisions on ADR privacy and confidentiality have an outsize effect on practices everywhere.

After the arbitral tribunal threatened to strike out Wilson's fraud claim, he abandoned that and a conspiracy case. The court concluded that Emmott could show the amended pleading to the courts in Australia and BVI when Wilson applied to amend its New South Wales claim to add conspiracy and fraud allegations "to bring a level of parity to the proceedings presently being conducted in … England" and to respond to an amended statement of claim in the BVI proceedings against Emmott's new company there that did much the same. The court allowed disclosure of a redacted version of the amended pleadings and the skeleton argument used to support the strike out application.

Lord Justice Lawrence Collins (later Lord Collins) listed the classic exceptions to privacy or confidentiality:

1. consent of all parties affected;
2. order of the court, or legally required;
3. reasonably necessary for the protection of an arbitrating party's interests;
4. interests of justice require it; and
5. public interest requires it.

The Exceptions

These sometimes-overlapping points are covered in the 3rd edition of David Foxton, ed., "Mustill & Boyd: Commercial and Investor State Arbitration," paras. 11.45-11.73 (2024).

1) Consent of all parties affected. Prior waiver by the party objecting to disclosure could be enough. In *Emmott v. Wilson*, the defendant had referred to the arbitrations in the foreign court proceedings.

Article 17(b) of the London Maritime Arbitration Association Terms allows a tribunal to hear two or more cases which appear to raise common issues of fact or law. Where parties have agreed to those terms, there is sharing by consent.

2) Order of the court or legally required. A receivership order could, if necessary, override confidentiality. *Milsom v. Mukhtar Ablyazov*, [2011] EWHC 955 (t https://bit.ly/4hc28kt).

Fraser Davidson, "Arbitration," 2nd ed. para 12.12 suggests that disclosure required by the order of a tribunal even if mistaken would be protected.

Freedom of Information legislation may entitle a member of the public to obtain material generated during an arbitration involving a public authority or state-owned company. *Maharaj v. Petroleum Co. of Trinidad and Tobago Ltd. (Trinidad and Tobago)*, [2019] UKPC 21 (available at https://bit.ly/4qjuhub).

Section 32(2) of the U.K. Freedom of Information Act 2000 contains an exemption for arbitration material covering:

> (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

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The Supreme Court relied on this to block disclosure in *Kennedy v. Charity Comm'n,* [2014] UKSC 20 (available at https://bit.ly/4ooPRvn). It suggests that the common law would have produced a better result for the applicant.

Company and public sector reporting, and *Esso v. Plowman* appear here.

If the company reporting is public and inaccurate, it would presumably lose the protection of this exception since it would not comply with the securities law concerned. This could in turn operate as a waiver of any objection to the other party correcting any errors in public. Indeed, the provision of such information could be seen as authorized by law to prevent shareholders and markets being misled and thus protected.

3) Reasonably necessary for the protection of an arbitrating party's interests. Here, one would find disclosure:

- to a current or possible litigation funder;
- to create an issue estoppel against an arbitration party in separate proceedings (really recognition of the award) (see *Associated Electric & Gas Ins. Svcs.*, above), but not where the parties are clearly different (see *Ali Shipping*, above), although the assertion does not have to succeed to avoid a breach of confidence claim. *Teekay Tankers Ltd. V. STX Offshore & Shipbuilding Co. Ltd.,* [2017] EWHC 253 (Comm) (available at https://bit.ly/46ZZBVO);
- where reasonably necessary to protect the legitimate interests of an arbitration party–not just "evidentially relevant";
- ordered by the court relating to documents used in an arbitration to enable a party being sued for the amount awarded against the claimant to assess the settlement's reasonableness. *Gray Construction Ltd. v. Harley Haddow LLP,* [2012] ScotCS CSOH_92 (available at https://bit.ly/4ojV0Vx); or
- to seek supervisory or enforcement help (Singaporean authority indicates that an award once registered for enforcement ceases to be confidential: *International Coal Pte. Ltd. v. Kristle Trading Ltd.*, [2009] 1 SLR 945 (available at https://bit.ly/4h8M2Ia)).

4) Interests of justice require it. An expert witness can be required to produce an allegedly contradictory expert report presented at an earlier arbitration. See *London and Leeds Estates*, above. But it has to be contradictory rather than about a different property and at a different time (In *E v. C*, the Lands Tribunal for Northern Ireland, [2018] WL 03479149).

An award can be used to base a claim or defend one against a third party. *Hassneh Ins. Co. of Israel v. Mew,* see above.

A court may order discovery of documents from an arbitration to make good a court claim for unlawful conspiracy between the parties to it. *Westwood Shipping Lines Inc. & Anor v. Universal Schiffahrtsgesellschaft MBH*, [2012] EWHC 3837 (Comm).

5) Public interest requires it. A court could order discovery to bring to light the bones of an arguable unlawful act or conspiracy. Id.

Disclosure of awards and documents generated during the arbitration can be used to report misdeeds to public authorities. *AAY v AAZ,* [2009] SGHC 142 (available at https://bit.ly/48wFwZN) (fabrication of evidence and a finding of criminal conduct by the arbitrator in Singapore).

Freedom of Information disclosures can be required by law of awards and documents generated in an arbitration. See *Maharaj*, above.

Disclosure generally in state matters could affect arbitration involving national bodies of all types. See *Esso Australia Resources* above.

A public body can obtain an order enabling another public body to disclose information that in that capacity it had a moral—not just a legal—duty to disclose. Id.

A disclosure by a government party may need to be made publicly because it raises environmental and public health issues. *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.,* (1995) 36 NSWLR 662 (available at https://bit.ly/4q8j1kd).

A receiver can obtain court documents to support its carrying out of a receivership, where the receiver obtained documents relating to an interim relief application made to court under Arbitration Act section 44 in the underlying arbitration, which provided evidence of an insolvent party's assets. See *Milsom*, above.

Disclosures to relevant public bodies can always be made to disclose the risk or fact of violence, or harm to anyone and other serious criminal acts.

A Sixth Exception?

In practice, there is probably a sixth exception, namely where the material is already in the public domain, perhaps due to enforcement proceedings in another country. *Symbion Power LLC v. Venco Imtiaz Construction Co.*, [2017] EWHC 348 (TCC), paras. 92-94.

The Standards

At the same time, the future Lord Collins noted that different rules and approaches may apply to different types of claims and procedures. This may be another way of saying that the interests of justice and public interest exceptions may operate slightly differently depending on the situation.

1) A litigating party may try to obtain documents generated in an arbitration. Courts will only require disclosure of confidential documents where "necessary for the fair disposal of the case". That explained *Dolling-Baker*, discussed above. Use of a document in an arbitration does not in itself make it confidential in any way. See *Milsom*, above. Courts also need to see whether the information could be obtained in a less damaging way to the confidentiality obligation.

2) An arbitration or litigation party seeks the court's help to obtain through a witness summons or other orders material used in another arbitration. That was the *London and Leeds Estate* case, discussed above. Like the first, a strong argument for confidentiality exists in the context of a court discretion.

Where a party seeks documents sitting in a court file relating to an arbitration or the publication of a court judgment concerning an arbitration, privacy becomes only an important factor. In *Glidepath BV v. Thompson*, [2005] APP.L.R. 05/04 (available at https://bit.ly/4o7j3aJ), a claimant in an employment dispute unsuccessfully sought material on the court files generated before the court referred a fraud claim to arbitration.

Mr. Justice Colman did not consider that access to the documents was "reasonably necessary to protect or establish the legal rights which he seeks to enforce in the proceedings

before the Employment Tribunals or otherwise in the interests of justice. … It must be clearly shown to the court that the document will play an essential part in establishing the right or the defence in question such that the applicant for access will be seriously prejudiced if access is denied."

3) Disclosure to third parties or in another case by an arbitrating party of documents generated in an arbitration including the award. This covers: "any documents prepared for and used in the arbitration or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and … evidence … given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court." See *Dolling-Baker*, at 1213, above.

