2023 CPR GLOBAL CONFERENCE

INTERNATIONAL APPROACHES TO DISPUTE PREVENTION: IDENTIFYING AND RESOLVING CONFLICTS EARLY

Hosted by CPR's Young Leaders in Alternative Dispute Resolution

Thursday, December 7

CPR PRESENTS:

THE 2023 GLOBAL CONFERENCE COURSEBOOK

THURSDAY, DECEMBER 7, 11:00 AM– 4:00 PM ET

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2023 CPR GLOBAL CONFERENCE

CPR International Institute for Conflict Prevention & Resolution

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AGENDA

TIME (ET)	EVENT
10:45 – 11:00 AM	Guests are Invited to connect to the Global Conference
11:00 AM	**Global Conference Begins**
11:00 – 11:10 AM	**CPR Introduction and Welcome Remarks:** • Knar Nahikian, CPR International Programming • Helena Tavares Erickson, CPR Acting CEO, Senior Vice President & Corporate Secretary
11:10 – 11:15 AM	**Remarks by Y-ADR Steering Committee Co-Chairs:** • Kate Gonzalez, Airbus Americas • Samuel Zimmerman, Hogan Lovells
11:15 – 12:15 PM	**PANEL 1 (Hosted by Y-ADR)** International Perspectives on Dispute Prevention through Escalation Clauses
12:15 – 12:25 PM	Break & Transition to Next Panel
12:25 – 1:30 PM	**PANEL 2 (Hosted by the European Advisory Board)** The In-house Counsel View of Dispute Prevention
1:30 – 1:40 PM	Break & Transition to Next Panel
1:40 – 2:45 PM	**PANEL 3 (Hosted by the Brazilian Advisory Board)** Dispute Prevention: Lessons from Tech, Life Sciences, and Energy Sectors
2:45 - 2:55 PM	Break & Transition to Next Panel
2:55 - 4:00 PM	**PANEL 4 (Hosted by the Canadian Advisory Board)** Keeping the Peace in Commercial Transactions: Dispute Prevention and Management Boards
4:00 PM	Closing Remarks

PROGRAM INFORMATION

CLE Credits:

The 2023 CPR Global Conference is suitable for experienced attorneys and is eligible for up to 4 credits NY CLE* if completed in its entirety, or credits for each panel as follows below:

Panel 1: New York CLE 1.0 Professional Practice, Non-transitional

Panel 2: New York CLE 1.0 Professional Practice, Non-transitional

Panel 3: New York CLE 1.0 Professional Practice, Non-transitional

Panel 4: New York CLE 1.0 Professional Practice, Non-transitional

Submit your CLE credit request form using this link: https://forms.office.com/r/pVP6c01zTE by Friday, December 22, 2023.

***New York CLE**: CPR (International Institute for Conflict Prevention & Resolution) has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York. This continuing legal education course has been approved in accordance with the requirements of the New York State CLE Rules and Regulations for credits as indicated above.

Other jurisdictions: Program documentation will be provided by request for those attendees seeking to self-report CLE in other jurisdictions.

2023 CPR GLOBAL CONFERENCE

SESSION OUTLINE:

PANEL 1

International Perspectives on Dispute Prevention through Escalation Clauses

Presented by the Y-ADR Steering Committee

THURSDAY, DECEMBER 7, 11:15 AM – 12:15 PM ET

The Y-ADR panel will open the day-long conference by setting the stage for a substantive discussion of dispute prevention - the forms it may take and how it can best be utilized by parties. This international panel of speakers will then take a detailed look at the use of escalation clauses, sharing valuable insights regarding successful implementation of these clauses and highlighting perspectives from some of the leading arbitration jurisdictions such as England, France, Hong Kong, Singapore, and the United States. Businesses and practitioners whose work can be cross-border in nature do not want to miss this opportunity to learn more about effective dispute prevention strategies in an international context.

Moderator:

VELISLAVA HRISTOVA, International Arbitrator

Panel:

DYLAN LYNCH, Raytheon UK

ELENA RIZZO, DLA Piper

SARA LITTLE, Orrick

BRANDON YAP, Drew & Napier LLC

VELISLAVA HRISTOVA

INTERNATIONAL ARBITRATOR

Velislava Hristova holds dual qualifications as an Attorney-at-law in Bulgaria and a Solicitor in England and Wales. She specialises in investor-State arbitration, complex commercial disputes, and public international law. With over six years of post-qualification experience, Velislava brings a wealth of experience, having worked with the international arbitration teams of leading US law firms in three of the major arbitration hubs in Europe – London, Vienna and Stockholm – and two of the largest law firms in Bulgaria. She participated in disputes across a range of industries under various institutional rules and involving parties from Europe, Asia, and Africa.

Velislava holds an LL.M. in International Commercial Arbitration Law from Stockholm University (Sweden) and an LL.M. from the University of National and World Economy (Bulgaria). Velislava specialised in Arbitration and International Commercial Law at Pace University (US) and attended the Paris Arbitration Academy (France), the ICC Summer course in International Arbitration organised by the International Chamber of Commerce (France) and the Advanced course on ICSID Arbitration organised by the International Investment Law Centre Cologne (Germany).

Velislava serves as a Vice-Chair of the International Arbitration Committee of the ABA's International Law Section, Chair of Young Bulgarian Arbitration Practitioners, Senior Editor of the EFILA Blog, Peer Reviewer of the Journal of International Dispute Settlement and Founder of the Energy Related Arbitration Practitioners (Bulgaria).

Velislava frequently publishes and speaks on international arbitration topics. In 2022, she won first place in the Young Practitioners and Scholars Essay Competition of the European Federation for Investment Law and Arbitration, and in 2023, she won the CPR Institute's Outstanding Professional Short Article Award.

SARA LITTLE

ORRICK

Sara is a member of Orrick, Herrington & Sutcliffe's International Arbitration Department and is currently practicing out of Orrick's Paris office. Originally trained in the US, Sara advises clients in both commercial and investment treaty arbitrations across a range of sectors including energy, defense contracting, aviation, construction, technology, and corporate disputes involving Joint Ventures and Licensing.

Sara has worked with clients from the United States, Europe, and Asia on disputes governed by French, Swiss, Iranian, and US (Maryland, New York, Washington, Illinois) law and in most of the major arbitral forums, including the ICC, SAC, HKIAC, and ICSID.

Sara is a member of the Young Professionals group of the Silicon Valley Arbitration and Mediation Center, Young ICCA, the American Bar Association and the International Bar Association. She speaks English, French, and Italian. Prior to moving to France, Sara worked as a litigator for the City of New York

ELENA RIZZO

DLA PIPER

Elena Rizzo focuses her practice on international investment and commercial arbitration. She has represented international companies, sovereign states, and state-owned entities in connection with cases under the leading institutional and ad hoc arbitration rules, including those of the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), and the American Arbitration Association (AAA). Her experience includes advising clients in the construction, logistics, oil and gas, renewable energy, and pharmaceutical sectors. In 2022, Elena has been nominated a "Rising ADR Star" by the CPR Institute.

Elena is dedicated to pro bono work. Notable pro bono representations include briefing and arguing appeals setting important precedent for custody and visitation requirements in New York, taking contested custody and divorce cases to trial, and obtaining Special Immigrant Juvenile Status for immigrant minors. Her devoted pro bono representation of multiple clients has been sanctioned by Sanctuary for Families in 2023, with the "Above and Beyond" award.

Elena is an active member of the New York arbitration community. Among her affiliations, she is a member of CPR Y-ADR Steering Committee. She also served as a member of the Arbitration Committee of the New York City Bar for two consecutive terms (until 2021).

Dylan Lynch is Head of Legal Operations at Raytheon UK where he advises on a range of legal matters across the business including company secretarial, insurance, property, claims management, disputes, as well as lots of other interesting matters that come across his desk. Prior to this role, Dylan was Legal Counsel where he focused on advising on contracts.

DYLAN LYNCH

RAYTHEON UK

BRANDON YAP

DREW & NAPIER

Brandon Yap is a senior associate at Drew & Napier's dispute resolution group in Singapore, with a focus on high stakes financial, commercial and technology disputes across both arbitration and litigation.

He manages cross-border disputes in a variety of industry sectors and under a wide spectrum of arbitral rules. From the pre-action stage, with emergency injunctions and disclosure orders to the terminal stage, with asset tracing and enforcement of judgments and arbitral awards, my mandates span the entirety of the disputes cycle.

Brandon maintains a special interest in the digital assets space, a nascent but growing frontier within the financial and technology ecosystem. As it is a realm where old rules are being rewritten, he is very excited to play an outsize role through dispute prevention, management, and resolution in furtherance of building and strengthening the civil and commercial guardrails for the space.

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SESSION OUTLINE:

PANEL 2

The In-house Counsel View of Dispute Prevention

Presented by CPR's European Advisory Board

THURSDAY, DECEMBER 7, 12:30 – 1:30 PM ET

Companies, and in-house counsel in particular, play an essential role in resolving conflicts before they harden into disputes. This panel of senior in-house counsel from different industries and geographic regions of Europe will discuss various approaches that their businesses use to avert or contain disputes. Our experienced panel will examine this with reference to the different stages of a project: from contract drafting to project management to identifying and resolving conflicts early once they arise.

Moderator:

NORADÈLE RADJAI, LALIVE

Panel:

KEVIN SMITH, Shell International Ltd.

