

Dispute Prevention in Business Transactions:
An Introduction and A Conversation

Hosted by Deborah Hylton, Hylton ADR Services, LLC
with:

Noah Hanft, AcumenADR LLC

Steven Bierman, Partner, Sidley Austin
Kimberly Caccavaro, Counsel, General Motors
Sashe Dimitroff, Partner, BakerHostetler

Kimberly Maney, Ass't GC, GlaxoSmithKline
Pilar Ramos, GC, North America, Mastercard
Myra Selby, Partner, Ice Miller

Significant time, human capital and financial capital are invested in planning and documenting strategic transactions. Even in long-term, mutual value-creating business relationships such as joint ventures, parties and counsel often give only passing attention to the potential for conflicts arising in performance and threatening the fundamental purpose of the deal. Well-honed but now-boilerplate dispute resolution clauses are often implemented with little if any reflection on risks of the transaction at hand.

Nearly 50 years ago, the prevalence of conflicts in major construction projects led to innovative measures to prevent, not just resolve, disputes. Thought leaders in the construction industry and ADR circles encouraged provisions and structures such as dispute boards to address conflict early. While many commentators have observed the value of dispute prevention in business transactions, innovations have not been widely adopted in commercial transactions beyond construction.

A leading ADR proponent for dispute prevention has been--as its name suggests--the International Institute for Conflict Prevention and Resolution (CPR). A non-profit whose members include global and U.S. companies, law firms, academics and ADR practitioners, CPR has provided significant thought leadership in prevention. In January 2021 CPR announced the launch of its Dispute Prevention provisions, available here <https://www.cpradr.org/resource-center/model-clauses/dispute-prevention>. The provisions supplement traditional dispute resolution clauses, rather than replace them, by calling for:

- Parties' commitment to the principle of early identification and discussion of disagreements.
- Internal relationship manager for each party to monitor performance with responsibility to manage the business relationship and identify, early on, any disagreements.
- Flexible options to utilize the services of a third-party as facilitator or neutral as disagreements arise in contract performance.
- Regular meetings, with or without the third-party neutral, to discuss deal performance and identify potential conflicts.
- A range of identified contract provisions and tools for use internally and with the transaction's counterparties to support the mutual endeavor.

My 22 years as a deal lawyer and dozen years in business-only roles prior to my ADR practice give me a natural affinity for dispute prevention. For CPR's annual meeting in January 2021, I gladly joined a group of in-house counsel and leading corporate and business litigators to role-play how the absence or inclusion of dispute prevention could impact a hypothetical joint venture. Noah Hanft, who launched the dispute prevention initiative at CPR and is now a full-time neutral, organized us in exchanging ideas about benefits of and obstacles to dispute prevention. We re-convened in this conversation to share with our colleagues in the ABA Business Law Section how dispute prevention can benefit strategic business transactions. To view a 20-minute excerpt of the role-play, see the link at the end of this article (with thanks to CPR for the permission).

NOTE: Opinions expressed by the participants in this conversation reflect the views of that participant but do not necessarily reflect positions of their respective employers. Opinions expressed in the video in the role of “skeptic” are purely for role-playing! Participation in this article and the video should not be interpreted as an endorsement by their employers of any processes, products, services or vendors.

Noah Hanft, after your notable career rising to general counsel at Mastercard, you took the helm of CPR for 5 years and initiated the dispute prevention project. What experiences as corporate counsel drove your interest in dispute prevention?

Even though I implemented mediation and early resolution of disputes, I now see that more could be done. In mediating commercial cases, it was clear that emotions ran high, there was a lot of ill will, and the parties had not begun speaking to each other until it was too late. The warfare had begun. After significant time and money was spent, most of these disputes did actually settle because of the better understandings gained through communication in mediation. It seems obvious: why not build in the tools to *really* address disagreement earlier in the process? (NH)

You have described prevention as your “mission”. Can we really prevent conflict?

