Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute For Conflict Prevention & Resolution
VOL. 29 NO. 10 NOVEMBER 2011

ADR Procedures

How and Why the Standing Neutral Dispute Prevention And Resolution Technique Can Be Applied

BY JAMES P. GROTON AND KURT L. DETTMAN

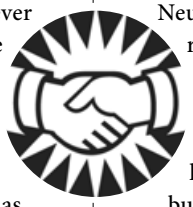
A "Standing Neutral" is an alternative dispute resolution process in which the parties in a business relationship select one or more "wise persons" to be available throughout the working partnership to assist in the immediate resolution of problems or disputes.

An earlier article by one of the co-authors—James P. Groton, "The Standing Neutral: A 'Real Time' Resolution Procedure that also Can Prevent Disputes," 27 *Alternatives* 177 (December 2009)—described the Standing Neutral process in detail, reporting on its considerable success wherever it has been used, particularly in the construction industry.

That article analyzed the dynamics that explain why the Standing Neutral technique not only *resolves* disputes promptly but also has the collateral beneficial effect of helping to *prevent* disputes.

This follow-up article will expand on the original by focusing on one of the Standing Neutral's most significant attributes: the flexibility, adaptability, and versatility of the process, which allows it to be tailored to fit many different kinds of business relationships and the particular dispute prevention and resolution needs.

After commenting on some of the notable ADR process characteristics that are particularly relevant to understanding the Standing Neutral approach, this article will (a) describe some of the variations of Standing Neutrals that currently are being used successfully in the business world; (b) review the essential elements of the Standing Neutral concept that should be present regardless of the variation used, and (c) discuss ways in which the process can be modified to adapt it to fit the particular dispute resolution needs of almost any kind of business relationship.



The article then suggests examples of business relationships that are good candidates for using Standing Neutrals. Finally, the authors propose a diagnostic tool to assist parties in comparing the optional variations to help them select the kind of Standing Neutral that is most suitable to meet the needs and priorities of a particular business relationship.

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THE CONTEXT

There are three observations about dispute prevention and ADR processes that put into a broader context the many different forms of Standing Neutral:

1. The genius of the modern ADR movement—where the "A" can now represent not only the word "alternative" but also "appropriate," "adaptable," and "anticipatory"—is the innate flexibility and adaptability of ADR

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View this newsletter online at wileyonlinelibrary.com
Alternatives DOI: 10.1002/alt.20334

CPR News

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Alternatives to the High Cost of Litigation is now available for mobile use for CPR members for free.

Alternatives' publisher, Jossey-Bass, a San Francisco-based unit of John Wiley & Sons, last month launched an app available for free from iTunes that provides exclusive handheld access to the monthly newsletter for individuals at CPR member organizations.

The details and download instructions are at www.cpradr.org. They are available to members when they log into the website with their registered work E-mail addresses. Members can read *Alternatives* in full text on their iPhone, iPad or iTouch.

John Wiley began providing app access to subscribers late last year via a new website, www.altnewsletter.com, which, like CPR's website, is updated regularly with select *Alternatives* content. The new CPR Members Only app provides exclusive free access to individuals at CPR Institute members as a benefit of joining the organization.

Alternatives is produced monthly, 11 times annually with a combined July/August issue, in hard copy by mail and electronically. CPR members get one hard copy, and unlimited free advance access to PDFs of each issue. CPR members also get free use of an indexed and searchable John Wiley archive of every *Alternatives* produced since the newsletter's January 1983 launch. Once signed into CPR's website, the archive provides useful PDFs of articles that chart the history of modern commercial alternative dispute resolution progress.

Nonmembers also may subscribe and access all *Alternatives* at OnlineLibrary.Wiley.com. Lexis and Westlaw contain full-text versions back to 1991.

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THE SURVEY SAID: CPR SEEKS YOUR ADR PRACTICE VIEWS

There are two new surveys on ADR issues available at CPR's website,

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Alternatives

CPR

JOSSEY-BASS™ An Imprint of WILEY

Publishers:
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International Institute for Conflict Prevention and Resolution

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John Wiley & Sons, Inc.

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Alternatives to the High Cost of Litigation (Print ISSN 1549-4373, Online ISSN 1549-4381) is a newsletter published 11 times a year by the International Institute for Conflict Prevention & Resolution and Wiley Periodicals, Inc., a Wiley Company, at Jossey-Bass. Jossey-Bass is a registered trademark of John Wiley & Sons, Inc.

Editorial correspondence should be addressed to Alternatives, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022; E-mail: alternatives@cpradr.org.

For reprint inquiries or to order reprints please call 201.748.8789 or E-mail reprints@wiley.com.

The annual subscription price is $199.00 for individuals and $337.00 for institutions. International Institute for Conflict Prevention & Resolution members receive Alternatives to the High Cost of Litigation as a benefit of membership. Members' changes in address should be sent to Membership and Administration, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022. Tel: 212.949.6490, fax: 212.949.8859; e-mail: info@cpradr.org. To order, please contact Customer Service at the address below, tel: 888.378.2537, or fax: 888.481.2665; E-mail: jbsubs@josseybass.com. POSTMASTER: Send address changes to Alternatives to the High Cost of Litigation, Jossey-Bass, One Montgomery Street, Suite 1200, San Francisco, CA 94104-4594.

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Worldly Perspectives

France Attempts To Boost Mediation Through Court Experimentation

BY GIUSEPPE DE PALO AND MARY B. TREVOR

On May 17, 2011, the French Parliament enacted law N°2011-525 on the "Simplification and improvement of the quality of the law." This law empowers the government to implement, through a decree (ordonnance), the provisions of European Directive 2008/52/EC on certain aspects of cross-border mediation in civil and commercial matters.

It is expected that France's forthcoming decree will go beyond the directive's scope to modernize the law applicable to domestic mediation as well.

In recent years, the French government has shown a real willingness to encourage the use of alternative dispute resolution mechanisms in general, and mediation in particular. Alternative approaches are seen as possible solutions to the problems faced by the French justice system, including excessive court caseloads. And, in fact, procedures for courts to refer civil and commercial cases to mediation have existed since February 1995. But the past 15 years or so have shown that these procedures are not widely used, especially for large cases.

More recently, efforts to encourage alternative approaches to dispute resolution have increased.

Within this movement, mediation is not the only ADR mechanism undergoing major changes in France. The government also has enacted Decree No 2011-48 of Jan. 13, 2011, reforming the 1981 French arbitration law. The new arbitration decree largely integrates the pro-arbitration case law of the French courts into the Code of Civil Procedure, making it more readily accessible to foreign practitioners and arbitration users.

The decree also contains some bold propositions that will certainly enhance the overall flexibility and efficiency of arbitration proceedings, and facilitate the enforcement of awards.

For example, the new arbitration law now clearly sets out that the parties, as well as the arbitrators, must act with speed and good faith in the conduct of the proceedings (Article 1463, paragraph 3).

In addition, any party that knowingly and without legitimate reason fails to raise an irregularity before the arbitral tribunal within

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The Basics

France lies in Western Europe, bordered by Germany, Spain, Belgium, Luxembourg, Switzerland, and Italy, but it also has numerous territories in various parts of the world. A republic, France's governmental structure includes a mixed presidential/parliamentary executive and a bicameral legislature comprised of the Senate and the National Assembly. The modern French state, the Fifth Republic, was founded in 1958. The current constitution, incorporating the 1789 Declaration of the Rights of Man and of the Citizen, was adopted in that year as well, although it has been amended many times since then.

Notably for this column, mediation in France can also trace its roots to the French Revolution of 1789.