TIM WILLIAMS, Wärtsilä Energy

JOHN REILLY, Raytheon UK

NORADÈLE RADJAI

LALIVE

Noradèle Radjai is a partner in the international arbitration team, specialising in commercial and investment arbitration in the energy, telecommunications and construction sectors. She has acted as counsel, advocate and arbitrator in about 100 international arbitration proceedings, including disputes arising from share sales and acquisitions, joint ventures, and large projects, governed by a variety of procedural and substantive laws.

Ms Radjai is highly recognised by the leading legal directories. She was ranked as one of the top 5 arbitration partners globally under the age of 45 in Who's Who Legal: Future Leaders – Arbitration 2017 and has been ranked since several years in Who's Who Legal's global ranking for all arbitration practitioners. She is also included by Chambers Global and Europe in their Europe-wide and Switzerland rankings of leading arbitration counsel.

Ms. Radjai is a member of the Executive Council of the Institute for Transnational Arbitration (ITA), a member of the Executive Committee of the Board of Directors of the Swiss Arbitration Association (ASA), former Vice-Chair of the IBA Arbitration Committee (as well as former Co-Chair of its In-House Counsel Sub-Committee), a member of the Pledge Steering Committee and of the CPR European Advisory Board.

Prior to joining LALIVE Ms Radjai worked in the international arbitration group of Skadden, Arps, Slate, Meagher & Flom LLP and Simmons & Simmons in London. Noradèle Radjai is fluent in both common and civil law,

KEVIN SMITH

SHELL INTERNATIONAL LTD.

Kevin joined Shell in 2012 as Senior Legal Counsel in London and later moved to The Hague in 2016 to take on the role of Managing Counsel, handling Shell's disputes across the EMENA region. In 2020, he was appointed to the role of Executive Committee (EC) Secretary, where he supported the EC and Board and worked closely with the Company Secretary while managing Shell's Securities lawyers. In 2022 he returned to London, rejoined Global Litigation and is currently Associate Counsel in that team, overseeing the management of some of the company's most complex disputes. Prior to joining Shell, Kevin worked in private practice in London as a disputes and investigations lawyer. He was born and raised in Canada and completed his studies at Oxford University and The College of Law. Kevin is married with a daughter and enjoys learning languages, playing piano and tennis. He speaks French, Dutch and German.

Tim Williams is an English solicitor responsible for construction and energy disputes at Wärtsilä Energy, a Finnish engineering firm which manufactures and services power generation, energy storage and other equipment for the energy sector. Tim is global lead for conflict prevention and dispute resolution in the Wärtsilä Energy business, including engineered equipment supply (engines and storage), EPC, project management, technical services, and long term operations and services agreements, and has a particular focus on supporting distressed projects and resolving large scale disputes, in arbitration, in the Courts and often in ADR.

TIM WILLIAMS
WÄRTSILÄ ENERGY

JOHN REILLY

RAYTHEON SYSTEMS LIMITED

John Reilly is the General Counsel at RSL and a member of the Board of RSL.

John provides legal advice and counsel across RSL and to the boards of a number of RTX owned UK companies. As a member of the Office of General Counsel, the body to which all Raytheon lawyers belong, he works closely with lawyers and paralegals in RTX, liaising on cross-border issues and providing legal advice to colleagues in other jurisdictions.

John joined Raytheon in October 1999 and following a number of years working from the Park Lane, London office, relocated to the Glenrothes, Fife facility. Prior to joining Raytheon, John worked as an in-house counsel in the automotive industry in the UK and US, before which he was in private practice as a civil litigator in the UK.

John is a member of the European Advisory Board of the International Institute for Conflict & Dispute Resolution. He also tutors in Corporate and Commercial Laws at the University of Edinburgh.

John is qualified as a solicitor in England/Wales and Scotland and holds degrees from the Universities of Glasgow and the London School of Economics.

John has also undertaken graduate studies in British Columbia and at the University of Edinburgh.

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SESSION OUTLINE:

PANEL 3

Dispute Prevention: Lessons from Tech, Life Sciences, and Energy Sectors

Presented by CPR's Brazilian Advisory Board

THURSDAY, DECEMBER 7, 1:45 – 2:45 PM ET

This panel will share experience and expertise from 3 different jurisdictions: Brazil, USA, and Norway. With diversified backgrounds, the speakers will explain the importance of building a culture of prevention of disputes and explore how to create awareness within the companies of the advantages to the business of avoiding disputes. They will also address the dynamics between in-house and outside counsel during pre-litigation negotiations arising out of Tech, Life Sciences and Energy contracts. The panel will discuss the relevance of early case assessment as a tool to measure the strength of the merits and to avoid starting litigation or arbitration without a conscious and careful analysis of the claims and counterclaims.

Moderator:

CAIO CAMPELLO, Campello de Menezes

Panel:

TAÍS TESSER, Google

HOLLY LOGUE, Gilead Sciences

MARCELO PERLMAN, Perlman Mediation and Legal Strategies

TOM MELBYE EIDE, Independent Advisor

CAIO CAMPELLO DE MENEZES

CAMPELLO DE MENEZES

Caio Campello is an independent arbitrator and mediator based in São Paulo, Brazil. He has more than 25 years of experience in complex litigation and commercial arbitration. Caio has a Master Degree in International Dispute Resolution from the University of London. He has completed executive courses on Negotiation at Harvard University and on Mediation at Pepperdine University. He is recognized by Chambers and Partners as leading individual in Arbitration over the past 10 years. Caio is included in the Panel of Arbitrators of several Brazilian arbitration institutions. He is member of the Brazilian Advisory Board (BAB) of the International Institute for Conflict Prevention & Resolution (CPR). He is also member of the Brazilian Arbitration Committee (CBAR). Caio is part of the Alumni of the International Chamber of Commerce (ICC) Academy for Arbitrators (Latin America). He is Co-Chair of the Mediation and Negotiation Task Force of the Instituto Brasileiro de Direito Empresarial (IBRADEMP-AMCHAM).

Holly has been an attorney focusing on life science and biotechnology companies for over 20 years. Her practice includes complex transactions, negotiations, litigation, intellectual property, corporate governance, and general corporate practice. Currently, Holly is an Associate General Counsel at Gilead Sciences, Inc. specializing in complex transactions and alliance management. Her previous roles included being the general counsel at two small life science companies and maintaining her own practice advising private and public companies in life sciences, medical device, data science and diagnostics. Holly earned her B.S. in biochemistry and her J.D. from the University of Michigan, and her M.B.A. in finance from Wharton at the University of Pennsylvania.

HOLLY LOGUE
GILEAD SCIENCES

TAÍS TESSER
GOOGLE

Head of Litigation at Google Brasil

Master Degree in Law from University of São Paulo, 2013

MBA Certificate from the Polytechnic School, University of São Paulo, 2008

Post Graduation Degree in Constitutional Law from ESDC, 2006

Graduation Degree in Law from University of São Paulo, 2003

MARCELO PERLMAN
PERLMAN MEDIATION AND LEGAL STRATEGIES

Marcelo Perlman is a commercial mediator based in Sao Paulo, Brazil. He is a Distinguished Fellow of the International Academy of Mediators (IAM), a Fellow of the Chartered Institute of Arbitrators (FCIArb), and has been included in the Panel of Distinguished Neutrals of The International Institute for Conflict Prevention & Resolution (CPR), in the Panel of Mediators of the International Centre for Dispute Resolution (ICDR), as well as in the rosters of mediators of different reputable Brazilian and Portuguese providers. Member of the Brazilian Advisory Board (BAB) of the International Institute for Conflict Prevention & Resolution (CPR), of the Mediation Advisory Committee of Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá (CAM-CCBC), of the Mediation Thought Leadership Group of the Chartered Institute of Arbitrators (CIArb), and other mediation-related initiatives. His mediation practice has been recognized on an yearly-basis in the international rankings Who's Who Legal and Leaders League.

Tom is an independent advisor and international arbitrator/mediator, having more than 20 years of executive legal experience with companies like Equinor, BG Group and Shell Global Upstream. Tom has also held advisory positions with the Ministry of Finance and the Ministry of Energy in Norway. Tom has not only extensive experience with all areas of Global Oil&Gas activities from Upstream to Downstream and Trading but also M&A and Dispute resolutions.

Tom has been legal decision executive for large disputes globally relating to Investor State, JV, Capital Projects, post M&A and Energy Transition issues.

TOM MELBYE EIDE

INDEPENDENT ADVISOR

2023 CPR GLOBAL CONFERENCE

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SESSION OUTLINE:

PANEL 4

Keeping the Peace in Commercial Transactions: Dispute Prevention and Management Boards

Presented by CPR's Canadian Advisory Board

THURSDAY, DECEMBER 7, 3:00 – 4:00 PM ET

This panel will discuss the effective use of dispute review or management boards as a preventative tool in commercial transactions. Sharing insights from panelists who helped develop the new **CPR Rules for Administered Dispute Prevention and Management Boards**, as well as insights from practitioners who have participated in or utilized such boards, the panel will discuss why such rules should be considered for commercial contracts, how the rules are implemented during the life of the transactional relationship, and why such rules are beneficial in the construction industry but also in IT, Health & Life Sciences, Manufacturing and many other industries.

Moderator:

LINDSAY ROWELL, Blake, Cassels & Graydon LLP

Panel:

DEBORAH MASTIN, Independent Neutral

VERLYN FRANCIS, Dispute Resolution Consultants Inc.

Lindsay is a Partner at Blake, Cassels & Graydon LLP. She practices all aspects of commercial arbitration and litigation with a focus on energy, construction, and environmental disputes. Lindsay regularly advises clients about domestic and international commercial arbitration.