Disagreement or conflict is inevitable. The opportunity is to prevent it from metastasizing into a full-blown dispute. As the writings from academics and others show, you can actually prevent disputes (where conflicts become entrenched) by addressing areas of disagreement early on. (NH)

Sashe Dimitroff, while we were preparing our role-play you discussed prevention with a group of general counsel and a CEO who were all former litigators. That group expressed a lot of resistance to the concept. Tell us about some of the many objections you heard.

The objections fall into a few basic buckets:

- 1. The most basic objections were based on a lack of understanding of the process – for example:**
 - a. “Dispute avoidance” sounds a lot like an escalation clause, which is something the companies were already doing; and**
 - b. It sounds like allowing an “expert” like an engineer or accountant act as an arbitrator. Adding any kind of third-party facilitator or neutral sounds like giving control over the decision to a technical third party who may not understand the legal or non-technical business issues, and lawyers and business folks are very loathe to do that.**
- 2. The process takes too much time and resources, and using a third-party facilitator or neutral takes too much money. Either the deal would go through or not – if there was a dispute, the issues can either be resolved by management during the escalation clause or they can’t (i.e., if we can’t fix it, it will have to go to court or arbitration).**
- 3. Putting the deal together is hard enough; we don’t want to show a lack of confidence our ability to get along by introducing a dispute prevention system. We could crater the deal before it’s out of the starting blocks. (SD)**

It’s interesting how many of those very issues actually have some factors that weigh in favor of dispute prevention, isn’t it?

It sure is. In each of these objections, there are actually significant benefits from adopting prevention.

- 1. As for market and trying something new in a critical transaction, the terribly low success rates in JV's show a need for innovation. Einstein's definition of insanity is doing the same thing and expecting a different result. It's time for some thoughtful innovation to protect the continuity of important projects.**

Also, dispute avoidance is very different than an escalation clause. It is prophylactic in that it allows parties to constructively work together through issues as they arise rather than waiting until the disagreements are so pervasive that everyone is "ready for a divorce."

- 2. Giving up control is a very important concern that needs to be heeded. Any third-party facilitator has to respect the boundaries of his or her role. You've said, Deborah, that the third party has only responsibility, not authority—and that's very true. The agreed neutral's role is to provide independent observations and perhaps suggest new solutions as additional information for parties to consider. In reality, it's winding up in arbitration or litigation that hands over the decision to a third party. Dispute prevention allows the parties to consider, accept, reject, or modify solutions. It actually gives the parties a head-start on exploring issues and solutions together.**

As to time and cost, the data shows otherwise, at least in the leading studies in construction. Even beyond that data, we can all consider the many times in which it was critical to slow down to speed up and invest time and perhaps some additional fees wisely in solutions along the way.

- 3. Of course it's important to protect the relationship, rather than put it at risk by introducing a dispute prevention system. Most businesspeople are pragmatic and have observed if not experienced plenty of failed commercial relationships. Forcing the parties to confront the reality that issues may arise might deflate some of the emotion of getting a deal signed, but it will surely lay a stronger foundation on which to build a solid future. (SD)**

We were fortunate to have three current in-house counsel on our panel. Let's explore their perspectives.

Pilar Ramos, Mastercard is well regarded for its success in joint ventures, so it's obviously done many things well along the way. What do even companies with a successful track record have to learn from these new provisions?

Going through this exercise caused some pause in my thinking about prevention. That's the first thing any company can do: create some pause in advance of transactions as a business strategy and a legal strategy. The executives ultimately will make the decision about using prevention tools. Companies will listen carefully to the advice of outside counsel, first at the inhouse counsel level and then as the advice is ultimately delivered to the executives. (PR)

Sashe mentioned a need for innovation. Kim Caccavaro, General Motors is recognized as focusing on innovation in its core business as well as in its legal department. In 2019 Financial Times named GM the most innovative in-house legal team in North America. How does that innovation mindset impact your thinking, Kim, about implementing dispute prevention?