About 65 million people live in the French Republic, and the French language is spoken by 128 million native speakers. Perhaps four times as many people speak French as a second language. Modern ethnic French is descended from the Celts, Iberians, Ligurians (from Italy), Greeks, Germanic Franks, Goths, Burgundians and Scandinavians, to name a few. It is illegal in France to collect census data on ethnicity and race, but estimates suggest that a significant proportion of French citizens are of non-French origin, either ethnically or nationally.

Through the French Civil Code, established by the Napoleonic codification, the French legal system has had a strong influence on the law of various countries in Europe and on the European Union. French culture has also had a strong influence on other nations, and France is the top tourist destination in the world.

France is a member of numerous international organizations, including the G8. While its government faces public finance problems, its economy remains relatively strong in today's recession-prone times, and more of its economic institutions are privatized than was once the case. (The sources for this information include the CIA's World Factbook at https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html, and www.gouvernement.fr.)

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the applicable time-limit is deemed to have relinquished the right to rely upon it (Articles 1466 and 1506).

Finally, an application to set aside the award no longer stays its enforcement (Article 1523), and the right to challenge the validity of the award can even be waived by the parties, when the seat of the international arbitration is France (Article 1522).

ADR & JUSTICE REFORM

Initiatives to reform mediation in France date back to 2008. In February of that year, a working group led by the former First President of the Paris Court of Appeal, Jean-Claude Magendie, was formed to carry out a comprehensive study of the justice system. The group's report, "Speed and Quality of the Justice System—Mediation: Another Way" (referred to below as the Magendie Report), offered various recommendations, including the creation of codes of conduct for mediators and the establishment of mediation offices within the courts to improve the information available to the public.

Additionally, the courts have launched numerous projects to improve the system of court-referred mediation. Although there is no requirement in French law for parties to participate in mediation before starting court proceedings, various initiatives have been put into place to encourage parties to consider mediation as a dispute resolution option.

For example, since 2010, various courts have been trying out a system of "double summons," under which parties are invited to meet with a mediator before attending a procedural hearing. So far, this practice has been limited to family matters, but according to recent statistics, it already has led to a significant improvement in the rate of cases referred to mediation.

THE CURRENT FRAMEWORK

Definitions: Mediation and conciliation are not clearly defined in French law. It is, however, commonly agreed that "mediation" means a dispute resolution process in which a person chosen by the parties proposes a solution to resolve the conflict, but the parties are not bound to follow it.

In contrast, "conciliation" simply means a process whereby two or more persons attempt to end a dispute. A third party may be involved to facilitate discussions, but that party has no power to propose a solution.

Procedure for court-referred mediation: Court referral to mediation is governed by Articles 131-1 to 131-15 of the Code of Civil Procedure (CCP). Pursuant to this framework, any judge hearing a civil or commercial case may appoint a mediator after having obtained the consent of the disputing parties.

In contrast with conciliation, which forms part of the judge's mission (CCP, Article 21), the power to refer cases to mediation is not an obligation of the judge, merely a prerogative. The duration of the mediation referral is quite short—three months—and it can only be renewed once, at the mediator's request. The referral does not discharge the court's power to take any measures it considers appropriate in relation to the dispute.

Confidentiality: CCP Article 131-14 ensures the confidentiality of court-referred mediation proceedings. It provides that the findings of the mediator and the declarations collected may not be produced or cited in any other proceeding without the parties' consent.

For conventional mediation, no CCP provision clearly states that mediators are bound by a duty of confidentiality. But French courts have ruled that, in conformity with the nature of mediation, each party should be able to communicate freely with the mediator, safe in the knowledge that information disclosed during the course of the mediation will remain confidential.

The effect of mediation and conciliation clauses: French law gives full effect to the parties' agreement to refer their future disputes to mediation or conciliation. In a 2003 decision, the Cour de cassation ruled that if a party brings court proceedings in breach of a conciliation clause, the legal action should be declared inadmissible by the courts.

The enforceability of the mediation agreement: When an agreement is reached during the course of court-referred mediation, it must be submitted to the judge for validation ("homologation") by all the parties to the agreement (CCP, Article 131-12). There is no obligation on the judge to validate the agreement, especially if the parties' rights are not sufficiently protected. Once the agreement has been homologated, it is considered to be a judgment rendered in non-contentious matters ("matière grâcieuse") and is enforced like a judgment.

Subject to certain conditions, agreements reached in the course of conventional mediation are qualified as "transactions," which have, pursuant to French Civil Code Article 2052, "the authority of res judicata of a final judgment," and are enforceable as such.

In principle, the implementation of European Directive 2008/52/EC should not lead to significant changes in the legal framework applicable to mediation proceedings. French law already complies with most of the directive's requirements.

MEDIATOR STATUS

The CCP contains few provisions addressing either mediator qualifications or their rights and duties.

This paucity is often cited as one of the main weaknesses of the law; critics worry that there is no guarantee that mediations are conducted in a fair and professional manner. To address this issue, two main topics have been on the agenda of both public authorities and

France's New ADR Manifestos

The statutes: A May 2011 'simplification and improvement of the quality of the law.' A June 2011 arbitration update.

What exactly is it about? Mediation. The May enactment allows the government to implement decrees for cross-border processes in line with the mandatory European Commission directive.

The expected effect? Like several other countries—see page 187—the transnational mandate will mean big changes, and more mediation, for business disputes at home.

the mediation community in recent years: the training and accreditation of mediators, and their ethical duties.

Training and accreditation of mediators: French law contains rather elliptical provisions on this topic. The CCP simply requires that mediators possess the "required qualifications" in the subject matter of the dispute and that they possess "appropriate training or experience" for mediation practice (Article 131-5). National authorities have been generally reluctant to create detailed rules about the number of training hours or types of qualifications for fear that such rules will lead to the "professionalization" of mediation.

In the absence of public initiatives, mediator associations have taken charge of mediator training, using sophisticated teaching methods. For example, the Paris Center of Mediation and Arbitration, or CMAP, offers 56-hour training courses covering the techniques and methods of mediation in commercial matters.

The mediator's duties: Various proposals for creating a mediator code of conduct are currently being examined. It is unlikely that these proposals will lead to the adoption of binding sets of rules governing the way that mediators should conduct the mediation process, but they could be used as guidelines.

In the Magendie Report, the working group prepared a "Mediator's Charter" containing a comprehensive list of duties and guidelines that mediators should follow, including:

- a duty of confidentiality;
- a duty of impartiality and neutrality;
- a duty of independence;
- a duty to ensure that the parties' agreement is not contrary to public policy and the mandatory rules of law;
- a duty to preserve the equality of the parties during the mediation process and to ensure that equity is respected when the parties reach an agreement, and
- a duty to preserve the autonomy of the mediator mission.

PROVIDERS AND FEES

There has been a proliferation of mediation centers in recent years, with national and regional reach. Recently, the French Federation of Mediation Centers created a national directory, available at http://cnb.avocat.fr/Mediation/index.php (English translation not currently available), which provides a reliable list of centers and mediators for parties who wish to refer their dispute to mediation.

At the national level, the most prominent centers are the CMAP, discussed above, the National Association of Mediators (ANM), and the European Association of Mediators (AME).

With regard to costs, the mediator's fee for court-referred mediation is determined by the judge at the end of the mediation. For conventional mediation, the mediator's fees or costs are not regulated by any legislation or code of ethics. Mediation centers are thus free to set fees as they wish. The CMAP, for example, sets the fees at 300 Euros per hour for domestic mediation, and 400 Euros per hour for cross-border mediation when the amount in dispute is between 30,000 and 1 million Euros. The daily rate for a dispute valued at 100,000 Euros would be between 4,000 and 6,000 Euros.

* * *

There is a clear willingness on the part of public authorities, the courts, and mediator associations to create conditions to make mediation a more attractive and widely-used means of dispute resolution.