Where a public interest may outweigh confidentiality, a party cannot just disclose material to third parties. A court or arbitrator may have to authorize it first.

4) Court hearings about arbitration. There are two rules in play here. Civil Practice Rule 62.10 presumes that a hearing on a point of law either taken as a preliminary matter or, more commonly, as an appeal from the award with the consent of the parties or the court, has to be held in public. All other "arbitration claims" hearings occur privately, including leave to appeal applications.

Rule 39.2(3) covers non-arbitration matters. It requires a private hearing when it involves confidential information or otherwise to secure the proper administration of justice.

In *CDE v. NOP*, [2021] EWCA Civ. 1908 (available at https://bit.ly/4mZkNkH), the U.K. Court of Appeal was concerned about an attempt to use an award concluding that the defendant had defrauded associated parties of the claimant in litigation. Lord Justice Males found that the case management conference and the hearing on whether the award could be used to set up a possible issue estoppel were not arbitration claims.

That brought into play rule 39.2's open justice presumption regardless of party agreement. Lord Justice Males found that the judge was right to hold the case management conference privately because the content of the award was clearly under consideration. But in the application for what was effectively summary judgment or the award's recognition, the same arguments would not apply with the same force despite Article 30.1 of the LCIA rules, which allow parties to put awards in evidence before state courts to protect or pursue their legal rights.

Davidson: Arbitration 2nd ed, para 12.07 raises the point that witnesses, advisers, experts, clerks, and employees are not subject to traditional confidentiality duties–at least not under rule 26 of the Scottish rules. He raises the question of what should be done if a witness declined to agree to confidentiality.

5) Publication of judgments delivered in proceedings to remove arbitrators or set aside awards and private or public hearings. There is a gradual shift here away from privacy. *Dept. of Economic Policy & Dev. of City of Moscow v. Bankers Trust Co.*, [2004] EWCA Civ. 314, concerned the question of whether a judgment on a failed application to set aside an award for procedural fairness reasons could be published along with a Lawtel summary of the judgment's salient points. The Court of Appeal upheld the judge's order blocking the judgment's publication while allowing the circulation of a summary on the Lawtel legal information service.

Lord Justice Mance felt that there was a spectrum between the arbitration, the hearing of any application, and an order given following a reasoned judgment on an application to set aside an award on due process grounds. The first is private, the second is private unless it involves an appeal from the award on a legal question, and the third is the judgment which should usually be public with appropriate redaction as necessary.

The court balances the public interest in judgments being made available and the need to preserve any confidentiality left. Judges try not to include too much detail and will anonymize or omit detail on request if the material remains private unless there is a countervailing public interest. See *Symbion Power*, above. In *Mercato Sports (UK) Ltd. v. Everton Football Club Co. Ltd.*, [2018] EWHC 1567 (Ch), the judge omitted the name of an individual and the size of the claimants' claim for that reason.

Premier League Ltd., v. Manchester City Football Club Ltd., [2021] EWCA Civ. 1110 (available at https://bit.ly/43g5zkh), moved the position further in favor of publicity. Both sides wanted to block the judgment's publication on a failed attempt to set aside the award for procedural unfairness and lack of jurisdiction. The latter point concerned whether the Football Association had correctly triggered an arbitration procedure in its rules in order to force the club to supply information for a disciplinary investigation.

The Court of Appeal supported Mrs. Justice Moulder's decision to publish her ruling without concealing the parties' names. Chancellor Flaux noted that most of the relevant information, including the club's argument, was in the public domain anyway.

Knowledge of the failure of its application could do no harm. Understanding what had happened was in the public interest. In a concurring judgment, Lord Justice Males was unimpressed by the League's agreement to oppose publication on the condition that it could use the court decision against other clubs.

Lord Justice Males felt that public scrutiny of the way in which courts exercised their powers in this type of case was in the public interest. He also noted that the time taken on the underlying investigation was a matter of public concern, particularly as the club had won the league twice while this had been going on!

The same first instance judge followed this approach in *Radisson Hotels ApS Danmark v. Hayat Otel Isletmeciligi Turizm Yatirim Ve Ticaret Anonim Sirketi (Ruling Re Anonymization and Redaction),* [2023] EWHC 1223 (Comm) (available at https://bit.ly/42IFOsH), on another failed setting-aside application in relation to a procedural problem. Here, the judge found that Radisson had not raised the objection to the arbitrator when it first knew of grounds for concern.

The judge also decided to publish the judgement which was not flattering about Radisson. It said nothing about the arbitration. Anonymization created problems with following the decision. Unusually, the judge allowed the arbitrators to apply for anonymization within a set time-limit. It is actually highly questionable where an arbitrator has any right to privacy.

Arbitration's Cross-Contamination

There are examples of cross-contamination between arbitration and other cases.

Since *Emmott v. Wilson*, there have been a series of first instance judgements in this area

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International ADR

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involving privacy, confidentiality and the six exceptions.

Using material from an arbitration to pursue a claim: In *Westwood Shipping*, discussed above, Mr. Justice Flaux allowed inspection of written pleadings and submissions in the arbitration, all items disclosed, witness statements, experts' reports, inter-solicitor correspondence, correspondence with the tribunal, transcripts of the hearings, written opening and closing submissions, and the award and reasons to enable the claimant to pursue a plausible conspiracy claim against a bankrupt arbitrating partner's parent company. The judge had his judgment published and after the order, there was nothing confidential left.

In *Teekay Tankers Ltd.*, noted above, Mr. Justice Walker rejected a claim for breach of confidence on interests-of-justice grounds arising out of an unsuccessful Korean court claim because the defendant had used the award to assert good faith issue estoppel and abuse-of-process arguments.

Mrs. Justice Proudman allowed an English court claim to be brought in *Sarah Lynette Webb v. Lewis Silkin LLP*, [2015] EWHC 687 (Ch) (available at https://bit.ly/4olthDX), which referred to the defendant's behavior as the solicitor for the claimant's employer during an arbitration concerning Webb's departure from the firm. The pleadings infringed Webb's employer's privacy rights, but the interests of justice justified this.

In *Avonwick v. Webinvest*, [2014] EWHC 3434 (Ch), the judge ordered discovery in litigation between a lender and a borrower of the arbitration documentation to deal with an argument that the borrower only had to repay the lender if the third party paid it.

Blocking a party from using its law firm or expert in a subsequent arbitration: In *A v. B and W,* [2025] EWHC 1092 (Comm) (available at https://bit.ly/42IzSQB), Mr. Justice Foxton had to deal with some alphabet soup.

A and D were two shipping companies owned by the same person. A tried to stop a law firm that acted for B against it from representing C in an arbitration against D. The judge noted that any documents which came into existence independently of the arbitration were not subject to arbitration confidentiality. Similarly, the existence of any disputes and the causes of them were also not covered. Claim particulars, witness statements and expert reports were.

The judge did not feel that A had an arguable claim with regard to the defendants' disclosure to firm B's Asia office on the identity of B's counsel and experts, or its party-appointed arbitrator, or its recommendation of the same arbitrator to C.

Everyone agreed that the transmission of the fact that a "serious settlement offer" made by A to C's law firm breached confidentiality, although any opinions as to why this had been done were irrelevant for this purpose. The fact of the settlement breached nothing; nor B's pleasure that the dispute had settled.

While some disclosure requests in the second arbitration were influenced by knowledge obtained in the first one, the discovery would have happened anyway. One part of the law firm could tell the other on how to handle the security for costs issue since that advice was not based on any confidential information about the parties.

The judge refused to remove the law firm because the fact of the settlement was not confidential and C corporation already knew the amount offered. The two cases were quite different. So, knowledge of the settlement figure would not be particularly useful.

The solicitors involved in the first case had fileted the papers available to C in the second case and then dropped out of the second case altogether. Different counsel were also instructed.