Lindsay is Member of the Y-ADR Steering Committee of the CPR Institute. She is recognized by The Legal 500 Canada 2023 (Dispute Resolution: Alberta) and Best Lawyers: Ones to Watch in Canada 2023 (Corporate and Commercial Litigation) and 2024 (Corporate and Commercial Litigation; Energy; Construction).

LINDSAY ROWELL

BLAKE, CASSELS & GRAYDON LLP

VERLYN FRANCIS
DISPUTE RESOLUTION CONSULTANTS INC.

VERLYN FRANCIS practised law for over 20 years and is an experienced arbitrator and mediator and dispute prevention and relationship manager in Commercial, Civil, Estates, Family, Disability, and Intercultural disputes. In addition to her independent arbitration and mediation work locally and internationally, Verlyn is a roster arbitrator and mediator on the Global and General Commercial panels of the CPR Panels of Distinguished Neutrals (CPR), Financial Industry Regulatory Authority (FINRA), the National Bar Association-ADR (NBA-ADR), Cayman International Mediation and Arbitration Centre (CI-MAC), New York State Bar Association, and the Canadian Transportation Agency.

She is the Principal Consultant, and the Culture, Diversity and Inclusion Specialist at Isiko (ē/sē/kō) Dispute Resolution Consultants Inc.

Verlyn has taught ADR at Longo Faculty of Business, Humber Institute of Technology & Advanced Learning; Lincoln Alexander School of Law, Toronto Metropolitan University; Faculty of Business, Centennial College in Toronto, Canada. She was a visiting professor of Advanced Negotiation in the Master of International Business at La Salle EMCI in Lyon, France; and guest lecturer in the LL.M. Dispute Resolution Program at Osgoode Hall Law School. She publishes and presents on Ethics in ADR, the Impact of Culture on Conflict, Diversity and Inclusion in ADR, Conflict Prevention, and Process Design. Her most recent publication is Ethics in Arbitration: Bias, Diversity and Inclusion (2020-2021) 51:2 Cumberland Law Review 419.

Ms. Francis holds J.D. and LL.M. (ADR) degrees from Osgoode Hall Law School, Toronto.

DEBORAH MASTIN
INDEPENDENT NEUTRAL

Deborah Mastin mediates and arbitrates large complex and multi-party commercial, construction and EPC disputes in the USA and internationally. She is a mediator and arbitrator with CPR, ICC, AAA (Mega Projects Panel, Large Complex Case Panel, Master Mediator Panel, Dispute Board Panel, ICDR International Panel), CIArb and LCIA.

Arbitrator and mediator since 1996, for disputes arising from the design, construction and operation of infrastructure facilities, including: nuclear and fossil fuel power plants, solar farms, power sales; mining, wastewater treatment; bridges; tunnels; highways; fuel pipe lines and utility corridors; commuter and light rail systems; airports; marinas; hospitals; university campus buildings, commercial and industrial projects; multi-family residential, hotel and resort developments, assisted living facilities

Until 2013, Assistant County Attorney for Miami-Dade County and Broward County; drafted contracts and litigated claims on public infrastructure projects, including $6 billion Miami International Airport expansion, $2 billion Ft. Lauderdale-Hollywood International Airport expansion, bridges, tunnels, museums, performing arts centers, stadiums, waste treatment facilities, environmental remediation, co-generation and other power plants, automated rail systems, light rail, utilities and piping, and information technology systems.

Fellow of: Chartered Institute of Arbitrators, American College of Construction Lawyers, College of Commercial Arbitrators, Dispute Board Federation. Past president Dispute Resolution Board Foundation Region 1 (USA and Canada)

Northeastern University School of Law JD

MIT School of Architecture and Planning SB

She is a enthusiastic supporter of early dispute prevention initiatives.

CLE MATERIALS

CPR is grateful to the authors who have granted permission to include their work in the 2023 CPR Global Conference Coursebook.

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Alternatives
TO THE HIGH COST OF LITIGATION
The CPR Institute's Monthly Newsletter on Avoiding Commercial Conflict

VOL. 34 NO. 4 APRIL 2016

ADR Systems / Part 1 of 2

How Businesses Use Planned Early Dispute Resolution

BY JOHN LANDE AND PETER W. BENNER

This is the first part of a two-part article summarizing the results of a study about why and how some businesses use "planned early dispute resolution" systems.

This month's article identifies elements of the "PEDR" systems and processes. The second part next month offers recommendations for businesses—and especially their inside counsel—for developing robust and sustainable PEDR systems in their companies.

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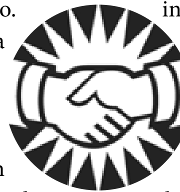
The study will be published in 13 *Univ. of St. Thomas Law Journal* (2017)(for more information, see http://ir.stthomas.edu/ustlj/), and is now available at bit.ly/1Qu9H0o.



One might assume that using a PEDR system should be a no-brainer for businesses that regularly litigate. Litigation undermines many business interests such as efficiency, protection of reputations and relationships, control of disputing and business operations generally, and risk management, among others.

One also might expect that because of these interests, most business leaders would direct their legal departments to implement PEDR systems.

Moreover, to advance the companies' interests and gain favor with the C-Suite, general counsel presumably would take the initiative to develop such systems and direct their staff and outside counsel to faithfully use a PEDR system. Inside counsel would readily comply because of the directives from their bosses. Outside counsel would comply out of concern for losing business to competitor law firms.

John Lande is Isidor Loeb Professor Emeritus and Senior Fellow of the Center for the Study of Dispute Resolution at the University of Missouri School of Law in Columbia, Mo. Peter W. Benner is a mediator, arbitrator, resolution adviser, and adjunct professor of dispute resolution at the Quinnipiac University School of Law in Hamden, Conn.; he was a partner for 28 years in Hartford, Conn.'s Shipman & Goodwin LLP.

Although these assumptions seem plausible, our recent study shows that they all are problematic. Indeed, despite strong interests in using some form of PEDR, many—perhaps most—businesses have not changed their litigation-as-usual approach.

PEDR is a general approach designed to enable parties and their lawyers to resolve disputes favorably and with reduced cost as early as reasonably possible. It involves strategic planning for preventing conflict and handling disputes in the early stages of conflict, rather than dealing with disputes ad hoc as they arise.

The International Institute for Conflict Prevention and Resolution, which publishes this newsletter, has been a leader in promoting PEDR systems. Indeed, some businesses represented in the CPR Institute have operated PEDR systems for decades.

Twenty years ago, Catherine Cronin-Harris, then a CPR vice president, published "Mainstreaming: Systematizing Corporate Use of ADR," 59 *Albany Law Review* 847 (1996), in which she chronicled the use of ADR by numerous corporations and argued that businesses were at the "threshold" of a third phase of systematizing business disputing.

The three stages were "(1) the ad hoc stage, characterized by idiosyncratic ADR use; (2) the strategy deployment stage, characterized by

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International ADR

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mandatory transparency in investment arbitration. Furthermore, probably the most revealing innovation, the E.U. suggests also the establishment of a permanent multilateral investment court as a new investment dispute resolution mechanism.

"The proposed court would draw its decision-makers from a pool of 15 pre-determined judges chosen by the state parties, at least some of whom might serve full-time. Each panel of the court would include three judges, put together 'on a rotation basis, ensuring that the composition of the divisions is random and unpredictable.'" Alison Ross, "Don't shun freedom of ISDS, warns Nappert," *Global Arbitration Review* (Nov. 27, 2015)(available with a subscription at bit.ly/1QklP8E).

But the new E.U. investment court, with its appeal system proposed by the European Commission, probably represents a step back from the protections and guarantees offered by international investment arbitration. The proposal seems to create different issues, which will not be analyzed in detail in this article, including decisions with respect to ethical challenges, enforcement, and the appeal system.

The best approach probably should be to persevere with international investment arbitration, a system with well-known qualities, and then try to reform ISDS in order to improve it, prevent abuse, and overturn its weaknesses. The permanent court has its own problems and limits, and an appeal tribunal, with power to review the facts of the case, does not offer more predictability than arbitral tribunals.

* * *

It is quite clear, especially to investment arbitration practitioners, that ISDS requires some improvements in order for the investment arbitration system to acquire that level of legitimacy and consensus now expected in the international arena.

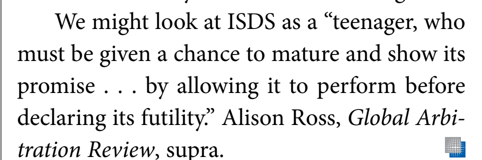
In negotiations over the Transatlantic Trade and Investment Partnership, the form of dispute resolution as well as politics will continue to be a subject for the negotiation process, in the midst of the higher-profile political heat the treaty will continue to face in a U.S. presidential election year. David Lawder, "EU trade chief: U.S. campaign rhetoric won't stop TTIP trade talks" *Reuters* (March 10, 2016) (available at reut.rs/1SBwEEA).

Even if some of the critics deserve attention and should possibly lead to some reforms of the international arbitration system, the general debate needs to be conducted in a constructive manner. Indeed, it is important to keep in mind that BITs and investment protections represent a major improvement in terms of a fair treatment of foreign investors and a neutral forum for dispute resolution.

The debate over ISDS should be used for an informed, sophisticated, and wise amendment of investment arbitration, because the alternative of "withdrawing from investment treaties—the logical conclusion of the critics' position—would likely have negative consequences for economic growth and the rule of law." Scott Miller & Gregory N. Hicks, supra.