So far, the initiatives that have been put into place within the courts concern specific types of cases, like family or labor disputes. But there are already encouraging signs that mediation could be used more widely in all types of cases. Last June, the French economic newspaper *Les Echos* published an article noting that an increasing number of high-value commercial disputes are being referred to mediation and that mediation is being praised by companies for its rapidity and effectiveness. "Les entreprises utilisent de plus en plus la médiation pour régler leurs conflits," *Les Echos* (June 21, 2011).

* * *

Next month, Worldly Perspectives will examine experts' views of the European Directive on cross-border mediation in light of the European Parliament's September resolution on the state of the implementation, and provide some surprising statistics on the directive. For more on the resolution, see page 187 of this issue.

(For bulk reprints of this article, please call (201) 748-8789.)

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techniques. Today, existing ADR techniques are being molded to meet parties' specific needs. New techniques and variations continue to be invented. To paraphrase and slightly modify Harvard University Law School Prof. Frank Sander's famous expression, the objective now should be to "design a fix that will fit any fuss."

2. A developing objective of ADR is to create ways of *preventing* possible future or incipient disputes—as contrasted with the traditional ADR goal of *resolving* disputes that have reached the point where outside third-party assistance is needed. Business leaders, their lawyers and dispute resolution professionals have typically devoted an enormous amount of time, energy and money in employing ways to resolve disputes *after* they have arisen. But they have rarely devoted much effort to anticipate and deescalate problems *before* disputes arise. Fortunately, during recent years, the business and legal worlds have become increasingly aware of the value of the variety of preventive ADR techniques that have been developed, and have begun to adapt them for the *prevention* of business disputes.

3. An important feature of all preventive devices is that in order to be effective, contracting parties should put in their agreement, before any disputes have arisen, processes for dealing with the inevitable problems and unexpected events that are almost certain to occur during their relationship. Once a problem surfaces, the parties often have markedly different agendas and interests. And in the absence of an existing agreed-upon process for dealing with the problem, chaos can ensue. By contrast, the existence of an orderly process already in place channels the energies and actions of the parties onto the constructive dispute prevention and

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dispute resolution path that they have jointly committed to in advance.

CURRENT USES

A number of different types of Standing Neutrals are currently being used in the business world, in the following forms:

Partnering Facilitator: A person can be appointed at the beginning of the business relationship to be available to the parties to assist them in initially establishing a collaborative, team approach to the business relationship and then to conduct follow-up partnering sessions to continue the collaborative process throughout the relationship. The Partnering Facilitator can also be available to assist the parties in negotiating to resolve disputes or in bringing in outside assistance, such as an expert or a mediator.

Dispute Review Board: A DRB is typically a neutral three-member board appointed at the beginning of a business relationship and continuing in place throughout the relationship. The DRB regularly visits with the parties and between visits receives updates so that the board can stay abreast of developments during the business relationship.

If disputes arise, the DRB "hears" the matter in an informal process. It then gives the parties detailed, but nonbinding, findings and recommendations that they can accept or reject, or use as the basis for further negotiations. Some DRBs, which also are known as dispute boards or dispute adjudication boards, issue "temporarily binding" determinations that the parties are bound to honor immediately, subject to the right to arbitrate or litigate later if they so choose.

Single Standing Neutral: Alternatively, a single individual Standing Neutral can be a substitute for the three-person DRB, and function in exactly the same manner as the classic DRB.

Initial Decision Maker: Under the current form versions of the American Institute of Architects construction documents, the parties can designate an Initial Decision Maker who performs some of the continuous evaluative and adjudicative functions formerly performed by the architect.

Standing Expert: If the parties foresee a potential need during the course of their relationship to seek an expert determination on disputed matters, they can appoint a Standing Expert who can be called upon to render an expert opinion whenever necessary. This can, for example, be most useful in relationships where complex technical, accounting, cost, or quality standards could be at issue.

Standing Mediator: The parties can appoint a Standing Mediator to be on call to mediate in "real time" any disputes as they arise.

Standing Arbitrator: The parties can appoint a Standing Arbitrator to be available to render immediately binding and enforceable determinations on disputes.

A Comparison of Standing Neutral Options

	Partnering Facilitator	Dispute Review Board	Single Standing Neutral	Standing Expert	Standing Mediator	Standing Arbitrator
ADR Personnel Required	One facilitator	Three members	One neutral	One expert	One mediator	One arbitrator
Degree of Neutral's Involvement	Regularly interacts with the parties—available when needed for disputes	Regularly interacts with the parties—available when needed for disputes	Regularly interacts with the parties—available when needed for disputes	When dispute arises	When dispute arises	When dispute arises
Meeting frequency	Quarterly or as Needed	Quarterly or as Needed	Quarterly or as Needed	N/A	N/A	N/A
Nature of process	Pro-active	Pro-active	Pro-active	Reactive	Reactive	Reactive
When disputes are addressed	As they occur; often issues resolved before becoming disputes	As they occur; often issues resolved before they become disputes	As they occur; often issues resolved before they become disputes	When claim is referred	When claim is referred	When claim is referred
Effect on relationships	Maintains relationships	Maintains relationships	Maintains relationships	Can maintain relationships	Can maintain relationships	Adversarial
Relative level of effort by contract participants	Medium	Medium	Medium	Low	Medium	High
Relative Cost (when activated)	Low to Medium	Medium	Low to Medium	Low to Medium	Medium	High
Lawyer Involvement	Low	Low	Low	Low to Medium	Medium to High	High
Relative Help in Dispute Avoidance	Helps avoid disputes	Helps avoid disputes	Helps avoid disputes	Some help	Some help	Some help

—By James P. Groton and Kurt L. Dettman

COMMON ELEMENTS OF SUCCESS

As the December 2009 *Alternatives* article cited above pointed out, the critical elements that have been shown to be essential to the proper functioning and success of any Standing Neutral process, and which should be incorporated into any Standing Neutral arrangement, are:

- The parties' advance commitment to a process for dealing with problems and unexpected events without having to resort to conventional dispute resolution methods;
- Early mutual selection and confidence in the qualifications and objectivity of their chosen neutral;
- Early briefing and continuing involvement of the neutral;
- Prompt "real time" action on any dispute that is submitted to the neutral.

During the relationship's honeymoon period, the parties' interests are aligned toward making sure that future problems are promptly and efficiently dealt with. The mutual process of establishing a dispute prevention/resolution system to mitigate and resolve problems as they occur, and working together to select a suitable, mutually selected Standing Neutral, creates a problem-solving and collaborative atmosphere that enhances the parties' relationship.

The fact that the Standing Neutral will serve for the duration of the business relationship is important to the process's continuity and stability. Because the Standing Neutral is initially briefed on the particulars of the business relationship, and is kept currently informed about developments that occur during the course of the relationship, the parties avoid the usual delays that occur in identifying and selecting a Standing Neutral after a dispute has arisen. They also avoid "learning curve" problems, and assure that the Standing Neutral will be able to respond promptly, efficiently, and substantively to the problem.

In addition, the requirement that any dispute be dealt with as soon as it is submitted assures that facts are fresh, transactional process costs are minimized, and the parties are committed to finding a solution.

All of these factors combine to encourage the parties to be realistic and candid in their dealings with each other and the Standing Neutral. They will explore a mutual problem-solving approach rather than rely on the Standing Neutral to solve the problem for the parties. But if they cannot resolve the issues in dispute, the Standing Neutral is literally a telephone call or E-mail away to help the parties.

ADDITIONS TO THE PROCESS

Beyond the essential elements above, many other features can be incorporated into the Standing Neutral process to enhance it.

A New & Essential ADR Technique

The process: The Standing Neutral, new and improved.

The application: It's not unusual in construction. Soon, it will not be unusual in any project-oriented deal.