Pragmatically, new ideas take some time for adoption. Lawyers are not naturally inclined to change, so it's a process. Even a company that perceives itself as cutting edge has to recognize there may be a new way that's beneficial. It reminds me of how rep and warranty insurance came

to be a common practice. At first it was perceived as a hassle, outside the norms. Now, after a few years, it's a well-accepted practice. (KC)

What new information did you uncover in exploring dispute prevention with the panel?

The cost savings! One large manufacturing corporation saved an estimated \$1 million to \$6.5 million each year over a 20-year period with dispute prevention integrated into its programs. A shared agency group reports savings of \$18 million from using a dispute prevention program in employment matters. The construction industry has a wide range of reduction in litigation which translates into cost savings. (KC)

Kim Maney, at GlaxoSmithKline you're part of the biopharma industry that's well known for long-term partnerships and mutual dependencies, especially given FDA timelines. Those deals build in thorough governance structures including escalation of issues up management and executive tiers. What does a prevention focus add, if anything?

Committing to the principle of prevention allows the team to embrace the governance models they have put in place. Frequent meetings can become a real forum for quick identification and resolution of issues. People can get comfortable that disagreement or misalignment is okay as long we have quick plan to find a solution. That in turn helps shift the focus in the collaboration from "winning" and "losing" and keep the focus on succeeding together. (KM)

The world is fortunate that some highly publicized and vital collaborations are producing solutions to our pressing COVID-19 needs. But historically and now, there are times the scientific hypotheses prove wrong and the desired product just fails. How does a prevention mindset help when the science just doesn't prove out?

Collaborations need to remain civil even when the joint projects end not as the parties intended, especially in a contracting industry such as biopharma where the number of potential partners is limited. The good communication and blame avoidance that happen in early tackling of issues can provide a solid foundation for the parties to work together on other projects. Using relationship facilitators or third party neutrals may help preserve these relationships. It can also allow business leaders to learn tools for in-the-moment healthy disagreement discovery and resolution. (KM)

Steve Bierman, you are a senior litigation partner at Sidley Austin, and I was intrigued by your supportive perspective on dispute prevention. You're such a highly regarded litigator, one would expect you to be spoiling for a fight. And one might cynically expect litigators to want to protect litigation business. What motivates your interest in dispute prevention?

I greatly enjoy being a litigator and am always up for a fight, when that best serves the client's interests. That said, we are first, and last, problem solvers for our clients in aiming to achieve their objectives. While that may mean full-blown litigating a dispute to a conclusion, it often means instead helping the client anticipate and avoid conflict in the first instance or managing disputes that do arise, without all-out war. I am concerned with client service, not with protecting litigation business. Clients appreciate, and I think will remember, counsel who finds solutions and recognizes that Benjamin Franklin was right: an ounce of prevention sometimes really is worth a pound of cure. (Franklin was referring to the value of preventing fires, over having to fight them.) And when litigation is warranted and unavoidable, as often is the case, we will be ready, willing, and able to meet the challenge. (SB)

You've gone through many mediations as an advocate and now sit as a mediator as well. How does dispute prevention sync with mediation—is it the same, a duplicate, or somehow different?

There's a continuum here. Dispute prevention protocols are different from engaging in mediation, but both are tools in the toolkit of conflict avoidance, management, and resolution. Adding a dispute prevention protocol to the menu for client consideration and, where appropriate, building it into contracts, gives parties a potential earlier firewall against mushrooming discord. Dispute prevention is complementary with mediation as a dispute containment tool by fostering communication between the parties and understanding of each other's perspective. Both prevention protocols and mediation help the parties strive together to find their own solution and common ground. (SB)

Myra, you came to your current distinguished practice as litigator, counselor, mediator and arbitrator after service on the Indiana Supreme Court and in state government policy roles. Is there anything from your judicial and policy experiences that are useful in dispute prevention?