It is necessary not to polarize the debate, but to provide an opportunity instead for new regulatory measures in order to promote a harmonized treaty-based investment regime.

We might look at ISDS as a "teenager, who must be given a chance to mature and show its promise . . . by allowing it to perform before declaring its futility." Alison Ross, *Global Arbitration Review*, supra.



ADR Systems

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establishment of tools to encourage ADR; and (3) the systems design stage, characterized by retooling of existing ADR strategies to integrate ADR use into the business and maximize its benefits."

She wrote that the system design phase emphasizes "(1) greater synthesis between the attorneys and business managers; (2) greater involvement of corporate dispute participants in prevention, as well as resolution, of disputes; (3) more effective ADR incentives with outside counsel and claimants; (4) fine tuning and earlier use of interest-based ADR procedures; and (5) industry-wide collaboration in ADR encouragement."

Businesses have not systemized their ADR use as much as one might have expected given their self-interest in doing so.

But some businesses have done so. This article summarizes the results of an empirical study analyzing why some businesses have adopted PEDR systems. It is based on 15 in-depth interviews of lawyers, all but one of whom are or have been inside counsel of large corporations that have developed PEDR systems. One interview was of a lawyer who has advised 15 to 20 clients in developing PEDR systems.

SYSTEMS ELEMENTS

There is no uniform model of PEDR systems.

Each company's system is a function of its line(s) of business, history of disputing, resources, business philosophy and culture, and the interests and actions of key stakeholders, among other factors.

Even so, it is possible to make some generalizations based on our interviews.

Early case assessment is the heart of the process. It is important to distinguish between early *assessment* of cases and early *resolution*.

In a PEDR system, companies routinely assess cases at an early stage but may decide not to pursue early resolution in certain cases. Indeed, the early assessment is critically important in being able to decide how to manage particular cases.

Even if companies decide to vigorously pursue litigation in such cases, this is part of a PEDR system if they make these decisions as part of a regular procedure rather than simply a case-by-case determination.

The CPR Institute developed a helpful Corporate Early Case Assessment Toolkit, which is available on its website at bit.ly/1LEv0eF.

Effective PEDR systems require at least one individual who is responsible for overseeing the system. One lawyer said that it was important to have one person to "own" the system.

These individuals often are called the "ADR counsel," though it would be more appropriate to call them "PEDR counsel" considering the range of functions they may perform.

These may include some or all of the following activities:

(1) helping plan the system,
(2) consulting with experts in ADR and in other companies,
(3) assembling information about the company's dispute resolution experience,

(4) eliciting views of stakeholders in the company about their interests, objectives, and values,
(5) developing recommendations and criteria for early case assessment and determination of optimal resolution processes to accomplish company objectives,
(6) developing materials and providing training for stakeholders,
(7) providing advice to lawyers and clients about handling particular cases,
(8) periodically reporting on the effects of the system, and
(9) proposing refinements of the system to make improvements and address any problems.

PEDR systems enable companies to manage disputes in a manner tailored to accomplish their business objectives. Companies differ in their preferences for using negotiation, mediation, arbitration, and other dispute resolution processes and whether to combine them in a stepped procedure. The policies may differ within a company depending on the type of case and relationship with categories of counterparties.

For a PEDR system to work effectively, those involved need to be trained so that they understand how to make it work. This begins with inside and outside litigators, who become oriented to view disputes as part of a business strategy, not just legal contests.

Transactional lawyers may negotiate more sophisticated dispute prevention and resolution clauses. In addition, they are likely to be the first lawyers who are contacted when contract disputes arise, so they should know how to respond effectively.

Business people also must understand how they can play an important and active role in successfully addressing legal disputes. The training of these stakeholders allows them to understand why using a new approach, with their participation, is in their interest, considering that many of them may feel that they are already doing a good job with the status quo.

INITIATION PHASE

In almost all of the examples we studied, inside counsel initiated PEDR systems.

An outside counsel who has assisted many companies in developing PEDR systems said that, in his experience, the legal departments initiated and designed the systems. The business leaders, he said, were "brought along" only at the end.

To initiate a formal PEDR system, one would need the "imprimatur of the general counsel," which would make top management more open to it.

PEDR systems can evolve gradually and/or be initiated through conscious planning. In some companies, in-house litigators took the initiative to develop these systems. In other companies, the PEDR systems evolved gradually over time and eventually became more formalized.

The latter might be called "Nike PEDR" systems: the lawyers just do it in their own cases, often without advance authorization of their superiors. Over time, their procedures evolved and became more formalized, and the lawyers enlisted support of the general counsel and top business leaders.

> ## Getting Ready
>
> **The subject:** Companies that prepare for disputes.
>
> **The method:** Planned Early Dispute Resolution involves tailoring a program along business lines that provides a path to resolve conflicts.
>
> **The study:** The authors' survey finds that despite 'the great potential benefits[,] . . . adopting and operating effective PEDR systems is surprisingly challenging.'

One lawyer developed a PEDR system by carefully analyzing the nature and causes of the company's disputes, their contracts, standard operating procedures, and (the lack of) training that could lead to preventable disputes.

She spoke with various people within her company, reviewed documents, evaluated potential liability, and brainstormed possible solutions. She created procedures and materials, including template documents, for business people to handle many problems themselves. She also helped them learn from disputes so that they could avoid future disputes—for example, by correcting inaccurate product specifications.

Lawyers initiating PEDR systems often studied other companies' programs and consulted a range of others for advice. For example, in one company, the legal department convened a team to create a guidebook to help busy commercial lawyers readily develop suitable ADR clauses as well as to help litigators in their department.

They collected ADR clauses from the company's contracts and held a series of "brainstorming teleconferences" with commercial lawyers in their company as well some of their outside counsel.

Another company is in the process of developing a PEDR system to make early assessments about the best way to handle different categories of cases. Those planners consulted with their in-house constituents, academics, mediators and arbitrators, and their outside counsel so that they "didn't reinvent the wheel."

They also consulted with plaintiffs' attorneys to be sure that they "weren't drinking their own Kool-Aid." Because of the sensitivity of consulting directly with plaintiffs' attorneys, they had two of their outside counsel contact several plaintiffs' attorneys without identifying their client.

The PEDR planners "workshopped" their ideas with some of the people they consulted to get their feedback. This involved distributing complaints they had received and roleplaying how their system might work, which identified issues they had not previously considered.

They are planning to test their system as a pilot program and make any necessary adjustments before rolling it out generally.

One former general counsel initiated the PEDR strategy in her company a few years into her tenure. When she started, the legal department had more of a "litigation orientation." She took time to establish credibility, and gradually reinforced the approach of taking control of disputes early and looking at them from a business perspective.

BUILDING SUPPORT

Because many people involved in handling business disputes are comfortable with the status quo and are convinced of its effectiveness, they may resist initiatives to change. Thus developers of PEDR systems must build support for these initiatives.

Proponents can identify interests that PEDR systems can satisfy for their business, such as reduction in the time and expense of litigation, achievement of better outcomes, maintenance of business relationships, protection of privacy, protection of reputations, greater control of disputes,

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ADR Systems

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reduction of risk, improvement in relationships between inside litigators and business leaders in their company, and improvement in coordination between companies and their outside counsel.

Identification of compelling business interests is a good starting point but it may not be sufficient to motivate people to incorporate PEDR procedures into their activities.

To fully succeed in institutionalizing a PEDR system, proponents must engage all the stakeholders, learn and accommodate their key goals and interests, consider options that would satisfy them, design the system to satisfy them, and publicize their successes to show that the system works.

Proponents may be successful if they can persuade stakeholders that the systems will help them solve their difficult problems and improve their standing with others in the company.

A former general counsel said that one needs to "bring people along and not get out too far ahead."

One lawyer said that, when she started to develop the PEDR system in her company, some people were skeptical. She tried to address their (implicit) question, "What's in it for me?" Rather than imposing a program, she tried to understand her clients' needs and how a PEDR system could help them improve their own job performance.

Many stakeholders have had negative experiences with litigation. PEDR counsel can help design systems to avoid or minimize the downside of such experiences in the future.

For example, in one company, business leaders felt that disagreements unnecessarily escalated into disputes and that the litigation docket was unwieldy and too expensive. So the PEDR system was designed to prevent management behavior that was likely to lead to disputes and, when disputes arose, to better manage the process for resolution.

The PEDR counsel sought to understand the "root causes" of disputes and develop dispute prevention processes. She said, "It's not our goal to win litigation. It's our goal *not to have litigation*."

Lawyers who want to institutionalize PEDR in their companies often need to make the business case to the internal stakeholders using data to demonstrate the economic benefits. Case management systems may produce data on costs, cycle times of disputes, and other factors that may help make the case for PEDR.

In one company, lawyers used data about the financial benefits of PEDR to address skeptics' concerns. Initially, the lawyers provided charts showing quantitative benefits to get the CEO and others "on board." They demonstrated that the company avoided having to pay tens of millions of dollars, considering reductions of out-of-pocket and legal costs as well as reductions in liability. After they established credibility within the company, they did not need to continue documenting savings from PEDR.

DATA DROUGHT

When developing a PEDR system, lawyers do not have experience in their own companies to demonstrate the benefits, so this may be a "chicken and egg" process because they do not have data of their own.

Proponents can take advantage of public success stories of well-known companies to demonstrate that PEDR can add value.

Commercial lawyers and those handling various specialties need to understand how litigators can create value for their company. One lawyer said that if litigators provide "vibrant ADR," their colleagues "get it." Having good experiences with mediation can change the "climate of the company" for both the legal and business people.