In *A Lloyd's Syndicate v. X,* [2011] EWHC 2487 (Comm), Mr. Justice Teare declined to prevent an expert giving evidence in an arbitration who had been engaged by the opposing party to express an opinion subsequently rejected on the meaning of a contract clause in a previous arbitration. The witness expressed the same view in a later case. In any event, this was a matter for the arbitrator to determine.

Court or Arbitrator?

A curious discussion concerns the need to apply to the arbitration tribunal if one still exists.

When it does not, the Commercial Court as the supervising court has jurisdiction. Otherwise, and where a third party is involved, the ordinary courts can deal with the problem. See *Webb* above. One cannot go to court to challenge the tribunal's decision. *Republic of India v. Vedanta Resources plc,* [2021) SGCA 50 (available at https://bit.ly/43dPv2s).

* * *

The English caselaw development of the various confidentiality exceptions, particularly in the areas of public interest and the interests of justice generally, correspond to broader developments in international arbitration and dispute resolution.

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration reverse almost everything said here where they apply. The 2017 Mauritius Convention applies these rules where host and investor states are contracting parties. Increasingly, one accepts that an arbitrator should not deprive a country of half of its annual gross domestic product without its citizens being able to scrutinize why this has happened.

Human rights' entitlement to a public trial normally regarded as waived in a commercial environment come into view when an athlete cannot compete in a sporting event without agreeing to arbitration. As the Court of Arbitration for Sport has discovered (*Mutu and Pechstein v. Switzerland*, 40575/10 [2018] ECHR 778, paras 175-183 (available at https://bit.ly/49bW2hQ)), Article 6(1) of the European Convention on Human Rights mandates a fair and public trial with judgment pronounced publicly which is not regarded as waived where the athlete has no real choice as to whether to arbitrate. CAS now provides a live-streaming service for such cases.

Adjudicative dispute resolution schemes of all types want to develop a coherent caselaw in order to help non-parties avoid future disputes. This cannot happen without the publication of awards. Schemes like the Uniform Domain-Name Dispute-Resolution Policy mandate publication except where sensitive information is involved, and where redaction is frequently used.

Confidentiality continues to exist in some form in English law and it remains practiced far more than this article would suggest. Nevertheless, the law can feel like an Emmenthaler cheese, definitely cheese but with considerable holes in it.

Worldly Perspectives

France's Steadily Improving Mediation Integration

BY GIUSEPPE DE PALO & MARY B. TREVOR

Mediation was first introduced in France in the family law field in the 1980s but was subsequently extended to the civil, commercial, social, and administrative fields in the 1990s, in response to growing demands for speed and quality of justice.

Since then, France has institutionalized mediation in various forms through a proliferation of laws and government actions designed to make mediation accessible at all stages of civil procedure.

This month's *Worldly Perspectives* will focus on the most significant French private law developments that have addressed civil and commercial mediation, the focus of the Rebooting Mediation Project study (see the link in the authors' credit), rather than on contemporaneous developments in the administrative (public law) area.

Furthermore, this column summarizes a report written in the middle of 2025, a year of continuing development of amicable dispute resolution (ADR) in France. Subsequently, a recodification of parts of the French Code of Civil Procedure—referred to here as the FCCP—has changed the designation, but not the substance, of some provisions referenced below.

The first legislative foundations for mediation were laid by Law No. 95-125 of 8 February 1995 (hereinafter, Law No. 95-125). It introduced provisions concerning mediation in Articles 131-1 to 131-16, which defined the conditions for implementing mediation, the mediator's role, and the parties' rights.

Order No. 2011-1540 of 16 November 2011 transposed the European Union Mediation Directive into French law by amending Law No. 95-125 to introduce provisions facilitating access to mediation and ensuring recognition of mediation agreements across different Member States.

Subsequently, Law 2016-1547 of 18 November 2016 on Modernization for the 21st Century (referred to below as the Modernization law) instituted reforms in a number of legal areas, including strengthening mediation in dispute resolution by specifying judicial and contractual mediation schemes.

Decree No. 2023-357 of 11 May 2023 established a mandatory pre-litigation ADR attempt for non-commercial civil disputes involving amounts equal to or less than €5,000 or that relate to a neighborhood dispute or an abnormal neighborhood disturbance.

Decree No. 2023-686 of 29 July 2023 introduced, in FCCP Articles 774-1 to 774-4, the amicable settlement hearing (ARA, *Audience de Règlement Amiable)*, in which a judge acts as the mediator. The hearing differs from

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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 Linda Benraïs; see the accompanying Background and Acknowledgments box.

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 France column relies on data from the project.

This month's column was prepared in collaboration with Linda Benraïs, Ph.D., who is an Affiliate Professor in the Department of Law, Political Science, and Society at ESSEC Business School, in Cergy, France, where she directs the Governance and Conflict Resolution Programs at the IRENE Centre on Negotiation and Mediation within the Institute for Geopolitics and Business.

She is also a Research Associate at the London School of Economics and Political Science through her ESSEC work. With more than 20 years of international experience, Benraïs provides specialized negotiation and mediation training and expertise for European Union institutions as well as for public and private organizations, combining practical expertise, research, and teaching in negotiation, governance, and mediation.

In addition to her academic roles, Benraïs is an accredited international mediator (CEDR-UK, ICP-FR, & Paris Court of Appeal) and an Assessor Judge at the French National Court of Asylum. She has led legal and judicial governance reform and mediation projects across Europe, the Balkans, the Middle East, Africa, and Southeast Asia for the European Union and other multilateral organizations.

Her teaching, research, and publications focus on international negotiation, business and workplace mediation, peacebuilding, governance, human rights, corporate social responsibility, and gender issues. Before joining ESSEC, Benraïs founded and directed the Agency for International Legal Cooperation at the French Ministry of Justice (1997–2012), gaining extensive experience in institutional reform, intercultural negotiation and management, and conflict resolution.

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a mediation or conciliation due to the unique perspective a judge offers. To guarantee impartiality, the ARA judge is different from the judge hearing and ruling on the litigated dispute. The litigation is suspended for the duration of the amicable settlement hearing. Decree No. 2023 of 3 July 2024 extended the ARA to commercial courts and commercial rent judges.

Beyond legislation, numerous mediation organizations, including the *Groupement Européen des Magistrats pour la Médiation* (European Group of Magistrates for Mediation, or GEMME), and others, have played a significant role in promoting and professionalizing mediation practices.

The Ministry of Justice, or MoJ, has recently launched various initiatives, including, in January 2023, its Action Plan for Justice (*Plan d'Action pour la Justice du 5 janvier 2023*). It addressed the training of lawyers in ADR, the involvement of lawyers and magistrates, the reform of legal aid, consolidating the texts relating to ADR into a single code, and the launch of the ARA.

In May 2023, the MoJ set up the "*Ambassadeurs de l'Amiable*" (French Ambassadors for Amicable Settlement), tasked with disseminating information about ADR, compiling an inventory of the current situation, and providing recommendations for structuring, developing, and perpetuating ADR methods.

In June 2023, the MoJ implemented the *Conseil National de la Médiation*, or CNM, which has federated and coordinated all organizations promoting mediation. The CNM defines and promotes quality and ethical standards for mediation, coordinates efforts to professionalize mediation practice, and aims to raise the profile of mediation with public and legal institutions. It published a progress report in early 2025 (available at https://bit.ly/47txzSQ).

The Legal Framework

Overall, mediation can happen in various ways. The parties may mediate due to a contractual commitment (conventional mediation), an ad hoc choice, or in compliance with the legal requirement for pre-trial mediation for certain small claims.

If a court action has been brought, the judge hearing the case can require the parties to attend a mediation information session that could, at their option, be followed by a mediation (judicial mediation). ARA's recent creation also means the judge hearing the case may decide to summon the parties to an amicable settlement hearing (conducted by a different judge using mediation tools and techniques) on the judge's own initiative after consulting the parties, or at the request of one of the parties.