The specifics: Standing Neutrals can accompany any deal to prevent disagreements from developing into disputes. Prevention is the modern ADR movement.

In tailoring the process to the particular nature and characteristics of the business relationship, however, the process designer needs to be familiar with and understand the differences—pro and con—among the different options.

Boilerplate approaches can lead to bad results if the process that is selected does not properly "fit the fuss." By making carefully calibrated changes to various elements of the Standing Neutral concept, business executives can adapt it to fit the needs of the particular business relationship. The following are some specific characteristics of the Standing Neutral concept that are frequently modified:

1. *The Standing Neutral's Role*. The neutral's role can be specified by the parties, falling anywhere along a wide spectrum from nonbinding to binding roles. These could include the following options within a range of real-time resolution options:
   - A strictly facilitative role, such as a "negotiation coach" or "partnering facilitator";
   - An evaluative role, such as providing an early neutral evaluation of an issue in dispute;
   - A combined facilitative and evaluative role, such as an evaluative mediator;
   - An informal conciliation role, such as giving a written, but informal, advisory opinion;
   - A broader evaluative role, such as rendering a recommendation as to how a problem should be solved, or assessing degrees of responsibility of the parties;
   - A more specific evaluative role, such as calculating the amount that one party should pay to the other party in a defined circumstance, or rendering a professional opinion on a technical matter;
   - An intervention—but facilitative—role when there is a dispute, such as a standing mediator, or
   - A binding decision-making role, such as a standing arbitrator.

2. *The Standing Neutral's Skill Sets*. Depending on the Standing Neutral's role, the parties also can prescribe specific skill sets for the neutral they select. Business executives most often select a Standing Neutral who is familiar with the type, practices and customs of a particular industry. Industry expertise, however, is only one of the elements to be considered in selecting the most appropriate Standing Neutral.

For example, if the Standing Neutral is to act primarily in a facilitative role rather than an adjudicatory role, the parties will want to have a neutral with demonstrated facilitative skills, in addition to expertise in the subject matter of the business relationship.

There are differences of opinion as to whether lawyers are appropriate Standing Neutrals. Standing neutrals are chiefly chosen for their industry expertise. But lawyers who possess specialized industry skills and also are experienced in the application of legal principles to a controversy can provide a valuable element to the Standing Neutral role, particularly where the dispute involves legal issues.

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3. *The Degree of the Standing Neutral's Involvement.* Another variable is how closely the Standing Neutral will be involved in the day-to-day progress of the business relationship. Depending on the circumstances, the perceived dispute prevention and resolution demands of the particular relationship, and the amount of resources the parties can expend, the parties may want the Standing Neutral to have fairly close and continuous contact with the parties; to have only occasional contact; or, alternatively, to serve merely in a "standby" role.

4. *The Number of Standing Neutrals*. The parties may wish to designate three people, instead of only one person, to serve as a Dispute Review Board that can bring a variety of experiences and subject-matter expertise in case disagreements arise. Some parties feel that having a mix of views and opinions will ensure that all parties' viewpoints are carefully considered and vetted by the neutral panel. In addition, the value of the multi-member panel is that not "all eggs are in one basket," as would be the case of a single neutral in whom one or more of the parties may lose confidence.

BEST USES FOR STANDING NEUTRALS

Based on the examples above, it isn't difficult to identify types of business relationships that should be ideal candidates for the use of Standing Neutrals:

1. Long Term (Multi-Year) Two-Party Business Relationships: A Standing Neutral should be of assistance in resolving problems in virtually any long-term or continuing relationship. Because unexpected events, problems and external changes can occur at different times during the relationship, a trusted neutral's continuity and big-picture view can provide valuable perspectives to help the parties deal with change. Examples of these kinds of relationships include:

- Long-term service or supply contracts;
- Outsourcing relationships;
- Manufacturer-distributor contracts;
- Franchise relationships;
- Research and development relationships, and
- Licensing arrangements.

2. *Complex Multiple-Party and Multi-Layered Relationships*: Some projects and enterprises can involve multiple parties and relationships at different levels of the project. For example, many commercial developments will involve an owner, a designer/engineer, a developer/concessionaire, a financier/lender, a builder and trade contractors, and an operator.

Each of these layers of organization and intertwined contractual relationships will have relational and contractual friction points that can generate disputes. A project-wide neutral or neutrals that can understand and deal with different layers or junctures of the parties' contracts can be an effective way of deescalating or quickly resolving disputes which, if left unchecked, might have a deleterious ripple effect on other parts of the enterprise or the entire venture.

Examples of these types of projects could include:

- a mixed-use land development project involving many different entities;
- a public/private toll-road project with project delivery stakeholders, finance stakeholders, and operational stakeholders; and
- an owner-developer design/build/deliver/operate project.

3. *Internal Governance Arrangements*:

(A) Corporate Governance—The Standing Neutral process can be applied in many ways for corporate governance. It can keep the inevitable differences of opinion and disagreements from escalating into harmful conflict.

For example, a corporate board of directors could ensure that there is an internal mediator, or "peacemaker," on the board. This can be especially useful in closely-held or family-owned corporations.

Variations could include, in the case of a closely-held corporation, using one or more outside directors as Standing Neutrals who could vote only in the case of a disagreement among the "inside" directors.

Or in the case of a corporation where there are two stockholders with a great disparity in ownership interests and a concern that the majority stockholder will ride roughshod over the minority stockholder to the company's detriment, the charter could provide for a five-person board of directors: two would be appointed by the majority stockholder, one would be appointed by the minority stockholder, and two more highly-respected independent "outside" directors are appointed jointly by both stockholders together.

In these situations, because the independent outside directors can control the outcome, there is an incentive for all directors to exercise good judgment and act reasonably in the company's best interests. Alternatively, if a board of directors did not want to have a Standing Neutral actually join as a board member, it could simply identify an outside person in whom its members have confidence, and appoint that person to be available to serve as a Standing Neutral resource in the event that the board members have a disagreement.

(B) Partnerships—These relationships are ordinarily for an indefinite time and involve parties who are likely pre-disposed to be collaborative, and therefore not dispute-prone. Nevertheless, any partnership could usefully identify and pre-select a Standing Neutral familiar with the partners who could be a source of objective advice if needed.

(C) Joint Ventures—These relationships are sometimes referred to as "temporary partnerships"—that is, a partnership for a finite time, or in order to conduct a defined enterprise—or a "consortium," formed to accomplish a particular project or objective.

The parties to a joint venture are likely to have independent interests outside the joint-venture relationship. So while they are disposed to being collaborative, they may not have the same kind of long-term commitment as a genuine partnership. They may have a greater likelihood of a need for assistance in solving problems, or handling differences of opinion. Such a relationship could benefit greatly by having in place an agreed-upon source of objective advice that could help to "keep the peace" in the relationship.

DIAGNOSTIC TOOL

As an aid to business parties who want to design a dispute prevention and resolution system using a Standing Neutral, the authors have developed a matrix of considerations and possibilities for the parties to use in designing the "best fix for the fuss." See the table on page 182.

The table identifies some of the most common variations of the Standing Neutral concept and summarizes some of the considerations that should be taken into account in

modifying various characteristics of the process to fit the parties' exact dispute prevention and dispute resolution needs.

In order to use this diagnostic tool most effectively, the authors suggest that the parties first *jointly* develop a "dispute risk profile" that assesses the following:

- The nature of the business relationship, including a matrix of contractual risk allocation, rights, and obligations;
- An identification of parties with direct interests, and stakeholders with indirect interests;
- The most likely types of disputes that are encountered in similar relationships or are anticipated in the particular relationship;
- The timing and frequency of likely disputes;
- The size and relative complexity of likely disputes;
- The business needs of the parties on when and how best to resolve such disputes;
- The outcome(s) that will be most likely to be acceptable to the parties, and
- The transactional costs (internal resources and out-of-pocket expenses) associated with various dispute avoidance/dispute resolution options.