One lawyer said that his company used prominent, highly capable mediators, which had a significant impact on attitudes about ADR within the company.

Since litigators usually are not involved in the negotiation of commercial transactions, it may take some salesmanship with in-house commercial lawyers to get them to understand the value of well-crafted dispute resolution clauses and to enlist the help of litigators when they negotiate commercial deals.

These clauses can be complex, involving such things as limits on discovery, the neutrals' selection process, and internal appellate procedures, as well as procedures to prevent disputes.

One PEDR counsel said that it may take "a substantial proselytizing effort" to persuade transactional lawyers to thoughtfully develop ADR clauses. He said that if the clauses are out of the ordinary, the other side may suspect that you are trying to put them at a disadvantage. Negotiating these clauses involves additional work for the transactional lawyers and so they have to feel that there is a payoff to devoting time and effort to negotiating these terms.

INTEGRATING INTO THE BUSINESS CULTURE

Lawyers in this study emphasized that the process of developing PEDR systems is a "cultural project."

For example, in one company, key stakeholders came to appreciate that PEDR provides a more sustainable way to deliver value, so it is now part of their business strategy and legal culture. One lawyer said that the primary motivation for developing his company's PEDR system was that it simply is "a better way to do business."

Adopting a PEDR system is easier when it is consistent with the general business culture, and it helps if the company values systematic processes and measures the performance of its litigation department.

For example, a PEDR system was established in a "learning company" which has a culture of checking assumptions and looking for improved business methods. In another company, the PEDR system was consistent with the company's overall business objectives, which made it easier for the general counsel to move in the direction she devised for the system.

On the other hand, if PEDR is not generally consistent with the business legal culture, companies may not undertake a PEDR strategy unless they have a leader who is a change agent willing to undertake something that may require additional time and effort.

Proponents of PEDR approaches should expect some resistance. There can be some professional risk to company managers or inside counsel if a PEDR strategy is different from the culture in the legal department or the company generally.

These employees may think, "Why push the envelope when you don't have to do so?" One lawyer described "pockets of resistance" in his company which required continuing training and education for people to appreciate the benefits of their system.

Another lawyer said that it was hard to get some litigators in his company to "buy into a new paradigm." He described "a battle against the old way of doing things" as the litigators were comfortable with the way that things always had been done and were reluctant to change. For example, many litigators want to substantially complete discovery before they feel that cases are "ripe" for negotiation.

It is especially important to transform the mindsets of inside litigators. A former general counsel pressed inside litigators in his company to have a cultural and strategic business orientation—and not merely a "check-the-box" approach in a formalized system

Symbols and language can have an important impact. A lawyer responsible for developing a major PEDR system said that the legal department had to get the message through to lawyers in various ways—almost like advertising, even with things like messages on door magnets.

A former general counsel said that after they had general "buy-in" for a PEDR approach within his company, they renamed the litigation department to add "dispute resolution" to the title of the department and individual lawyers. He said that made a "huge difference."

* * *

Considering the great potential benefits of PEDR systems, one might expect that most business leaders would insist on using such systems.

Our study, however, shows that adopting and operating effective PEDR systems is surprisingly challenging. Even so, some legal and business leaders have provided the leadership needed to promote these systems, overcoming various barriers.

Our study identifies some of these barriers and the ways that business lawyers and executives have confronted and managed them.

In Part 2 next month, we offer recommendations for businesses and the ADR field to promote effective PEDR systems.

SAVINGS EXAMPLES

Here are notable examples of planned early dispute resolution programs that resulted in savings to the companies deploying the processes:

- A DuPont study found that "average potential litigation cost savings from use of early mediation . . . were $61,000 per employment litigation matter and $76,000 per personal injury case. Savings in commercial matters averaged $350,000."
- General Electric Co.'s PEDR system included an early case assessment program, early warning system, guidance on selection of dispute resolution methods, training, and "after action reviews," which resulted in savings of millions of dollars per year.
- Monsanto Co. previously had substantial litigation with many of its major competitors but now has no litigation with any of them due to relationship-based dispute resolution and conflict avoidance processes. Teams of business representatives and scientists met regularly to identify potential disputes before they became real problems and, with the participation of antitrust lawyers, explore potential collaborations.

—John Lande & Peter W. Benner

The Master Mediator

A Brief Stroll on the Roundabout of Authenticity, Confidentiality & Impartiality

BY ROBERT A. CREO

Editor's note: Alternatives *columnist Bob Creo, a Pittsburgh arbitrator and mediator, has been revisiting his catalog of CPR Institute website columns, originated a decade ago, in a Back to Basics* Alternatives *series that he has subtitled "Human Problems, Human Solutions." These updated and expanded columns are in print for the first time, building on new concepts and knowledge. He has revisited a wide spectrum of mediation room behaviors and practices.*

* * *

While watching the last episode of Downton Abby series, it reminded me of driving in Great Britain and confronting a "roundabout" or what we Americans might call a traffic circle. Three to five paths converge and the driver must quickly maneuver the desired route.

I analogize this to the mediator who is routinely faced with the tension between authenticity, confidentiality and impartiality. Although often harmonized, these are moments in a session where a deliberate choice must be made to prioritize one over the other.

What I used to call "building rapport," or "credibility" and "trust," has evolved into what I have framed as two of the four basic tenets of negotiation and mediation, Engagement and Authenticity. The other two are Creativity/Flexibility and Openness, not attachment, to outcome. See, e.g., Robert A. Creo, "The Master Mediator: Looking My Way—Thinking Fast and Slow . . . and Mediator Sense," 32 *Alternatives* 94 (June 2014)(available at bit.ly/1Rb0g6x); Robert A. Creo, "The Master Mediator: Being Right, Even When Wrong, Must Not Stop the Neutral's Push to Resolution," 31 *Alternatives* 119 (September 2013)(available at bit.ly/1YE3WU0).

I humanize the conflict by engaging the other participants on multiple levels. One level is abstract: I am "The Mediator," which carries with it certain frames and connotations.

It is an image that may contain elements of prestige, power or wisdom. It creates an expec-

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The author is a Pittsburgh attorney-neutral who has served as an arbitrator and mediator in the United States and Canada since 1979. He conducts negotiation behavior courses that focus on neuroscience and the study of decision-making, and was recognized by Best Lawyers in America as 2014 Mediator of the Year for Pittsburgh. He is the author of "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is a member of *Alternatives*' editorial board, and of the CPR Institute's Panels of Distinguished Neutrals. His website is www.robertcreo.com.

Alternatives

TO THE HIGH COST OF LITIGATION

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ADR Systems Design

Corporate Dispute Resolution Strategies to Make Mediation and Arbitration Better Alternatives

BY E. NORMAN VEASEY

This article is centered on the desirability of instilling a particular culture in corporate decision making on responsible and effective dispute resolution methods.

In business-to-business transactions, the parties should consider together what can go wrong with the developing happy courtship and marriage. That thinking is not unlike the concept of considering a pre-nuptial agreement.

Let me begin with my takeaway and go from there. The takeaway is that when the negotiation of a transaction is underway, the parties should be earnestly focused on the best contractual methods of resolving disputes that could arise in a less-than-best case scenario. There must be an early discussion of the dispute resolution clause, which may be as crucial as some of the important substantive provisions in the written agreement embodying the transaction.

In any transaction negotiation the parties do not want a dispute to arise. Absent an agreement on an alternative method, litigation will be the default. And, in some cases the litigation default may be appropriate. If, for example, there is a jointly recognized desirability for a judicial precedent, the only meaningful way that can happen is in litigation. But, absent that kind of consideration, the alternatives to litigation should be explored.

DECISION-MAKING METRICS

There is, of course, no uniform or generally preferred system for resolving business disputes. One size does not fit all. Many factors will shape the decision on the best dispute resolution strategy for a particular matter.

At the negotiation stage of a business transaction, when the parties should be considering the possibility that a future dispute might emerge, what metrics should the corporate decision maker consider in weighing the pros and cons of negotiation, mediation, arbitration, or litigation? The key to making an informed decision involves a careful analysis of risks and rewards, which is particularly important, of course, in complex business transactions.

Normally, it will be the corporate general counsel who is the principal point person in the quest for the optimal method for seeking a successful outcome of a dispute. Today there is more pressure than ever on GCs to avoid disasters in dispute resolution. The GC's goal, is to provide the company with the best opportunity for an optimal and cost-effective outcome of a dispute.

Why is the GC such an important player in this analysis? Usually the GC wears many important hats. In our book, *Indispensable Counsel*, my co-author Christine Di Guglielmo and I stated that the GC should be the partner-guardian, blending the business function with her role as guardian of the corporate integrity. E. Norman Veasey & Christine Di Guglielmo, Indispensable Counsel: The Chief Legal Officer in the New Reality 59-68 (Oxford 2012).

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The author is a former Chief Justice of the Delaware Supreme Court and is currently Special Counsel in Wilmington, Del.'s Gordon, Fournaris & Mammarella, where he focuses on practicing as a neutral in arbitration, mediation, and providing expert witness services. This article is derived, in large part, and updated from a 2015 *Business Lawyer* article, E. Norman Veasey and Grover C. Brown, "An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions," 70 *Bus. Law* 407 (2015) (available at https://bit.ly/3dVUFnI). This article and the 2015 article on which it is largely based were informed not only by the cited literature and our experiences but also by the input received from interviewing the 19 general counsel referred to in the earlier article.

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Commentary

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cases to be made by the firm, something quite alien to the dispute resolution world.