A French Framework

This month's Worldly Perspectives jurisdiction: France.

The state of practice: A highly developed infrastructure of laws and institutions supports a culture of … some hesitancy. Lots of options and familiarity have helped overcome obstacles and spurred development.

The state of the prospects: The broad support also means a broad range of challenges for more and better French mediation. The columnists discuss eight areas needing attention.

Confidentiality and privilege. Law No. 95-125, Article 21-3, protects confidentiality, incorporating the same principles and exceptions set out in EU Mediation Directive Article 7. Article 21-3(2) states that "The conclusions of the mediator and the statements made during the mediation may not be disclosed to third parties or invoked or produced in judicial or arbitral proceedings without the agreement of the parties."

The provision's wording, less clear than that of the Directive, has led to lengthy litigation and doctrinal debate concerning documents produced during mediation. Case law has confirmed confidentiality's integral role in mediation, but Article 12-3's vagueness concerning documents likely will continue to fuel litigation.

In judicial mediation, the mediator must disclose to the judge minimal information about the mediation's overall timing and progress. Under no circumstances is the mediator required to disclose any information about the content of the parties' negotiation.

Article 21-3's lack of clarity, as well as possible confusion about the mediator role in judicial mediation, may explain the *Rebooting* study responses, which indicated a range of understanding about confidentiality in mediation. But nearly half of respondents believe it is "guaranteed in all cases, without exception."

Enforceability. French law gives full effect to mediated settlement agreements. In case of breach, two legal mechanisms are available to enforce the deal. With the first, homologation, the judge certifies or approves the agreement. Under FCCP Article 1565 et seq., the judge cannot modify the settlement's terms and may only ascertain that the transaction does not violate the law. The second mechanism, in FCCP Article 1568 et seq., relies on a writ of execution issued by the court clerk for agreements countersigned by outside lawyers.

As long as a case remains on a court's docket, the judge can address any difficulty interpreting or executing the settlement agreement between the parties, so it is in their best interest to seek homologation. An alternative approach, perhaps more in the spirit of mediation, is to include within the settlement agreement a clause agreeing to mediate issues about its performance.

Asked how mediated agreements are enforced in case of breach, respondents to the *Rebooting* survey provided mixed responses. Just over half believed they could be enforced "through a simple court procedure," while nearly a quarter indicated they could only be enforced "through extensive measures." The different responses may simply indicate different areas of practice or differing views on what constitutes a "simple" procedure.

Statute of limitations. Regarding non-judicial mediation, Article 2238 of the French Civil Code suspends the limitation period from the date on which the parties agree in writing to resort to mediation or, absent a written agreement, from the date of the first mediation meeting. The limitation period resumes at the

end of a period that may not be less than six months from the mediation's end (as declared by one or both parties or the mediator).

Duration and statutory fees. Concerning duration, conventional and ad hoc mediation differ from judicial mediation. Non-judicial mediation has no prescribed limitations and can last as long as necessary, depending on the dispute's complexity.

In judicial mediation, the judge sets a duration of three months, renewable once from the date of payment of the mediator's advance, in the mediation order (FCCP Art. 131-1). The judge may terminate the mediation at any time, either on the judge's own initiative if he or she considers the mediation compromised or pointless, or at the request of one of the parties (FCCP Art. 131-10).

In a 2021 MoJ survey of civil mediators, available at https://bit.ly/48Qljy9 (hereinafter – 2021 MoJ Survey), 87.3% described the duration of the mediator's mission (from the first session) as less than six months. For 76.7%, a maximum of three sessions was required. This duration complies with the FCCP Article 131-3 on judicial mediation deadlines. The *Rebooting* study estimates mostly fell within the 30-90 day range, with a plurality of responses within that range saying up to 60-90 days.

Regarding fees, mediators, whether conventional or judicial, charge for their services (except for mediation information sessions)—unlike conciliators. This difference can lead to competition among ADR providers that may erode, to some extent, the confidence of both prescribers and litigants in mediation.

Conventional mediators' fees are not regulated and can be decided with the parties based on an hourly rate, a flat fee, or other arrangements. Mediation centers include the cost of mediation based on an hourly rate or a flat fee in their mediation rules, with the flat fee based on the dispute's complexity.

In judicial mediation, the judge establishes the fee payment and its schedule, and determines how the costs will be distributed between the parties (FCCP Art. 131-13). Approaches vary, depending on the dispute and its complexity. In setting the fee, the judge will consider criteria such as the parties' means, whether they qualify for legal aid, and the financial stakes involved.

Some mediation practitioners favor developing performance-based mediator remuneration, on the model of lawyers' fee agreements. Others consider this approach contrary to the mediator's ethical obligation of disinterest in the outcome. Overall, mediation remuneration remains a sensitive issue.

The Demand Side

Recourse by statutory measures. A wide range of ADR procedures, comprising mediation, conciliation, participative procedure, and the ARA, are now offered as part of the MoJ's ADR policy.

ADR can be initiated before and during civil and commercial litigation in the judicial courts. Under FCCP Articles 807-1 to 807-3, during a trial, the parties can also ask the judge to hold a settlement hearing or a trial caesura (bifurcation). Furthermore, since the October 2023 implementation of Decree No. 2023-357 of 11 May 2023, noted earlier, an attempt at ADR has been mandatory for certain small civil claims.

Recourse by judge referral. Judicial mediation and the ARA (described earlier) can be used at any time from the start of the proceedings to the delivery of a judgment, and by any judge, whether a pre-trial or summary judge.

In judicial mediation, through a so-called "two-in-one" order addressed in FCCP provisions, the judge requires the parties to meet with a mediator to learn about the purpose and procedure of mediation, authorizes the mediator to obtain the parties' agreement to engage in the process, and, finally, orders mediation should agreement be obtained. This order does not remove the judge from the case. The parties' only obligations are to meet with the mediator for the mediation information session (Art. 127-1 FCCP); there are no penalties or sanctions for refusal to mediate.

Asked "To what extent do the courts refer cases to mediation?" the *Rebooting* study's mix of responses led to no significant majority, perhaps due to the variety of court practices that can now lead to mediation. A majority of respondents were aware of the courts' power to order parties to attend mediation information sessions, but nearly half appeared unaware of the recent introduction of compulsory mediation for small claims. Responses did generally recognize the lack of economic incentives, in the form of penalties or sanctions, for mediation participation.

Recourse by contract clause: Under French law, confirmed by case law, a mediation clause in a contract is binding on the parties and the court, with a few exceptions. To be fully enforceable, the clause must set out the terms and conditions for its implementation (e.g., compulsory and prior recourse to any court or arbitration, conditions for appointing the mediator).

A mediation clause may be invoked at any stage of the proceedings. But it cannot prevent referral to a court for emergency measures or to request investigative measures (FCCP, Art. 145).

Recourse by voluntary agreement—ad hoc mediation: FCCP Articles 1528 and 1529 provide that parties may attempt to resolve their dispute with a mediator's assistance, even absent a contract clause, provided the dispute falls within the jurisdiction of the declared judicial court. This *ad hoc* practice, however, is not common.

Lawyers may advise their clients to mediate or even suggest the name of a mediator or mediation center. Under Article 8-2 of the National Rules of Professional Conduct for Lawyers, mediation is an ADR option that lawyers must present to their clients, as part of their duty to advise, when they conclude it is appropriate.

In addition, protocols of good practice agreed between bar associations and courts include promoting ADR methods. Despite the active promotion of ADR within the profession and by the MoJ, however, some lawyers remain reluctant.

Ensuring Quality

There is no standardized mediator accreditation system.

The Courts of Appeal maintain lists of judicial mediators. For these lists, the requirements of good reputation, integrity, diligence, competence, and training or sufficient experience in mediation practice are generally expected and have been reinforced by case law. Rules of ethics and professional conduct are also available on the court portals.