The following are the factors, illustrated in the page 182 table, that the authors have found to be most important to consider when determining the correct type of Standing Neutral for a particular business relationship:

- Need for neutral, objective advice;
- Nature of advice that is needed;
- Skill sets of the individuals most likely to have the needed expertise;
- Number of neutrals required;
- Nature and frequency of involvement of the neutral;
- Dispute prevention vs. dispute resolution, or both;
- Level of resources required by the parties and the neutral;
- Costs (both internal and external), and
- Lawyer involvement, if any.

The parties can use all or some of these factors, or can memorialize the ones that are important to them based on the business relationship or dispute risk profile. The bottom line, however, is that the parties should carefully consider what they intend to accomplish through the Standing Neutral process, and that the parties make sure that the process they select and design indeed will meet their goals.

* * *

The reasons why parties choose to have a Standing Neutral, or the contexts in which parties may use a neutral, or the role that the neutral is assigned, are as varied as there are types of business relationships. But parties normally expect that every Standing Neutral arrangement will serve three broad purposes:

1. *Real time resolution of any disagreements*. The most obvious practical reason for appointing a Standing Neutral is to make sure that if any disagreements arise they will be resolved promptly and efficiently, on a "real time" basis.

2. *"Therapeutic" and "preventive" effects*. The most valuable attribute of the Standing Neutral concept, no matter which variation is used, may well be its therapeutic and preventive effect, described in the December 2009 *Alternatives* article cited above. In this role, the Standing Neutral serves not only for the implementation of real-time dispute resolution techniques, but also as a remarkably successful dispute prevention device.

3. *Cost effectiveness of the process*. Even though some expense is involved in the process of selecting, appointing, orienting, and periodically keeping the Standing Neutral informed about the business relationship, these costs are relatively minimal compared to the costs in both human and monetary capital if parties encounter a dispute that requires traditional adversarial dispute resolution processes.

In short, the Standing Neutral concept is one of the best examples to illustrate the old adage, "An ounce of prevention is worth a pound of cure."

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BIG SPENDS, BUT ALSO BIG AWARDS: THE CHARTERED INSTITUTE SURVEYS ARBITRATION COSTS

The biggest expense in international arbitration, and the reason for escalating costs, is the lawyers' bill.

A new study by the London-based Chartered Institute of Arbitrators finds that external legal costs account for 74% of parties' spending on international arbitration matters, well ahead of the 10% spent on experts, 8% on other "external expenses," 5% on witness fees, and 3% on management costs.

The report, based on a survey focusing on individual arbitration matters, also breaks down where outside counsel is spending the money: 19% of it goes to pre-commencement/commencement arbitration activities; 25% on pleadings; 14% on fact and expert witnesses, and the bulk, 37%, on the hearings. Only 5% of outside counsel costs go to discovery.

The survey was reported at a London conference on Sept. 27, and is based on an Internet poll conducted between November 2010 and June 2011, along with telephone follow-ups last summer. Overall, the survey highlights the need for vigilance in controlling arbitration costs, but replaces anecdotal impressions with statistical data.

The study couldn't make a conclusion on whether ad hoc arbitration is easier on budgets than administered, big-provider matters. In the survey group of 254 international arbitrations, 62% of the cases were administered by institutional providers, and 38% were ad hoc.

The CIArb report states, "It was not possible to make statistically significant observations about where institutional arbitration is less expensive than ad hoc arbitration or whether arbitrations administered by one in-

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stitution were more expensive than those administered by another."

The Chartered Institute's "Costs of International Arbitration" survey was completed by lawyers and international arbitrators from five continents. The international arbitration matters used for the study were conducted between 1991 and 2010. CIArb is a London-based nonprofit that promotes ADR use internationally through training and education, and has 12,000 "professionally qualified" members in more than 110 countries.

The results, said Doug Jones, CIArb's president, at the September conference, highlight the need for arbitrators to draw on a "toolkit of processes" in order to control the rising costs of international arbitration, according to a press statement account.

The study, however, didn't examine the impact of other ADR processes as either complements or alternatives to arbitration. "I am not sure that there is a direct correlation," notes Jones in an E-mail to *Alternatives* through a CIArb official, adding, "Mediation has an important part to play in international arbitration but there is no evidence from the survey that costs of [international arbitration] are influencing mediation take-up."

In the survey, 71% of the respondents described themselves as party representatives. Another 25% were tribunal members, and 4% did not identify with either category.

The largest single category of respondents was from the United Kingdom, at 32%, with 20% from the rest of Europe. The remaining 48% of the respondents came from Asia, the Middle East, Africa, North America, Australia and other locations—a total of more than 190 countries.

CIArb states that it "aimed to gather detailed data about the costs of international arbitration, how those costs are made up, the allocation of costs by arbitrators and the extent to which these may depend upon the nature of the dispute, the seat of arbitration, the amount in dispute, the composition of the arbitral tribunal and the costs incurred prior to, and during, the arbitration."

The matters examined weren't mega cases, but clearly were high-end international matters: "[A]t least 50% of claims were between £1 million and £50 million, while at least 75% were for £10 million or less," the report states. The average matter took 17-20 months.

"While anecdotal evidence suggests that the costs are too high," notes Jones in his survey report introduction, "we felt that some hard data was necessary in order to really understand what those costs are, and what can be done to reduce them."

How Much Is Too Much?

The issue: We need data to back up the perception that arbitration costs are out of control.

The project: The Chartered Institute of Arbitrators undertakes a survey of international matters to provide hard numbers on ADR spending.

The results: The high costs come from outside lawyers' fees. But the awards sought often are obtained. So back to you, the user—Is it worth it?

First, the study reports that 48% of the parties spent up to £250,000 on claims of £1 million or more. Another 44% indicated that the average spending "was no more than £1 million" on claims of between £1 million and £10 million. The study says that 50% of the parties had costs of "no more than £1.5 million" for claims ranging from £10 million to £50 million.

Then, the results zero in on lawyers' costs. The cost breakdowns, the study says, were "remarkably much the same" regardless of the nature of the dispute and the amount spent, whether by claimants or respondents.

CIArb reports that 74% of party costs went to external legal costs, also including, where applicable, barristers' fees. The remaining 25% of the overall arbitration costs was spent on experts, "external expenses," witnesses, and management costs.

"[It] appears that a party's expenditure is mostly on its legal team, not on experts, documents or witnesses," notes Humphrey Lloyd, a former judge on the U.K.'s High Court of Justice, in a second introduction to the report. That fact, and other findings, led Lloyd, a neutral who chaired the CIArb's conference organizing committee, to ask, "How can we reduce the time and cost of international commercial arbitration?"

But there also is CIArb data that suggests the money may be well spent: About 62% of parties claiming between £1 million and £10 million in their arbitration demand obtained an award in the range, while the claims range of £10 million to £50 million had a 46% success rate. The study also says 33% of claims for £100 million or more received awards "for no less than this amount."

Still, Lloyd notes in an E-mail that costs need to be closely managed. "The survey results show that parties new to international arbitration need to establish at the outset effective controls over the costs of outside lawyers," Lloyd wrote. "The survey also showed that most expenditure came right at the beginning and at the end, e.g. from the run up to the hearing. As with experts, limits or estimates need to be agreed for each stage, difficult though it can be," he added.

The study looked at arbitration parties' common costs. It reports that 60% of shared costs are spent on arbitral fees, with the remaining expenses going to pay for the proceedings' transcripts, the hearing venue, and other costs.

The key issue arising from the September CIArb conference that examined the survey results is the need for process flexibility, according to the organization's press release.