The actual task of handling complaints has become a highly sophisticated activity. Disagreements exist about what constitutes such a thing. A strict reading for the ESMA/EBA guidelines makes a customer's remark about the color scheme in a bank branch into a reportable complaint requiring investigation and a final response on the subject.

The United Kingdom, in possible breach of the MiFID Org Regulation, allows firms to exclude cases from their complaint handling where there is no allegation of a financial loss or material distress or inconvenience. Even then, a cross customer can easily allege the cost of a reply-paid envelope and enter the exciting world of regulated complaint handling.

There is a growing consensus that customers need not complain in writing. Many find it difficult to write or just communicate more naturally out loud. Third parties, like friends, loved ones, and caregivers, can always complain if authorized to do so on behalf of the person involved. The firm has to assume until it discovers otherwise that the customer gave the necessary authorization. (Very few people complain on other people's behalf without being asked to do so!)

Undertaking an investigation within a business is a skill of its own, involving a combination of bravery and tact and a basic grasp of employment law. Regulators expect neutrality but must know that employees are not independent of those who pay them.

Hardcore complaint handlers have stories to share about handling "impossible complainants." (See the author's You Tube videos on the subject at https://bit.ly/2Ujrunb and https://bit.ly/2MCxiEk.) Upset people do not always conform to standard cultural norms of communication. They range from customers who are too upset to explain themselves coherently to racist obscene bigots.

In the middle of all this sometimes charges a lawyer who typically does not understand the products concerned or how to obtain the best outcome for his or her client.

Model Procedure

The question: What's the use of complaining?

The answer: A lot. Raising your voice in a bunch of industries in the United Kingdom is the first step in resolution processes that lead to consumer satisfaction.

The conclusion: Resolution via complaints is "easily the most important to most people of all the forms of ADR."

In many cases, the skills required of complaint handlers are people-related but not as mediators would recognize them. Matching communication methods—do not ring a customer who has written to you and try to telephone someone who has rung you—and trying not to discuss sensitive consumer credit issues in the workplace or with someone awoken by the firm's telephone call are all part of the skillset.

Idealists argue that complaint handling is an excellent way to prevent the recurrence of incidents. Disgruntled customers are a source of intelligence but only a partial, slightly unreliable source. Firms do plenty of appalling things without their clients realizing this.

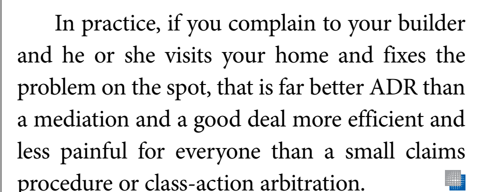
Complainants tend to be concentrated among the more articulate members of the population with the time, confidence or drive to raise things. Equally, some firms are much better at making it easy to complain and at identifying the "I don't want to complain but" complaint cases. Those, in particular, capture a more accurate picture of what is happening.

* * *

Deposit institutions reported 615,802 new complaints about current accounts alone to the U.K. Financial Conduct Authority in 2019's second half. See https://bit.ly/2UfuBMP. There were 4.2 banking and credit card complaints reported for every 1000 accounts. This omits all the cases that the firms concerned failed to spot.

Yet we do not hear very much about customer complaint handling as a dispute resolution form. In many countries, notably in Europe, it is the most regulated form and easily the most important to most people of all the forms of ADR.

In practice, if you complain to your builder and he or she visits your home and fixes the problem on the spot, that is far better ADR than a mediation and a good deal more efficient and less painful for everyone than a small claims procedure or class-action arbitration.



ADR Systems Design

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DISPUTE RESOLUTION IN THE FOREFRONT

Before I discuss mediation, arbitration, or litigation and the pros and cons of each, I would urge the reader to consider unassisted negotiation between the parties of the dispute arising from the transaction, as well as other possible extra-contractual disputes that could present opportunities for a global resolution of a wide range of *inter-partes* interactions.

Such a wide vision, as distinct from the tunnel vision focused only on the narrow dispute arising out of the discrete transaction at issue, is often used by a skilled mediator when the dispute resolution alternative of mediation kicks in.

As part of their study of dispute resolution protocols, John Lande and Peter Benner have urged business decision makers to adopt what they call "planned early dispute resolution," or PEDR, systems. The emphasis of their PEDR system is on the word "Early:"

> [T]o advance the companies' interests and gain favor with the C-Suite, general counsel presumably would take the initiative to develop such systems and direct their staff and outside counsel to faithfully use a PEDR system

John Lande and Peter W. Benner, "How Businesses Use Planned Early Dispute Resolution,"

34 *Alternatives* 53 (April 2016) (available at https://bit.ly/2Zh5ltb).

Perhaps one lesson here is for the GC and the business people negotiating the transaction to involve litigators early in the business negotiation strategy. Such an emphasis on the holistic concept of dispute resolution, as distinct from the linear and myopic reliance on litigation, can transform the company's culture. Id. at 57.

Effecting this kind of cultural shift in the mindset of the transactional lawyers is not always easy as there may be an inertial barrier in that area:

> We found that disputes usually are left to legal departments where often there are often minimal incentives to change as long as the departments operate within budget, try to control outside legal costs, and avoid bad results. In that environment, innovation commonly is not rewarded and does not flourish.

Peter W. Benner & John Lande, "How Your Company Can Develop a Planned Early Dispute Resolution System (Part 2)," 34 *Alternatives* 67 (May 2016) (available at https://bit.ly/2ALumT1).

Lande and Benner have concluded that:

> Our recommendations require lawyers and executives to think different than the traditional way of handling business disputes. (Id. at 68).

The litigator's perspective at the negotiation stage of the business transaction can add value in at least two respects: (1) educating the business people to the pitfalls and costs of litigation, and (2) cementing the control that should be exercised by the business people throughout by carefully crafted dispute resolution clauses in the transaction documents.

Consider the variables, such as the following, which may be among those that drive the GC's decision that mediation probably should be employed before arbitration or the litigation default:

- Is the dispute domestic or international?
- What is the subject?
- Are the predominating issues legal or factual?
- Who is on the other side?
- What court or courts would likely have jurisdiction?
- What is the importance of confidentiality?
- What skills should the neutral have?
- How can the delays and costs of discovery in arbitration be contained?
- What experiences have the GC and her advisers had with dispute resolution processes?

Keeping Options Open

The task: Systematizing the approach to business disputes.

The methodology: Address the potential for disputes early by dealing with it in your contract. The first resolution step is negotiation.

The advice: When a former Chief Judge of the nation's bellwether judiciary for commercial matters says that there is no uniform or generally preferred system for resolving business disputes, his preference for an ADR approach must be heeded.

ANALYZING TRENDS

It is common for transaction documents to prescribe that the parties to the transaction must engage in an escalating, step-by-step process for dispute resolution. That is, in a business-to-business transaction, the first dispute resolution step is often a requirement that particular executives—perhaps by title and perhaps at sequential seniority levels—of the respective companies meet and attempt to negotiate a settlement.

This step should not be a pro forma, check-the-box, exercise but a meaningful, sincere, and crucial dispute resolution mechanism. If that fails, a common provision is to require often with some specificity in the details, that the process moves to mediation.

This also is a crucially important step. If the mediation fails to produce a settlement, the most important question is, what is to be next?

The overarching question normally involves a disciplined risk/reward analysis in selecting arbitration or litigation at this juncture. In his outstanding book, Mediation Practice Guide: A Handbook for Resolving Business Disputes (American Bar Association 2d 2003), Philadelphia attorney Bennett G. Picker notes that greater attention is being paid to dispute resolution clauses in contract negotiations and increasing use is being made on "progressive, multi-step contract clauses that require, for example, executive negotiations followed by mediation followed by arbitration." [*Editor's note*: the author notes that Picker provided valuable input on early drafts of this article.]

In a transnational transaction, mediation is a particularly viable option and, if further dispute resolution steps are needed, the parties will often conclude that international arbitration is a better dispute resolution process than adjudication in certain foreign court systems.

The beauty of both mediation and arbitration of international disputes is often centered on the application of international conventions—e.g., the time-honored New York Convention governing the enforcement of international arbitration awards and the recent Singapore Convention regarding recognition of internationally mediated settlements. The Singapore Convention is new and its effectiveness may have defenses that could be a barrier to enforcement. So, its effectiveness has not been fully tested.

A domestic dispute often requires a different analysis, however. It is here that opinions are mixed and it is domestic dispute resolution on which this article is focused.

SOLVING DOMESTIC ARBITRATION

Some problems that GCs have experienced with domestic arbitration, when viewed in hindsight, could have been avoided. The GC may come to recognize that there are effective ways to cure many of the concerns with careful drafting, better processes for the selection of effective neutrals, and streamlining the entire process, particularly discovery, to achieve a speedy and successful resolution.

Respected commentators have noted that arbitration can be problematic and may not enjoy the hoped-for outcomes of being quicker and less expensive than litigation. For example, David Burt, former senior in-house counsel in the DuPont Legal Department and a consultant to the CPR Institute [*Alternatives*' publisher], has observed:

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> In business-to-business matters, executives want efficient, good-enough justice from arbitration. They want a way forward in valued but threatened relationships. Often they don't receive it. Arbitration has become bloated and slowed by U.S. discovery, obstructed by heavily-briefed motions practice, and even sometimes coarsened by incivility. Efforts at right-sizing individual proceedings are intimidated by the suppressive fire of overlawyering.

David H. Burt, "A Call for Corporate Leadership to Sustain and Reinvigorate a Culture of Arbitration," 36 *Alternatives* 43 (March 2018) (available at https://bit.ly/3e32ice).