Unlike many EU Member States, France does not require at least 40 hours of training. An exception is for those to be registered with the *RNCP-Répertoire national des certifications*

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professionnelles. French universities and other mediation training centers offer courses lasting up to 200 hours. According to the 2021 MoJ Survey, four out of five mediators (78.2%) had completed up to 200 hours of training.

Nearly half of *Rebooting* study respondents, reflecting reality, stated there is "no formal accreditation system," with some suggesting there are, effectively, "accreditation based on market standards."

Nearly half of *Rebooting* study respondents, perhaps reflecting differing experiences, also believed the required standards are acceptable, but almost the same number believed the requirements are non-existent or insufficient. These contrasting views reflect a recurring dilemma in mediation between the desire for greater regulation to stimulate and harmonize disparate practices, and the desire to preserve as much flexibility as possible to encourage the expansion of mediation, particularly in complex and high-value disputes.

Market Statistics

Size of the market. Despite the recommendations of the Council of Europe (see https://bit.ly/436ygjG) and others, there is no legal obligation in France to publish annual statistics on mediation.

The 2021 MoJ Survey responses suggested a total of 26,083 conventional and judicial mediations in that year. Respondents to the 2024 *Rebooting* study produced a wide variety of responses ranging from "less than 1000 cases" to "more than 100,000 cases," with the most popular response (nearly a quarter of respondents) was "between 10,001 and 50,000 cases."

Assessing the true numbers in France is further complicated by variations in judicial referrals as between individuals and institutions, variations in the number of people mediating full time, variations in mediation types, and different institutions' statistical approaches.

Strong agreement among *Rebooting* study respondents came in response to the question of whether there is a balanced relationship between mediation and judicial proceedings, with more than three quarters saying no, and none saying yes. In the 2021 MoJ Survey, 64% of respondents considered that "the number of requests addressed to them by the courts is insufficient."

Despite the impetus for proactive policies on amicable settlement, the lack of statistical tools tends to maintain the idea that a marginal proportion of disputes are submitted to mediation and, more generally, to erode confidence in mediation.

Mode of mediation. Online mediation encompasses mediation using tools enabling mediation to be conducted by videoconference, telephone, and the possible use of AI and automated processes. The Covid-19 pandemic provided an opportunity to develop remote mediation, including combining remote mediation with face-to-face mediation, an approach still used.

Article 4 of Law No. 2019-222 of 23 March 2019 amended articles in the 2016 Modernization law to provide a legal framework for online mediation. Online mediation service providers must comply with minimum requirements to protect personal data and limit the use of algorithms and automated systems, and are otherwise subject to the same minimum rules as other mediators. The criteria are detailed in the MoJ's certification framework, which provides that online service providers may apply for certification from a body accredited by COFRAC (available at https://bit.ly/47z8xBX).

The French MoJ has also created the "Certilis" brand (see https://bit.ly/47BFRZ6) to offer certified online mediation services that comply with minimum legal requirements.

Although *Rebooting* study respondents gave a range of answers to a question about the extent of online mediation use, it is generally known that online mediation has become well-established since the pandemic.

Settlement rates: According to the 2021 MoJ Survey, three out of four mediations ended in an agreement.

Costs: Concerning average mediation costs, *Rebooting* study respondents gave widely varying responses, perhaps reflecting their different types of mediation experience. Responses ranged from "between 501 and 1,000 euro" (16.67%) to "between 4,001 and 5,000 Euros" (9.72%). The most selected category (19.44%) was "between 1001 and 1500 Euros."

Number of mediators. It is unknown how many mediators are active (or seeking to be active) in the French mediation market and beyond. According to the 2021 MoJ Survey, mediation is not a full-time job for a significant proportion of them. Respondents to the *Rebooting* study again expressed a wide range of views. While 7.02% believed that there were "more than 10,000 mediators" in the market, 14.91% believed there were "less than 100" mediators. The most popular choice (20.18%) was "between 5,001 and 10,000 mediators." Some 64.04% of respondents agreed with the statement that "the supply of mediation services in civil and commercial disputes is exceeding the demand for those services."

Key Challenges

Despite significant developments, several challenges remain if a culture of mediation and, more generally, amicable settlement is to be fostered in France. The first challenge concerns the need to consolidate laws addressing mediation into a codified law that more clearly defines and differentiates mediation, conciliation, and the ARA.

The second is the fragmented nature of mediation's institutionalization and the need to strengthen the ADR acceptance by all those involved in the law and beyond.

A third challenge concerns the absence of regulatory standards for mediation practice. The CNM, supported by mediation movements and the broader MoJ, has recently made valuable recommendations for addressing this challenge.

The fourth challenge concerns the need to increase the perceived societal and economic benefits of ADR broadly and at the individual actor level. In a market offering multiple competing modes of ADR, clearly defined, articulated concepts and identification of socio-economic benefits are needed. From this perspective, training for judges, lawyers, mediators and other prescribers is essential.

The fifth challenge is the need to develop high-quality, harmonized training for all those involved in mediation and other ADR processes to promote confidence in them.

The sixth challenge concerns whether French justice system resources are adequate

to address the many future needs mentioned here.

The seventh challenge concerns the need to establish and pool statistical tools. A pilot scheme could be used to develop fair and effective rules on statistical and reporting tools for all types of mediation, whether public, administrative, institutional, contractual, or judicial.

The last challenge concerns promoting mediation in the broader commercial and business context, particularly regarding social and environmental vigilance and corporate sustainability due diligence. Mediation is conducive to supporting these obligations. It allows companies to engage in profitable dialogue and facilitates creative and mutually satisfactory ways to reduce and manage risks linked to company activities affecting fundamental rights, health and safety of people and stakeholders, and the environment.

To end the survey, *Rebooting* study respondents expressed a wide range of views on measures that could accelerate France's mediation development.

The specific legal measures that attracted the most support from respondents, in descending order, were requiring mandatory mediation information sessions before litigation proceedings; providing incentives for mediation, such as tax credits or refunds of court fees; and "requir[ing] lawyers to inform parties of mediation as an alternative to litigation and enforce penalties for lawyers who fail to do so."

Respondents also supported more general endeavors to promote mediation use, including raising awareness, educational efforts, and quality assurance measures. The most-supported measure by the respondents (and the authors) was to "establish a mediation advocacy education program for law schools, business schools, and other higher educational facilities." Next came "develop[ing] and implement[ing] pilot projects to encourage the use of civil and commercial mediation."

* * *

Since the 2014 iteration of the *Rebooting* study, French mediation development has steadily improved.

Its integration into civil judicial proceedings has accelerated; awareness among legal professionals, including judges and lawyers, has increased; and training programs have proliferated. Today, mediation, in association with other ADR mechanisms, is a pillar of modern justice, supported by institutions and associations that work together to make justice faster, more accessible, better accepted, and adapted to the new challenges.

Respondents to the current *Rebooting* study broadly favored greater integration of mediation into the courts, including more judicial orders for mandatory mediation information meetings. But most prefer leaving mediation itself voluntary, except for small-scale disputes.

In author Linda Benraïs' view, too, mediation must remain free and voluntary if it is to retain its appeal. Sanctions for unreasonable refusal to mediate, even if they promote mediation growth, should be avoided except for small disputes and neighborhood problems.

Some respondents appeared to be unaware of current law about certain issues, reinforcing respondents' support for improved education standards, and, perhaps, reflecting the rapidity of mediation's recent evolution.

Finally, measures and incentives facilitating the use of mediation to support corporate vigilance and diligence duties offer an important and timely opportunity to be seized.

ADR Techniques

(continued from front page)

CEO, CFO, VP for Operations, and VP for Human Resources at the table—each one with their own partisan and, as to be expected, somewhat inconsistent interests, which could result in failure if their discrete interests are not met.

Calls for a mediator, don't you think? And if your answer to both the negotiation vignette and the mediation vignette is "yes," you, too, will want to know more about sales.