Most definitely. The judicial background develops the ability to examine a dispute in a 360 degree fashion and be comfortable with that vantage point—that's the muscle the judge uses all the time. In state government policy, I developed the muscle of listening to extremely varying views from different perspectives and points of view. In litigation or arbitration, the views tend to be diametrically opposed. In policy work, the differences are multi-faceted and often arise from a range of entirely different realms, values or issues. In order to move forward on policy, one has to find some space in the controversy to hold all those disparate views—not to resolve, but to hold the disparate views. (MS)

How does that influence your view of dispute prevention?

I'm a firm proponent of the value in dispute prevention. I don't take its importance lightly. It's easy to say that it's important without trying to implement prevention, but I strongly believe in it and see the value of how it works. In my work with clients, I see the 360—not just 2 sides, but all sides—whether I'm advocating in a dispute or help to resolve in settlement or mediation. (MS)

Pilar, coming back to innovation, what do you think executives need to see or hear to adopt prevention for the first time?

Having trusted counsel --both outside and inhouse--who are informed, comfortable and confident in implementing prevention tools is key. We as lawyers are so creative as problem-solvers. Designing new processes for prevention uses that muscle in a novel way. We should be open to the idea for prevention. Take resources like CPR's as a starting point or directional guidance, and then build what works for the transaction and your company. (PR)

Kim Caccavaro, are there particular insights that can encourage deal teams to adopt prevention?

These processes complement traditional escalation clauses. First, by getting companies to take up the issues as they arise and before they escalate into enough of an issue to warrant escalation. This isn't another step in escalation, it's a commitment to deal with disagreements even before escalation. Second, by using a third party neutral, the parties have a resource with "transactional" history who can help identify when people are talking past each other. We've all experienced reading an email or hearing a comment in a way completely unintended by the sender. Getting those misunderstandings stopped early on saves time, money and business relationships. (KC)

Steve, what role do you think successful litigators like you have in leading the adoption of dispute prevention systems?

Learning about dispute prevention and management tools, and bringing them to the client's consideration and potential benefit, can really enhance the value that outside counsel brings to the table. I think it's a potentially differentiating factor, and for a client whose own thinking on disputes is evolving, a powerful way to align with a client's needs. Taking a broader view, gaining experience with conflict avoidance mechanisms and dispute resolution techniques expands the litigator's arsenal and makes you a more effective advocate. (SB)

Noah, you are one of the most knowledgeable thought leaders in the prevention field. What practical suggestions do you have for those exploring dispute prevention for the first time?

The key is educating management teams. Everyone I've spoken to says, "it makes perfect sense." It's shockingly intuitive. Take it to CFO's who grasp the financial benefits. We probably need new language—call it alliance management, business preservation, business continuity—to emphasize the contributions and value-add. Most important, it needs to be seen as a critical business provision, not the legal "boilerplate" at the back of the contract. (NH)

Myra, this is a newsletter of your colleagues in business and corporate litigation. What are your closing thoughts for them about encouraging clients to adopt dispute prevention processes?

Prevention is becoming an important alternative for more and more businesses, so business lawyers need to adapt to it. For those of us trained and comfortable as litigators and advocates always supporting one point of view, dispute prevention takes getting some adjustment. It's understandable when people are skeptical about it. Obviously, nothing substitutes for a positive experience. Before actually experiencing it, explore the evidence showing that prevention works. I would say "try it" in a situation where it won't change the long-range risk calculation much for the client. To our business/corporate law colleagues who put deals together, I encourage them to discuss dispute prevention with clients as one of many tools for approaching the inevitable conflicts that arise in a business transaction. Prevention, before resolution, has real economic, business and relationship benefit that business clients understand. (MS)

To watch a 20-minute clip of the role-playing simulation, click [here](#). Special thanks to CPR for making the clip available and to Sidley for video editing.