Nevertheless, Burt concludes that much depends on in-house counsel, noting that:

> Part of our job … [as] in-house lawyers must [be to] advise … colleagues to temper expectations, but also stress arbitration's … strength:
>
> - Certainty;
> - Excellence of judging, especially where the default venue doesn't offer a secure rule of law;
> - Increased confidentiality;
> - Empowerment of parties to design the process, which is best done at the moment of contracting but sometimes possible at the moment of disagreement; and
> - Better potential to preserve business relationships compared to litigation.

Burt notes, however, that some litigators can be part of the problem by tending to engage in overlawyering, thus making some arbitrations bloated and slow:

> Lawyers who assume that their charge is to chase every tiny advantage contribute to the system's deterioration. … Throwing every tool in the Federal Rules of Civil Procedure at a private arbitration rarely serves the client, although it might serve counsel's interests. …
>
> One final word to outside counsel. Be trial lawyers, not litigators. If something will not make much of a difference at the hearing, exercise some leadership and don't ask for it.

NEUTRAL SELECTION

The Effective Mediator: The importance of selecting the best available neutral is common to both mediation and arbitration, whether domestic or international. One wants a mediator who can keep the negotiation going, consider creative solutions to the dispute (perhaps by also incorporating resolving extra-contractual problems), and press the combatants to seek common ground—being very reluctant to take a failure to reach agreement for an answer.

For a mediator, one wants a professional who is absolutely impartial, possesses strong negotiating skills, and has the training and experience to understand the challenges presented by the mediation process. This paradigm mediator should be an optimal blend of styles that are both facilitative and evaluative. See Picker, Mediation Practice Guide, at n. 7. I regard mediation as an art form blending these skills.

The Effective Arbitrator: If a dispute may be headed to arbitration, one wants to be able to select arbitrators with other outstanding professional skills in managing disputes, including those likely to arise in discovery. In the end, one would want arbitrators whose skills can result in keeping things on track and managing the process in a way that won't let the arbitration get out of control.

Sometimes the categories of expertise for the arbitrator (e.g., retired judge, expert in the subject matter) are negotiated and specified in the written agreement memorializing the transaction. Sometimes the decision is made ad hoc once the dispute arises.

Thus, quite different skills may be implicated in each category: in arbitration the neutral will be called upon to make *decisions* (perhaps suggesting that the category of retired judge may be appropriate); whereas, in mediation more of an art form may come into play because the goal of the mediation process is not a decision, but it is getting the parties to consider a range of options in arriving at a *settlement.*

In a mediation the neutral is a facilitator. Some former judges are excellent at the mediation art form as well as managing arbitration. Some former judges who are outstanding in managing the process of arbitration may be too decision-oriented to be effective mediators.

In deciding on the kind of neutral to select—either in the transaction agreement or after the dispute has arisen—it may be desirable in certain situations to have a neutral who is an expert in the field at issue.

For example, in today's high-tech world, a thorough knowledge of the technology applicable to the dispute is often a key consideration. Selecting an arbitrator with experience in a specialized field may or may not be practicable. But having experienced arbitrators is not only a modern consideration but also that kind of selection process has historical roots.

In a recent online memo, American Arbitration Association Vice President P. Jean Baker not only reminded us of the following relevant history but also pointed to it as an ancient precursor of the 21st century trend in some high-technology areas to seek neutrals who possess expertise in "cutting-edge technology," particularly when high-tech business disputes go global. See P. Jean Baker, "Arbitrators Provide Technical Expertise, Confidentiality," *Law & Business Media* (Feb. 28, 2020) (available at https://bit.ly/2RtiF8P).

In the Middle Ages, Italian merchants were keen to settle disputes without the costs and delays of litigation arising not only in bilateral business-to-business disputes but also in conflicts involving industry standards and practices. These merchants didn't want judges learned only in the law; they wanted neutrals who understood the business mores of diverse industries. So they often turned in those days to a form of arbitration, involving merchant-neutrals. Id.

Baker also reminds us of the long-revered arbitration benefit of confidentiality. As she notes:

> Many times, business disputes—especially those involving technology—involve some kind of proprietary or confidential information, in which case the companies want to protect those details from public exposure. If you go into litigation, the court proceedings are public, meaning anybody can sit in and view them [unless the judge seals the courtroom and the record]. Arbitration, on the other hand, is inherently private. Id.

ADR COMMUNITY TRENDS

In the 2015 *Business* Lawyer article linked above,

we surveyed the then-recent studies, which I will now touch on, as they are still valid.

In 2008, the College of Commercial Arbitrators convened a national summit to consider the growing concerns of businesses regarding litigation. One of the chief concerns leading to that summit was that arbitration was becoming as costly and lengthy as litigation.

Participants at the summit overwhelmingly (about 90%) believed that the chief benefit of arbitration over litigation *should be* its promise of speed and economic efficiency. But it was similarly the belief of almost three-quarters of the participants that, in general, arbitration, as it was then being practiced in many iterations, had failed to deliver on that expectation.

One of the reasons these summit participants concluded that arbitration often failed to provide a speedy and economic experience is that most outside lawyers who participate in arbitrations are litigators, used to trying cases in court. Because of that background, they pursue lengthy and expensive trial practices, including discovery. About half of the summit participants thought that "excessive discovery" was the cause of arbitration becoming costly and inefficient.

The participants noted that it is not unusual for litigators to agree to litigation-like procedures for discovery, even to the inappropriate extent of using standard civil procedure rules as binding, because that's what they do.

Similarly, the summit participants concluded that arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices especially because it is the parties' arbitration and they have agreed to wide-ranging discovery. More than 60% of the participants felt that too-lengthy hearings, as well as ineffectually controlled discovery, contributed to the inefficiency and cost of arbitration.

In 2011, the RAND Institute for Civil Justice conducted a study of attitudes in business-to-business arbitrations. That study, although limited in scope, revealed several things. First, about 60% of the respondents felt that arbitration is often faster than court litigation. But only a bare majority agree that arbitration was cheaper than court litigation. Many of the respondents with the most experience in arbitration disagreed with the contention that it saved money *or* time.

One thing that respondents concluded, by a large majority, was that many arbitrators tend to compromise the outcome when rendering their decisions. This was regarded as unfortunate.

One RAND study factor that significantly weighed in favor of arbitration was that arbitration could avoid excessive, emotionally driven jury verdicts. Other important factors included confidentiality and the ability of the parties to select their arbitrators.

A factor weighing against arbitration in the view of some participants was the absence of plenary appellate rights that would be available in certain litigation, particularly where a strong appellate precedent is deemed by the parties to be desirable.

Although there are relatively recent rules provisions of some ADR entities (e.g., the CPR Institute, JAMS, AAA) that permit incorporation in some contracts of appellate ADR panels and provide for their implementation, this process is rarely undertaken. Also, of course, it does not allow for the imprimatur of a precedent from a court of record.

And I might add my own opinion that insurance companies traditionally tend to prefer arbitration over litigation because of confidentiality, no plenary appeal, no precedent, no jury and no punitive damages. Those of the opposite view in the various surveys that informed our 2015 article cited as negative factors the costs of arbitration, the length of time for a decision, the lack of clear-cut decisions, and lack of arbitrators with expertise.

Although there appears to be a fear of the "judicialization" of arbitration proceedings—that is, the greater control over the process by law firms and less control by the companies—studies have concluded that most companies favor arbitration of international disputes. It is important to keep in mind the favorable attitudes of businesses toward the efficacy of international arbitration are distinct from their uneven attitudes toward domestic arbitration.

In 2014, Thomas J. Stipanovich and Ryan Lamare reported on the results of a 2011 survey of Fortune 1000 companies' corporate counsel. The results of this study showed, again, that ADR mechanisms are used in search of a time-saving, cost-effective method of dispute resolution.

This report noted, however, that companies were using mediation more widely and domestic arbitration less widely in recent years. Nearly half of the respondents stated that they frequently or always voluntarily submitted disputes to mediation, while almost half said they rarely or never voluntarily submitted domestic disputes to arbitration. Thomas J. Stipanowich & J. Ryan Lamare, "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations," 19 *Harvard Neg. L. Rev.* 1 (2014) (available at https://bit.ly/2YGi8DB).

My thesis is that (1) domestic arbitration bottomed on a carefully-drafted agreement and strong management by the arbitrator need not rival litigation for excessive costs and delays, and (2) mediation should be employed whenever feasible.

FROM THE INTERVIEWS

As previously noted, five years ago, my co-author, former Delaware Chancellor Grover Brown and I not only surveyed the literature but we also interviewed 19 GCs to inform our 2015 *Business Lawyer* article. As to domestic dispute resolution, the results of those interviews included the following points:

- One of the nearly universal opinions of the GCs was that confidentiality was usually an important positive factor in favor of arbitration. The affirmative views about the value of confidentiality included: recurring or hoped-for future business between the parties, secret commercial or scientific information, concerns about the company's reputation, not revealing certain business or litigation strategies, not upsetting customers with a public display of problems (such as uncertain supply), and the like.
- Most GCs embrace mediation, not only because it may avoid arbitration or litigation, but also because it tends to introduce *rationality* and right-sizing into the thinking of the decision makers on both sides of the dispute. The mediation process may also reveal important information from an opposing party.
- In fact, certain executives who might be intransigent on settlement considerations may come away from the mediation session having experienced a "cold shower" of reality and awareness of downside probabilities that could arise in litigation or arbitration.
- Good mediators will insist that executives who have decision-making authority must be present at the mediation sessions. The benefits of that insistence include: (1) educating the decision makers on both sides of the reality of the strengths and weaknesses

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ADR Systems Design

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of the merits of both sides and what may lie ahead if they do not settle; and (2) having present at the mediation executives in authority on both sides to be able to agree on the terms of a settlement, whether it is in the form of compromising the legal and factual issues in the dispute and/or in the form of a new deal between the parties.