Research into high-end sales, with their high-end consequences, found that successful salespeople do not persuade; they ask well-structured questions that help buyers (and themselves) better understand the problem and envision solutions. The successful sales process uses questions in support of this "staged process"—recognizing needs, evaluating options, resolving concerns, and choosing a path forward.

The research also found that the questions and the process put the buyer and the seller on the same side of the discovery table. Equally important, the resulting answers help create a shared perspective of the issues which, in turn, enabled parties to feel and think their way through to potential solutions.

This research shook my lawyerly belief in advocacy. Early in my mediation career, I thought convincing others of what they should do was the mark of a great mediator. But over time, I saw that disputants resist being told what to do—if only because they are the ones who must live with the result, and they are often unsure how it would play out. Durable agreements come from self-discovery, I learned, not from coercion.

Rackham's SPIN model—**S**ituation, **P**roblem, **I**mplication, and **N**eed-payoff questions—equips mediators with a framework for productive inquiry. See Spin Selling, above. Of particular value are Implication questions, which take a problem and help the Buyer explore its effects and consequences, and Need-payoff questions, which invite the Buyer to identify possible solutions.

It is these two questions that most help parties delve into and understand the realities of their situation, the costs and consequences of staying put, and the benefits of change.

One mediation illustrates the power of this approach. A young woman injured by a bus was facing a difficult legal battle. The defense's position? Her injuries were due to pre-existing conditions.

Instead of jumping into law and liability, I asked her, "Are you okay?" and later, "How has this changed your life?" She shared that her true hope was to switch careers. I followed: "I wonder if you and the company would be interested in using this mediation to help that happen?"

Together, they created an agreement that supported that goal. And the company, at its own volition, expanded her agreed figure to cover her legal fees. No one was bludgeoned. Everyone was heard.

Legal Risk v. Human Risk

Research into complex sales also sheds light

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ADR Techniques

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on emotional barriers. Rackham observed that people are less likely to move forward until they feel that staying put is more painful than the risk of change.

Effective questions help parties confront the cost of inaction and imagine a better future. Only when these fears are addressed do they feel safe enough to commit.

Traditional mediation focuses on legal risk, which has always fascinated me as a former Assistant U.S. Attorney. Two reasons: I had won jury trials that few in the U.S. Attorney's Office thought were winnable. And I had lost jury trials that few in the Office thought I would lose. Putting it all together? I stopped brain-betting what a jury would do after my 30th jury trial.

And I stopped prognosticating completely once I became a District of Columbia U.S. Circuit Court of Appeals mediator. I believed then and still believe that court-supported mediation is a gift from the judges. Instead of requiring a disputant to hand over their future to a judge or a jury who will apply the law to the facts as they understand the law and hear the facts, mediation invites the parties to design their own future as they choose, as long as that future does not break the law or violate public policy.

To design your own future, to co-create value? What a gift! And what a burden, because now all responsibility rests with the disputants and their counsel.

This is true risk—Risk with a capital R. The mediator is asking the disputants, encouraging them, or, depending on mediator style and the lawyers' ineptitude, browbeating them to dive into the future with no idea if there is water in the pond. It's not legal risk that is stopping them from moving. It is *human* risk—the fear of change, fear of loss, fear of the unknown.

It is these human risks that freeze disputants into inaction. Mediators who think only of legal odds might have a hard time helping the parties deal with these very human risk factors. But it is recognizing and managing them appropriately and well that unlocks resolution.

Partnering with Counsel

These insights reshaped my practice. I became more intentional in how I prepared for mediations. Rather than imposing a standard mediation process, I began collaborating with counsel to co-design the mediation.

I started meeting lawyers and their clients in their own environments, learning about their perceptions and goals way before the day scheduled for mediation. As a result, we usually began the mediation in joint session. The risk level to all was low enough that to begin otherwise made no sense. (Not doing so may even have frightened everybody.)

A Shared Perspective

The ADR technique: Translating sales practices in the mediation room.

But why? Questions that target customers' purchasing requirements are adaptable and effective as a basis for mediators to satisfy parties' needs.

Projecting Better Outcomes: Sales research skills can help the mediator reach the goal of helping parties find the courage and clarity to do what's right for them.

After that, joint sessions and caucuses became tactical tools, not default stages. Counsel became partners in guiding the process. All intended and designed to help reduce their and their clients' human risk.

Sales research also introduced me to the idea of an "advance"—an incremental, observable step forward. In complex cases that require multiple sessions, simply continuing isn't progress. Progress is when each session produces a concrete result.

So now, before every meeting, I work jointly with counsel to identify goals—best-case and minimal—and to assign homework in between. "What do each of you and your clients need to learn from the other to help both your clients decide next steps?"

We also decide together who must attend the next meeting to ensure the process advances. This planning maintains momentum, avoids surprises, and, in that process, builds trust.

Choosing Not to Jump To Solutions

Another key lesson: Choose not to offer solutions too soon.

Sales research shows that early answers often miss the mark, leading to objections and even outright rejection, no matter how spot-on the solution. Mediators are especially vulnerable to this. Those of us who are trained as fast-thinking lawyers rush to solve.

But we must resist. We must listen deeply and allow parties to explore their concerns. Sometimes a well-placed question is more effective in helping parties move than any "knowing" suggestion.

Living With The Outcome

Ultimately, mediation is not about the mediator's wisdom. It is about the parties' and their wisdom. They alone must live with the result. And sometimes their brains and their guts are in conflict with each other.

The best mediators understand this. They are fluent in many styles and strategies. They adapt to each situation and empower each party.

By borrowing insights from sales, mediators can enhance their effectiveness. They can ask better questions, respect human risk, plan measurable advances, and listen more usefully. They can create a disputant-centered process that produces durable, satisfying, implementable agreements.

Mediation is not about telling people what to do. It's about helping them find the courage and clarity to do what's right for them. Try out the sales research yourself and see how it works to provide courage and clarity to the parties. And give yourself time to get comfortable with your new skills and adapt them to your own personality and style.

Back to School on Dispute Management

Relational Negotiations: Three Proven Approaches To Help You Work Through Issues and Conflict

BY KATE VITASEK

Last month's column covered the evolution of negotiation strategies–showing how approaches have shifted to more collaborative moves from competitive tactics over the recent decades. "The Evolution of Negotiation: From Combative to Collaborative," 43 *Alternatives* 176 (November 2025) (available on *Westlaw*). This month, I build on the topic and show how using a more collaborative relational negotiation approach can prevent disputes when applied early.

Let's start with a definition of negotiation. *Getting to Yes* authors Roger Fisher, William Ury, and Bruce Patton define negotiating as a "back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed."

In "Preventing the Dispute Before It Happens: Proven Mechanisms for Fostering Better Business Relationships," we take a similar–but-different–approach to defining negotiation. [*Editor's note:* Kate Vitasek co-authored the book—a prominent source for these columns—with James P. Groton, and former CPR Institute officers Allen Waxman and Ellen Waldman.] It is described as "any method of direct or indirect communication where parties with opposing interests work together to resolve a problem, conflict, or dispute." We purposefully add emphasis to promote negotiation as a key tool when issues are small–in the problem and conflict phase–before a dispute arises.

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Benefits of Negotiated Resolutions

There are several benefits to using negotiation to solve problems, conflicts and even disputes. These include:

Maintain Control: Contracting parties are not forced to participate in a negotiation. If they opt for negotiation as a pre-dispute resolution mechanism, they can opt to negotiate directly or use a representative, such as a lawyer. Additionally, the parties are free to accept or reject the outcome of negotiations and may withdraw at any point during the process.

Non-adjudicative: Negotiation involves only the parties, meaning they are not using a third party to decide on their behalf. Negotiating parties, however, may request a third party to assist in facilitating their negotiation process.