In urging international arbitrators to have a toolkit of processes to be deployed as appropriate, the press release notes that "various potential 'tools' have already been identified," including tailoring evidence to suit the resolution process, focusing parties "only on the key information needed to

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resolve the dispute," efficient deployment of experts, and effectively organized hearings.

There were other interesting findings:

- According to the survey, 62% of arbitral proceedings were administered by an institution, with the Paris-based International Chamber of Commerce the most popular choice.
- Party costs averaged about £1.3 million in common law countries, and about £1.5 million in civil law countries, nearly a 13% difference.
- Arbitrations whose seat was in the United Kingdom generally cost less than those in the rest of Europe, with claimants averaging 10% less in the United Kingdom.
- External legal fees were more than 26% higher in continental Europe than in the United Kingdom.
- About 42% of the respondents were involved in general commercial disputes, 5% didn't respond, and 53% were divided among Oil/Gas/Energy, IP/Technology, Construction/Engineering, and Shipping/Maritime.
- Claimants spent 12% more than respondents.

At the London conference, CIArb President Jones said, "[T]here is no doubt that costs are an issue for users of international arbitration. . . . There is going to be an ongoing exercise in transparency in arbitration costs from now on, building on what we know already."

UPDATE: PARLIAMENT CHECKS IN ON THE EUROPEAN CROSS-BORDER MEDIATION DIRECTIVE

If you are looking for government support and encouragement of commercial ADR, you won't do better than the September resoluton issued by the European Parliament.

The Sept. 13 document provides a strongly supportive state-of-the art accounting of commercial mediation. It declares the European Union member state's implementation of cross-border mediation successful so far. It stakes out new ground for future commercial use continent-wide.

The resolution assesses progress in the face of the passing of the May deadline for member states to adopt new laws and court procedures providing for mediation in cross-border cases. It also gives a basic outline of key transnational ADR trends and challenges.

The European Commission had examined the need for beating back large-scale litigation for years. In 2008, it adopted "Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters," which requires the nations to install mediation processes.

Parliament resolutions are nonbinding on countries, unlike the directive. Generally, they send political messages. This resolution memorializes some of the key moves by individual member states, and the challenges for European ADR. The next big push will be to increase mediation acceptance and use.

The resolution provides broad support for the directive's ideas, noting that the directive has had an effect beyond its mandate, which was to standardize mediation use in cross-border commercial conflicts. Many of the member states, including France (see page 179), Italy, and Ireland, have used the international mediation requirement as a launching pad for re-doing their domestic ADR schemes.

The European Parliament also notes that nations have adhered to requirements on confidentiality and enforcement of mediation agreements.

The resolution followed a report presented to the Parliament's Committee on Legal Affairs by the committee's "rapporteur," Arlene McCarthy, who is a member of the European Parliament from northwest England, and who has been a prominent advocate for international mediation over the past decade. McCarthy's report on European nations' mediation directive implementation steps served as the basis for the resolution.

The commission "needs to ensure that the mediation law is implemented in all 27 member states," states McCarthy in an E-mail. She adds, "We need to see more practical examples of how mediation works and how it can deliver fast and affordable justice to our citizens."

The resolution delivers the examples. After 11 declarations about the directive, the document lists 21 steps to further institutionalize cross-border commercial mediation practice in Europe, and which contain numerous brief illustrations of implementation.

The first declaration notes that confidentiality as set out in the directive already existed in some nations' domestic ADR schemes. It cites a Bulgarian Code of Civil Procedure provision allowing mediators to refuse to testify about a dispute they have mediated, as well as local laws in France, Poland, and Italy that support confidentiality.

On the other hand, the declaration notes, Swedish mediation rules "state that confidentiality is not automatic and require an agreement between the parties to that effect."

Addressing mediation settlement agreement enforcement under directive Article 6, the Parliament resolution states that the

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Europe's ADR Endorsement

The update: The European Parliament looks at implementation of the mandatory cross-border mediation requirement for commercial disputes after three years.

The verdict: May's deadline has largely been met, implementation has been broader than originally envisioned to include domestic requirements, and, yes, mediation is better than litigation. Win-win and win.

What's next? The Parliament has asked the EC to bring ADR to consumer disputes with new legislation.

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majority of member states have a procedure for giving the settlement agreement the same authority as a judicial decision. It compares and contrasts enforcement methods—courts v. notaries—in the Netherlands, Germany and Austria, as well as others.

And in one of its nearly strident passages, the resolution "calls on the [European] Commission to ensure that all Member States that do not yet comply" with the directive enforcement provisions "do so without delay."

"The Commission also needs to bring forward its ADR proposals this year based on the principles of efficiency and affordability and using best practice examples to persuade parties to try mediation," notes MEP McCarthy. She adds in the E-mail to *Alternatives* that "While mediation has a success rate of around 70%—rising to 80% if parties voluntarily opt for mediation—only 1% of parties embroiled in legal disputes across the [European Union] are choosing it."

There are other significant declarations in the resolution. Returning repeatedly to the laws and processes adopted by early-adopters Italy, Romania, and Bulgaria, it points out that some countries "have chosen to go beyond the core requirements of the directive in two areas, namely financial incentives for participating in mediation and mandatory mediation requirements."

It cites Bulgaria's 50% court filing fee refund, and Romania's full refund, for cases successfully mediated. And Italy, among others, has made it mandatory. [*Alternatives*' Worldly Perspectives column, by Giuseppe De Palo and Mary B. Trevor, has watched this closely. On financial incentives, see, e.g., "Bulgaria's Major Mediation Steps Include Cash Back on State Filing Fees," 28 *Alternatives* 155 (September 2010), and on mandatory processes, see, e.g., "Germany Finalizes Its EU Directive Law to Add a New Domestic Push for Mediation," 29 *Alternatives* 120 (June 2011). For the columns' account of Europe's progress on installing local cross-border mediation laws, see "Update: The Continent Settles in with Mediation as Nations Implement the European Commission's ADR Directive," 29 *Alternatives* 131 (July/August 2011).]

The resolution also

- Notes that despite implementation controversy including a lawyers' strike in Italy over mandatory ADR, nations "whose national legislation goes beyond the core requirements of the Mediation Directive seem to have achieved important results in promoting the non-judicial treatment of disputes in civil and commercial matters," and that "mediation can bring about cost-effective and quick extrajudicial resolution of disputes through processes tailored" to the parties' needs, again citing Italy, Bulgaria and Romania;
- Notes that while some countries "are a little behind," members state "are, as a whole, largely on track to implement" the directive, and "most . . . are not only compliant, but are in fact ahead of the Directive's requirements";
- Encourages the European Commission to examine where the members states have gone beyond the directive in implementing their new laws in a "forthcoming" EC report;
- Asks the EC "for the prompt presentation of a legislative proposal" that addresses "the consumer-friendly features of alternative dispute resolution schemes, which offer a tailored practical solution";
- Declares that "solutions resulting from mediation and developed between parties could not be provided by a judge or a jury . . . [and] therefore, that mediation is more likely to produce a result that is mutually agreeable, or 'win-win,' for the parties," adding that "as a result, acceptance of such an agreement is more likely and compliance with mediated agreements is usually high";
- Calls for further action relating to mediation education, general public awareness, and "enhancing mediation uptake by businesses" as well as mediator qualification rules or laws, and
- "Considers that national authorities should be encouraged to develop [programs] in order to promote adequate knowledge of alternative dispute resolution; considers that those actions should address the main advantages of mediation—cost, success rate and time efficiency—and should concern lawyers, notaries and businesses, in particular [small and medium enterprises], as well as academics."