Flexible: The parties can tailor the negotiation process to fit their needs. For example, they can agree on the timing and location of negotiations, the number of negotiating sessions the parties commit to, and the information they share. Additionally, they can determine the negotiation rules they will use (e.g., an interest-based approach).

Bilateral/Multilateral: A negotiation process can involve as few as two parties (e.g., a single buyer and supplier) or multiple parties (e.g., a construction project owner, the architect, and the builder).

Confidential: The parties may negotiate in public or in private. Usually, organizations—especially in the private sector—opt to have confidential negotiations.

Cost-Effective: Negotiating is typically less expensive because it does not involve court, mediation, or arbitration fees, and often does not require lawyers' services.

Research Backs Collaborative Talks

There is significant research into the benefits of using more collaborative negotiating approaches.

Research in collaborative approaches gained momentum when John F. Nash Jr., John C. Harsanyi, and Reinhard Selten's work won a 1994 Nobel Prize in economics. The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1994, Nobel Prize (available at https://bit.ly/4odKZJm).

Their work inspired academics around the world to delve deeper into what is known as game theory. Game Theory, Stanford Encyclopedia of Philosophy (definition and discussion at https://bit.ly/3J37VMy).

Game theory is the study of the outcome of strategic interactions among decision-makers. By employing rigorous statistical methods, researchers can model the outcomes that occur when individuals opt for a cooperation approach instead of an aggressive, power-based approach to negotiation.

The University of Michigan's Robert Axelrod—a mathematician turned game theorist—used statistics in a famous game theory study to show that when individuals cooperate, they reach more advantageous outcomes than when they don't. He published his research and conclusions in the book "The Evolution of Cooperation" (1984; revised ed. 2006), which is widely taught around the world.

Sadly, many business leaders are taught strategies focusing on using their power and playing to win at the other party's expense. Kate Gibson, "4 Strategies for Shifting the Power Balance in Your Business," Harvard Business School Online, *Business Insights Blog* (Aug. 9, 2022) (available at https://bit.ly/3VVZju9).

This is an easy trap to fall into when negotiating, as books such as "Start with No," "Get More," and "The Negotiating Game" all teach how to

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win at the negotiating table. Nobel laureate Oliver Williamson advises against this—stating, "Muscular buyers not only use their suppliers, but they often 'use up' their suppliers and discard them." Williamson calls a power-based muscular approach "myopic and inefficient." Oliver E. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations," 22 *J.L. & Econ.* 233 (1979) (available at https://bit.ly/4qalTNA) (relationship governance).

Relationship-Preserving Approaches

Below are three relationship-preserving negotiation tactics that can be used to resolve problems and conflicts before they escalate into formal disputes.

Use an Interest-Based Negotiation Approach. The best-selling book "*Getting to Yes*" began promoting a more collaborative, "principle-based" negotiation approach in 1981. Today, the concept has evolved with a variety of experts teaching collaborative/interest-based approaches which generally agree on the following best practices:

- Concentrate on interests, not positions.
- Separate the people from the problem. This entails not blaming the other side for the problem(s) one has encountered and discussing the perceptions held by each side. It also requires a commitment to ensure effective communication between all parties.
- Listen carefully and actively to what the other side is saying and acknowledge what is being said. This can be done by asking questions and by making frequent summaries.
- Make the negotiations a "win-win" outcome by creating options for mutual benefit.
- Use objective standards. Ideally, the standards are agreed to before starting the negotiation sessions.
- Evaluate proposals and solutions in light of the BATNA, or "best alternative to a negotiated agreement."

Focus on Getting to We. The book *Getting to We: Negotiating Agreements for Highly Collaborative Relationships* (by Jeanette Nyden, author Kate Vitasek & David Frydlinger) (Springer 2013) goes beyond interest-based negotiation and suggests the following three relationship-preserving tactics:

- Adopt Guiding Principles. Guiding Principles—used in relational contracting—are a powerful tool that can be applied to any negotiation. Even if the parties have not adopted the Guiding Principles as part of a formal relational contract, they can still agree on the Guiding Principles for their unique negotiation.
- Agree on Allowable/Not Allowable Tactics: Many negotiation books teach tactics that promote adversarial behaviors. An effective approach for preserving the health of a business relationship is to go through a list of known negotiating tactics and define if each tactic is allowed or not allowed in the actual negotiations. A good rule of thumb is for the parties to prohibit tactics that erode trust, such as bluffing, good cop-bad cop, and stalling.
- Agree on the Level of Transparency the Parties Use: The premise is that, if information is power, information shared is exponentially powerful in helping parties work through solutions. When the goal is problem-solving (versus dispute resolution), being as transparent as possible will help the contracting parties solve their problem with a broader lens.

Control Factor

The technique: Structuring discussions.

The premise: Negotiating is a given, and it's a well-documented science. This column grounds its place in dispute prevention.

The improved business setting: You can collaborate not just on a project or a contract or an enterprise, but also on how you discuss your business.

Incorporate Step Negotiation. Step negotiation encourages individuals at the lowest level in each organization to solve potential problems promptly when they arise. If these individuals cannot resolve a potential problem, they escalate the item to the next higher management level in each organization.

There are three rules of thumb when incorporating a step-negotiation process.

1. Establish a clear definition for the various types of issues and determine when they should be escalated. For example, what does it mean to have an "issue" versus a "problem" versus a "conflict" versus a "dispute"?
2. Integrate step-negotiation into your dispute management clause, which outlines pre-agreed-upon processes and timeframes to prevent problems from festering. I'd go so far as to say use a simple table or flow chart to help people "see" how to use the process.
3. Incorporate an issue log (and/or risk register) into your continuing governance forums to track issues and ensure they are properly escalated and resolved.

A step negotiation process provides an inherent incentive for resolving issues while they are small. How? When individuals from each organization have autonomy to work through a potential "issue" or "problem" when they are small, they can demonstrate to colleagues and supervisors their ability to solve problems; individuals are thus incentivized to promote their problem-solving prowess.

A happy side effect is a reduction in conflict that escalates into a dispute. The defined step-negotiation process also helps provide structure so potential problems do not fester. And this approach spares "upper management" from having to get involved, preserving their time and attention for more vital tasks.

Step-Negotiation Case Study

The case study below illustrates a step negotiation process in a construction project. OwnerCo is a typical organization funding a construction project. In this case, OwnerCo was the designer/architect/funder of the construction project.

OwnerCo contracted with BuildCo as the general contractor that would perform much

of the work, including overseeing subcontractors. The parties agreed to a five-step dispute prevention ladder to help them prevent disputes. See the chart below.

The process begins when either party identifies an issue that requires the parties to work together. The goal for the parties is to resolve issues at the lowest level before they escalate into problems, conflicts, and disputes. The process starts at the lowest level possible (inspector/foreman) and proceeds through both organizations' hierarchies. Unresolved issues at the lowest level are flagged to the next level in the escalation ladder.

As issues escalate, the focus shifts from a simple issue to a potential problem, a defined problem, a conflict, and a formal dispute. An escalation to the next level is a formal signal to everyone involved that there is a heightened need for collaboration to work through the escalated item.

A Risk Register tracks issues to manage risks and prevent issues from becoming a problem. If appropriate, the parties can skip levels in the dispute prevention ladder. For example, if something urgent happens and needs immediate attention, an item can start at a higher level (e.g., a defined problem). The goal, however, is to identify and manage risks before they become problems.

Escalating an item to the next level occurs in writing (an email or simple memo), which signals the lower-level participants are requesting help from the next level. A key part of the process is that at each step in the dispute prevention ladder, the individuals at the lower level must identify their points of disagreement and suggest what they might need for resolution.

When an escalated item moves to a defined problem, the parties complete a form to help them document and articulate their misalignment to the next level. When an escalated item reaches the final level (a dispute), the parties trigger a formal Notice and Cure Agreement.