The resolution is manna for mediation advocates. "It is especially significant in its encouraging recognition of countries which have gone beyond the core requirements of the directive to create incentives and mandatory mediation procedures," says *Alternatives*' Worldly Perspectives column co-author Giuseppe De Palo, who has monitored the developments in his work as the head of ADR Center, Italy's largest private ADR provider and an affiliate of U.S.-based provider JAMS.

[Next month, Worldly Perspectives will analyze the resolution's significant provisions and discuss their practical effect on member states, with a focus on the observations relating to the new Italian mandatory mediation law. For more, see Worldly Perspectives on page 179.]

* * *

Here are key resources:

- The Sept. 13 European Parliament resolution: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//EN
- MEP Arlene McCarthy's report on mediation directive implementation: : www.europarl.europa.eu/activities/committees/reportsCom.do;jsessionid=F4FDD09D4A2E364E401D45286A0D7347.node2?language=EN&body=JURI
- The original 2008 European Commission mediation directive: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF
- The EC's most recent press statment on the mediation directive: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/919&format=HTML&aged=0&language=EN&guiLanguage=en

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as part of the organization's continuing efforts to dissect, analyze, and improve the conflict resolution field, and to better serve users of CPR's products and services.

Visit www.cpradr.org to express your views on the following two surveys:

- CPR's Survey on its Panels of Distinguished Neutrals and ADR Rules. CPR is currently asking its constituents about their uses of CPR's panels and the organization's non-administered processes for matters that did not require CPR's intervention or aid. CPR's goal is to obtain an accurate picture of the widespread use of its rules, procedures and offerings.
- Survey on the Use of Mediation in the Asia-Pacific Region. CPR is collecting information about the use of mediation in the region, and barriers. For more information on the Asia-Pacific efforts, contact CPR Senior Vice President Beth Trent at btrent@cpradr.org.

For direct links to the survey via an E-mail, please send an E-mail requesting the survey links to info@cpradr.org.

Y-ADR IN LONDON ON NOV. 16

There is still time to register for a big Y-ADR event coming to the United Kingdom this month.

CPR's Y-ADR Group—"Young Attorneys in Alternative Dispute Resolution"—introduces lawyers to in-house counsel in the international ADR practice area. In its seminar/networking events, participants get an inside view of the role of ADR systems and practices in big companies and multinational organizations. Attendees meet and collaborate with in-house counsel and ADR experts to analyze and hone techniques, processes, and systems that improve commercial conflict resolution efforts around the globe.

The Nov. 16 session at the law firm of Herbert Smith in London will feature a panel on the topic, "What Defines Success in Mediation?" The panel will discuss how even if early mediation does not result in an immediate settlement, the effort nevertheless may be considered successful if, for example, it results in a narrowing of the issues, or a more cooperative, cost-effective approach to the litigation itself.

Last-minute registration is available now under the Events tab at www.cpradr.org.

Last month, the CPR Institute announced three more Y-ADR events for 2012: A February session at the Paris office of Shearman & Sterling; an April panel at San Francisco's Morrison & Foerster, and a return to New York next summer, with a July event at Allen & Overy. Watch the CPR website for dates, topics and registration information.

For more information about Y-ADR events or to sponsor a program in your office, please contact CPR Special Counsel and Director of Dispute Resolution Services Olivier Andre at oandre@cpradr.org. Also, join Y-ADR on LinkedIn at "Y-ADR—CPR Institute," for more information.

GET READY FOR CPR'S 2012 ANNUAL MEETING, FEATURING KEYNOTER SCOTT TUROW

Get ready for CPR's Annual Meeting: The 2012 dates are Thursday and Friday, Jan. 12 and 13, and the location is the Barclay Intercontinental Hotel in New York City.

Act fast: Early bird rates will be available until Nov. 7. Please check www.cprmeeting.org for terms and conditions, and registration. Concurrent with the meeting, CPR is offering Basic Mediator Training. The Jan. 11-12 training, at the CPR Institute's offices in New York, allows trainees to attend the final day of the Annual Meeting.

Information on the 2012 Annual Meeting, which is called "It's A Shrinking World: Acceleration and Evolution in Dispute Resolution," is available now at www.cprmeeting.org. Mediator training information is at CPR's main web location, www.cpradr.org.

The meeting will highlight the work of top legal researchers on the state of the art in alternative dispute resolution, and include a traditional CPR Annual Meeting general counsel's panel. The sessions, which include a cutting-edge seminar for which CPR expects to award 1.5 hours of New York CLE Ethics credit, are listed below.

Two high-profile keynoters have been announced. On Jan. 12, author Scott Turow—best known for "Presumed Innocent" and "The Burden of Proof," both of which were made into major films—will kick off the meeting.

Turow, a partner in the Chicago office of SNR Denton, crossed from the legal publishing world to mass-market success with his first book in 1977, the nonfiction "One L: The Turbulent True Story of a First Year at Harvard Law School." He has written two nonfiction books and nine novels. Turow is a former federal prosecutor, and currently focuses on pro bono criminal litigation, including high-profile capital cases.

The second-day keynote will be provided by Harriet Miers, former White House Counsel for President George W. Bush, and a partner in the Dallas office of Locke Lord Bissell & Liddell. Miers—who also served as Bush's deputy chief of staff and was the first woman head of her law firm—is well-known for her law practice management skills, and will discuss strategy in dealing with the government.

Miers has had a career of "firsts." She was the first woman hired at her firm's predecessor, Locke Purnell Boren Laney & Neely. In 1985, she was selected as the first woman to become Dallas Bar Association president and, in 1992, she became the first woman president of the Texas State Bar.

Miers also was nominated by President Bush to succeed Associate Justice Sandra Day O'Connor at the U.S. Supreme Court, but

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Miers' nomination was withdrawn when opponents raised questions about her trial work and close ties to the president.

The scheduled meeting panel discussions include:

- *Current Perspectives on the Law and ADR:* The session will focus on hard-to-get ADR empirical evidence. Research and survey results regarding corporate legal practice and conflict resolution will be highlighted, including the recently completed Cornell/CPR Institute/Pepperdine survey of the Fortune 1000; the RAND Report on Business-to-Business Arbitration in the United States; the Deloitte Global Corporate Counsel Report 2011, and the 2010 International Arbitration Survey conducted at Queen Mary, University of London, in conjunction with White & Case. The moderator is David Bruce Lipsky, director of the Scheinman Institute on Conflict Resolution at the ILR School, Cornell University, Ithaca, N.Y. He will be joined by Fred Kipperman, RAND Institute for Civil Justice in Santa Monica, Calif.; New York White & Case partner Ank Santens, and Gregory Swinehart, national managing partner of forensic and dispute services at Deloitte LLP in New York.
- *Business Roundtable:* A group of leading general counsel will discuss the implications of the ADR surveys in the prior panel, as well as address innovative and practical steps they have taken—or are thinking about taking—to reduce the increasing cost and time consumed by dispute resolution. The managing partner of Jenner & Block's New York office, Richard Ziegler, will moderate. Ziegler is former GC at 3M. The panel includes Carlos Hernandez, senior vice president, chief legal officer and secretary of Irving, Texas's Fluor Corp.; Janet Langford Kelly, who is senior vice president, legal, as well as general counsel and corporate secretary of Houston-based ConocoPhillips Co., and Amy Schulman, who is executive vice president and general counsel of Pfizer Inc., as well as president and general manager of nutrition at Pfizer Nutrition Inc., in New York. Also invited for the panel is France-based General Electric Co. general counsel Jean Claude Najar.
- *"We Have Met the Enemy and It is Us"*: The discussion will focus on the steps ADR clients, practitioners and neutrals take that unintentionally undermine negotiations and reduce the likelihood of a successful outcome. The panel will begin by addressing effective ADR practice, and then concentrate on ADR practice issues from both the perspective of how certain ADR provisions in clauses may have unintended consequences, and how parties and practitioners may make resolution more difficult. New York-based Patterson Belknap Webb & Tyler partner Peter Harvey, who is former New Jersey attorney general, will moderate. The speakers include James Breen, president of the Breen Law Firm, Pembroke Pines, Fla.; Michael Moore, a partner at SNR Denton in Dallas; Christopher Nolland, who heads a Dallas law firm bearing his name, and New York City neutral Edna Sussman, who is Fordham University School of Law's Distinguished ADR Practitioner in Residence.
- *Developments in International Dispute Resolution:* This panel will address emerging issues in managing cross-border disputes, including the member nations' approaches to implementing the European Union's mediation directive (for more see page 187); the Uncitral Working Group III Online Dispute Resolution initiative; risks to enforceability of awards, and other late-breaking concerns. A. Stephens Clay, a partner at Kilpatrick Townsend & Stockton LLP in Atlanta, will be the moderator. Panelists include Jose Astigarraga, name partner in Miami's Astigarraga Davis; Teresa Giovannini, a partner in Lalive, of Geneva, Switzerland; Colin Rule, who is chief executive officer of San Jose, Calif.'s Modria, and Eduardo Zuleta, a name partner in Gomez-Pinzon Zuleta Abogados, of Bogotá, Colombia.
- *Roundtable on Mediation with the Government:* The panel expects to explore and describe the many ways in which companies and federal and state governments interact, and will demonstrate the best approaches in negotiating with government officials. The panel will cite specific examples and draw from their experience representing business or federal agencies. John Bickerman, president of Bickerman Dispute Resolution of Washington, D.C., will moderate the discussion featuring Sheila Birnbaum, a New York Skadden, Arps, Slate, Meagher & Flom partner who is the special master overseeing the reconstituted 2001 Victim Compensation, which is now addressing the needs of first responders and their families; Joanna Jacobs, the director of the U.S. Justice Department's Office of Dispute Resolution in Washington; Dickstein Shapiro partner Peter Morgan, also of Washington, and Peter Steenland, counsel to Sidley Austin's Washington office.
- *Ethical Issues in Mediation and Arbitration:* A session for which CPR expects to award 1.5 hours New York state CLE Ethics credits will use case studies from facilitator Ellen Waldman's recently book, "Mediation Ethics," as well as specially prepared arbitration case studies, to give the audience an interactive opportunity to examine fundamental issues faced in mediation and arbitration, including conflicts of interest, confidentiality, and multicultural issues. Joining Waldman as facilitators are Charles Craver, Freda H. Alverson Professor of Law at the George Washington University School of Law in Washington, and the CPR Institute's Kathleen Scanlon, who also heads her own New York law firm.

Limited CPR Annual Meeting sponsorship opportunities are still available; they are listed at the CPR website. Contact CPR Vice President Molly Brannon at mbrannon@cpradr.org with sponsor questions. See the back page for the sponsors so far.

CPR News

UPDATED: MORE NEW CPR CLE ONLINE

Four new continuing legal education topics have been added to the CPR Institute's online library of on-demand courses, presented by WestLegalEdcenter.com.

And it's also not too late to participate in a sizeable part of the January 2011 Annual Meeting, virtually. If you could not be in New York last January, or if you want to share the experience with your colleagues, the CPR Institute has four sessions available online, on demand.

All of CPR's online seminars—34 at press time—carry CLE credit in jurisdictions nationwide, including Ethics presentations. The CLE courses available via www.cpradr.org cover hot ADR topics, systems design, and the latest commercial conflict resolution practices. All are accredited and hosted by WestLegalEdcenter.com, where the CPR Institute is a content partner. And now, 25 sessions are available as podcasts for CLE credit-on-the-go, where permitted.

CPR members automatically get a 25% discount as a member benefit when registering at the WestLegalEdcenter site, even where the member may have an existing purchase agreement with WestLegalEdcenter, which is a division of Thomson Reuters.

The 2011 Annual Meeting sessions now available on demand are:

- "Disclosure and Other Ethical Issues in Mediation," including a discussion of diligence, confidentiality, and impartiality, which provides Ethics CLE credit;
- "The Future of Investment Disputes," on how international investment arbitration may develop in light of the growing pressures on the arbitral system;
- "New Strategies for Resolving Disputes," in which a mock appellate argument is held in front of former federal court judges on the constitutionality of the new CPR Economical Litigation Agreement, and the third-party financing of disputes, and
- The kickoff general counsel roundtable session, in which GCs from three top companies provide their views on running an in-house law practice with effective, resolution-oriented processes.

See CPR News at 29 *Alternatives* 146 (September 2011) for highlights of the first three sessions; for a summary of the GC roundtable, see CPR News, 29 *Alternatives* 111 (May 2011).

Brand new on demand is a Sept. 8 webcast on neuroscience and decision making—"From Conflict to Creativity: Neuroscience Insights for Commercial Dispute Resolution." And from an August session, now on demand is "Changing the Game: How to Move from Tug of War to Science Project in Settling Business Disputes," an advanced ADR techniques session applying collaborative law in commercial cases easily, efficiently, and effectively.

Two CPR Institute programs from earlier this year have just been introduced online. First, top in-house counsel present their views in "Early Case Assessment: How Corporations Decide What Dispute Resolution Mechanism is Right for Them." The June session—one of CPR's exclusive Y-ADR programs geared to younger conflict resolution practitioners—opened with CPR Board Chairman William H. Webster, of event host Milbank, Tweed, Hadley & McCloy, delivering opening remarks. Webster, a former federal judge who also was director of the Federal Bureau of Investigation and chief of the Central Intelligence Agency, also participates in an extensive Q-and-A session that is part of the presentation.

Judge Webster was surrounded by corporate attorneys well-versed in cutting-edge conflict resolution techniques. The panel and discussion was moderated and the event hosted by Washington Milbank partner Michael D. Nolan. Panelist participants included Michael Bisignano, vice president, legal and deputy general counsel at Blackboard Inc., a Washington, D.C., education technology company; David Burt, corporate counsel at Wilmington, Del.'s E. I. du Pont de Nemours & Co.; Stephen A. Chernow, assistant general counsel, Intelsat SA, in Washington, D.C.; Pamela Corrie, general counsel and chief risk counsel, GE Capital, and Brennan J. Torregrossa, assistant general counsel, GlaxoSmithKline.

Heavy hitters also are featured in a newly posted April panel discussion, which also was held in Washington, D.C.. The seminar was part of the book party for CPR's new Master Guide to Mass Claims Resolution Facilities, which addresses issues of mass claims resolution facilities.

The session was held at Dickstein Shapiro, and featured a conversation with members of the CPR Institute Commission on Facilities for the Resolution of Mass Claims, which developed the guide. Dickstein Shapiro partner Deborah E. Greenspan, who is the firm's complex dispute resolution practice leader, moderates the session. Greenspan is co-chair of the CPR mass claims commission.

Greenspan's panel featured commission members David Austern, president of Falls Church, Va.-based Claims Resolution Management Corp., which provides claims processing services to asbestos personal injury trusts, and Thomas H. Hill, General Electric Co. senior executive counsel for environmental litigation and legal policy, who is based in Fairfield, Conn.

Also on the panel is Kenneth R. Feinberg, who is founder and managing partner of Washington's Feinberg Rozen, and who served as CPR commission co-chair. Feinberg is best known as the first Sept. 11 Victim Compensation Fund special master, which was recently reconstituted to address illnesses of first responders (see CPR Annual Meeting item above).

Under an appointment by President Obama, Feinberg currently is overseeing the payments from the claims facility set up by BP plc to address damage from last year's Gulf of Mexico oil disaster.

All sessions are available via WestLegalEdcenter.com and under "Events" at www.cpradr.org.