Once an issue escalates to the next level, it is incumbent on those personnel to meet as soon as possible to try to resolve the issue. But once an item escalates to a potential problem, the individuals at the next level hold an ad hoc meeting to address the issues. As time is money in construction projects, individuals at the dispute ladder's second and third levels have set aside predefined times on their calendars to work on potential problems and defend against increased discord. If there are no problems, the parties can simply cancel the meeting.

Although this example originates from the construction industry, the concept can be applied in any industry.

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The bottom line is that relational negotiations can be hugely beneficial for all parties—reducing conflict, giving parties autonomy to work through potential issues when they are still small, and helping parties prevent problems before they become formal disputes.

While I have outlined three relationship-preserving negotiation approaches in this article, it is important to consider that you don't have to cherry-pick. The best organizations use all three!

Level	OwnerCo	BuildCo	Defined Focus	Escalation Trigger
1	Inspector	Foreman/ Superintendent	Issues	Issues managed on a Project Risk Register
2	Resident Engineer	Project Manager	Potential Problems	Email or memo
3	Construction Engineer	Area Manager	Defined Problems	Problem Resolution Form
4	Division Chief	Operations Manager	Conflict (Claim)	Claim Form
5	Board	President/ Owner	Dispute	Notice and cure provision guidelines in contract

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In our courts, we seek to embed ADR, not as an add-on, but as a *default mindset*—a habit of asking, "What does this person need? What's the conversation that hasn't happened yet?" I am grateful to be part of a court system that supports and encourages this way of problem-solving to help the public we serve.

Design matters. The way we structure choices—how we invite people to mediate, how we frame options—can guide people toward resolution, without force, without fear.

Prevention isn't just about systems. It's also about our choices as individuals.

It's the *daily discipline* of showing up, listening deeply, staying curious, and seeking out collaboration. Of asking, "What else might be happening here?"

It's also about energy. If we want to prevent conflict, we must *renew ourselves*, so we can meet others with clarity, compassion, and creativity.

Of course, not all conflict can be prevented. Some conflict is necessary and even healthy. The danger is when we get stuck—when conflict becomes identity. Our job is to *unstick or dislodge* it. To create space for movement, for nuance, and for possibility.

That brings me back to Chuck Newman.

Chuck believed in the idea that people—given the tools and the trust—can resolve their own conflicts. That's the heart of prevention. Not solving problems for people, but *with* them. It's challenging, and it's something I struggle with every day—as a mother, daughter, spouse, sister, friend, colleague, and manager.

So today, I invite us to keep doing the work. Work that is often unrecognized, and uncelebrated.

Sometimes the *amount* of the work or the *complexity of the tasks* can feel insurmountable. I like to take comfort from ancient wisdom (as well as modern day podcasts, articles, and books).

In the Jewish tradition, in the Ethics of Our Fathers, there is a phrase, *Lo alecha ham'lacha ligmor. V'lo atah ben chorin l'hibatil mimena.* [It means,] "You are not required to finish the work, nor are you free to abandon it."

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This phrase speaks to the commitment [and] perseverance, needed to improve one's own character, on behalf of the local community, and the world. Even as we know that we can never fully accomplish all we may dream of accomplishing, we take comfort that w*e are part of a larger arc of change—and our contributions matter, even if the finish line is far off.*

So to my family and friends, my professors, including [Columbia University Law School Clinical Professor of Law Emerita] Prof. Carol Liebman, who is in the audience, mentors, ADR colleagues, the Statewide ADR Advisory Committee, and the broader ADR Community: Thank you for this journey. Thank you for this honor. You inspire me to do this work with all my heart.

Duncan MacKay: … I'm deeply honored to receive this recognition from the Association for Conflict Resolution of Greater New York.

I would like to thank the association's leadership for this meaningful award—and extend my appreciation to the members of ACR for the vital work you do every day to promote peace, dialogue, and conflict resolution in our communities and professions.

ACR-GNY's mission to connect, convene, and advocate for the conflict resolution community is both inspiring and essential. Your commitment to inclusivity and collaboration strengthens not only the field of ADR and conflict resolution, but the fabric of our society. The breadth and diversity of the association's membership—from mediators and lawyers to educators, clergy, and restorative justice practitioners—reflects the richness and reach of this important work.

I congratulate my fellow Chuck Newman Award recipient, Lisa Courtney, whose leadership in the New York State judicial system and bar has been instrumental in supporting and expanding ADR programs across the state. I was privileged to serve on the Connecticut Commission on Civil Court ADR in 2012 under then-Chief Justice Chase Rogers, and I deeply appreciate the importance of Lisa's work to expand ADR in our justice system. …

This award is especially important to me for two main reasons:

First, it is presented in connection with Mediation Settlement Day—my passion for mediation, and ultimately dispute prevention and ADR, was ignited 42 years ago as a student intern at the University of Massachusetts community-focused Massachusetts Mediation Project, and my passion for mediation and ADR has not abated since.

Second, because the award is in the name of Chuck Newman. While I did not have the privilege of knowing Chuck, I read a special tribute to him written by Simeon Baum entitled, "Summoning Chuck Newman: Brilliant Mind, Great and Warm Heart, Generous Engagement with Community," [15(2) *NYSBA New York Dispute Resolution Lawyer* 12 (2022) (available at https://bit.ly/3XbC3bW)].

It was evident from that tribute, and from earlier remarks by Dr. Nick Pozek [ACR-GNY's president], Noah Hanft [the evening's MC, principal in New York's AcumenADR, and former president of the CPR Institute, which publishes this newsletter], and Lisa Courtney, that Chuck was universally regarded as a guiding light in New York's ADR and conflict resolution communities, nurturing not just the growth of the conflict resolution profession, but the spirit of connection, compassion, and commitment that defines this community.

By bearing his name, this award ensures that Chuck's legacy continues to inspire us—as it will inspire and humbles me—not only in the work we do, but in how we show up for one another each and every day. This is especially meaningful tonight as Chuck's wife is here and some of his children are participating remotely.

As an in-house attorney for the past 29 years, I've had the privilege of championing dispute prevention and ADR in the corporate and commercial contexts.

Working with my outstanding and supportive business and legal colleagues at Eversource Energy, we have embraced strategies like proactive risk mitigation, supplier relationship management, dispute prevention and stepped ADR clauses in our agreements, and early conflict intervention.

We engage in these practices not just to avoid litigation, but to preserve and strengthen commercial relationships, and help the business fully realize the benefits of the agreements we enter.

These tools are not just legal mechanisms; they are Business Enablers. …

These beliefs have guided my work with organizations like the American Arbitration Association—[which MacKay thanked for hosting the event]—the International Institute for Conflict Prevention and Resolution [which publishes *Alternatives*; McKay has long been active in a variety of CPR projects and is currrent CPR Dispute Prevention Committee co-chair], [the Association of Commercial and Transactional ADR Professionals, known as] ACT-ADR, and most recently, the Association of Corporate Counsel, where we're building a new community focused on dispute prevention and ADR among in-house lawyers.

In closing, thank you again to ACR-GNY for this recognition, for your leadership in advancing the practice and public understanding of conflict resolution, and for recognizing the growing importance of dispute prevention in our field.

Let's continue to innovate and advocate for approaches that identify the seeds of conflict early and enable thoughtful resolution before escalation—building stronger, more resilient relationships in the process.

Paraphrasing a saying attributed to Chuck Newman in the tribute article on this Mediation Settlement Day, let us all strive to "awaken the genius in the parties" to help them prevent and find resolutions to conflicts.

Thank you!

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After the presentation of the Chuck Newman Award to the recipients, Duncan MacKay participated in a panel discussion on dispute prevention that also featured Noah Hanft, and Kate Vitasek, a Distinguished Fellow in the Global Supply Chain Institute at the Haslam College of Business at the University of Tennessee in Knoxville, Tenn., and author of the *Alternatives* column, "Back to School on Dispute Management," which can be found on page 203 of this issue. See https://acrgny.org/msd-2025 for details on the program, including a link to a recording of the full program.