THE FACTORS: COST V. NON-COST

The advantages and disadvantages of the litigation default are obvious. What is not so obvious to the GC and other corporate decision makers is the optimal risk/reward analysis between litigation and arbitration. In both, there are cost factors and non-cost factors.

Cost factors involving lawyers' fees, arbitrators' fees, delay, executive time, the extent of discovery, and the like that must be carefully and realistically evaluated in both litigation and arbitration scenarios. This is where the learning process resulting from an attempt at mediation—successful or not—can be helpful.

As to non-cost factors, confidentiality is often a key factor favoring arbitration. If the dispute is between companies with continuing relationships, trade secrets, business strategy, or for other reasons, the privacy of arbitration may be considered a definite plus and sometimes may trump countervailing issues.

Of course, other non-cost issues may affect the choice of arbitration vs. litigation. For example, litigation could likely default to an unfriendly forum, so arbitration might be better because the parties have the ability to weigh in on the selection of the decision maker.

The lack of a plenary appeal in arbitration, although viewed by many of the GCs we interviewed as potentially problematic, could be seen by some decision makers as a plus because it gives the arbitrator more leeway to streamline the proceedings without inordinate fear of reversal.

Because most of the excessive costs and delays in some domestic arbitrations are attributable to pre-hearing discovery, the parties should make the selection of an efficient manager one of the highest priorities in selecting an arbitrator or arbitration panel.

As Delaware Chief Justice for twelve years (1992-2004) and before/after that judicial service, more than 50 years as a litigator and Fellow of the American College of Trial Lawyers, I have seen that litigators can run amok with discovery and over-try a case. But they can do good work if they are properly fenced in by a carefully crafted contract and a stern no-nonsense judge or arbitrator. Both should be the goals in dispute resolution.

Common sense is always a guide. Analyzing the level of discovery, including e-discovery, that is essential and proportionate to the issues should provide the good arbitrator with good guidance. An arbitrator, absent contractual provisions to the contrary, may permit or limit discovery to the extent that he or she feels necessary to adjudicate the dispute properly.

And, given the extremely high barrier needed to reach vacatur of arbitration disputes, an arbitrator has a great deal of discretion in determining what and how much discovery should be permitted to provide for a fair hearing. (The limited grounds for vacatur are discussed in our 2015 article. See E. Norman Veasey and Grover C. Brown, "An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions," 70 *Bus. Law* 407, 427-430 (2015) (available at https://bit.ly/3dVUFnI). In the words of Justice Elena Kagan: "The potential for those mistakes is the price of agreeing to arbitration. … The arbitrator's construction holds, however good, bad or ugly." *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2070-71 (2013).)

CONTRACT PROVISIONS

One way to attempt to mitigate the cost/delay problems is through careful drafting of the contractual dispute resolution clauses or by the procedural decisions of the arbitrator(s) at the preliminary hearing stage. There are numerous methods that top managerial arbitrators use in controlling discovery and mitigating delays.

In the transaction's drafting process, the dispute resolution mechanism under consideration should have two dimensions. First, there are the essential provisions. I like to refer to the 10 provisions derived from a famous 2003 article by John M. Townsend ("Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins," 58:1 *Disp. Resol. J.* 28, 32 (February-April 2003) (available at https://bit.ly/2WSGmuE)), which I have paraphrased as follows:

1. Unequivocal agreement to arbitrate (perhaps after exhausting the negotiation and mediation steps).
2. Articulate what disputes will be arbitrated (broad or narrow clause).
3. What rules will govern the arbitration (e.g., AAA, CPR, JAMS).
4. What institution, if any, will administer the arbitration *(e.g.,* AAA, CPR, JAMS).
5. The seat of the arbitration.
6. In an international agreement, the language of the arbitration.
7. The applicable substantive law.
8. The procedural law that will apply.
9. The number of arbitrators (whether a single arbitrator or a panel), their special qualifications (if any), and how they will be chosen.
10. An agreement that judgment may be entered (and in what court) on the award.

Second, I think there are some key points that each negotiator must have as a mindset in the drafting process:

- Think through what you are trying to accomplish by the dispute resolution provision.
- Think through what legal or factual issues may arise, depending on the nature and provisions of the contract.
- Consult with counsel experienced in litigation, mediation, and arbitration.
- Advance planning is key. Do not wait until the substantive terms of the negotiation are being agreed to and drafted. Avoid the problem when the negotiators are experiencing "deal fatigue" and scrambling at the last minute to find boilerplate dispute resolution clauses.
- Consider including provisions such as expediting the process with time limits to be enforced by the arbitrator, prohibiting interrogatories or requests for admissions, limiting the scope and number of document requests, the number and length of depositions, award of attorney's fees and interest, etc.

* * *

Dispute resolution decisions are intensely contextual and depend upon many factors.

First, intense and skilled negotiations between the parties is crucial.

Second, mediation with a skilled and experienced mediator is ordinarily a low-risk/high-reward, promising scenario. Moreover, it bears emphasis that effective use of the optimal processes of well-crafted ADR clauses coupled with the deployment of seasoned and skilled neutrals, holds the promise of being more economical and swifter than the distraction of litigation.

Here are the overarching issues: Is the dispute resolution process under contemplation more likely than not to end in disaster if arbitration is the default after failure of the escalating settlement steps? If the arbitration can be set up with the safeguards referred to in this article—specifically, state-of-the-art best practices and high-quality neutrals—the likelihood of disaster should be sufficiently diminished so that a speedy and well-managed arbitration is more likely than not to result.

So, the clutch question that the parties should ask themselves when they are negotiating the business transaction or later when the dispute has arisen is this: Is the dispute resolution under contemplation more likely than not to end in disaster if litigation is the default? Or is arbitration the better road to resolution?

I think arbitration can be the better road in most circumstances, absent special considerations (e.g., the parties' perceived need for a judicial precedent). Substantial attention must be paid to drafting an excellent dispute resolution clause with a tightly-controlled arbitration process. Furthermore, substantial due diligence should be devoted to the selection of the best available neutral.

ADR Ethics

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based upon each individual plaintiff's injuries. The resolution, which appears to be typical for mass settlements, was widely publicized.

But a June 3 news report identifies Mediator Togliatti's father, George Togliatii, as the Vice President of Security, Surveillance and Safety at Mandalay Bay at the time of the shooting, a role he remained in until shortly before his daughter was appointed as one of the mediators in the case. See Katie Wilcox & Bianca Buono, "One mediator in Las Vegas shooting settlement is daughter to former MGM security Vice President," *12News KPNX* (Phoenix) (June 3) (available at https://bit.ly/2zadWTH).

According to the report, Mediator Togliatti notified the lawyers of this conflict, and the attorneys agreed to have her serve anyway.

The press has found letters from two of the plaintiffs' attorneys disclosing and minimizing Mediator Togliatti's conflict, one stating that her father's MGM position "may motivate her to get the matter resolved."

Yet some plaintiffs claimed to be unaware of her father's position until recently. And several plaintiffs now question the settlement agreement's legitimacy.

Plaintiff Michelle Leonard, who suffered knee and ankle injuries in the attack, maintained, "This is why I'm speaking out. Because this is wrong." See *12News KPNX* report above.

Another plaintiff, Roger Kenis, opted out

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Dispute Prevention Strategies To Halt Strife Before It Starts

By **Ellen Waldman and Allen Waxman** (March 27, 2023)

Ellen Waldman

Allen Waxman

Turbulence in world affairs presents unique challenges to commercial partnerships.

Russia's invasion of Ukraine and resultant sanctions have impeded the flow of goods, sparked product shortages and cost increases, and sent shudders through existing distribution networks.

Escalations in the U.S.-China trade war, tariffs and the great powers' move toward economic decoupling have similarly shaken established supply chains. Climate change and pandemic-related events create additional disruptions and uncertainty.

Instability in the business environment has led to increased disputes, clogging courts still coping with pre-pandemic backlogs. Although court closures initially dampened claims, the pace of civil filing has steadily increased over the last year. Indeed, 44% of in-house counsel surveyed in Norton Rose's 2023 Litigation Trends reported that they expected the tide of litigation to continue to rise over the next 12 months.[1]

And, of course, this adversarial battling takes place in an environment of ballooning costs. In 2022, it was estimated that for every $1 billion in revenue, corporations spent $1.7 million on legal fees and costs.[2]

In sum, there are too many disputes inflicting too much disruption to corporate purpose. Litigation is notoriously slow, costly and relationally ruinous. Even alternatives like arbitration and mediation impose costs, direct and indirect.

Wouldn't it be better if mechanisms existed to prevent disputes in the first place?

Well, they do.

For at least three decades, sophisticated parties in the construction and labor-management arenas have understood the wisdom of taking precautions to prevent conflict in business and worker relationships from escalating into disputes.

The construction arena has been particularly attuned to the destructive effects that delays caused by disputes can have on their projects. They have instituted various procedures, like dispute resolution boards, to expedite resolution and get the parties back to work.

Similarly, leading companies have demonstrated that preventative measures, such as open-door policies or ombuds programs, can be effective in reducing strife and discontent in their workforces.

These relatively small investments at the beginning of relationships can and should be expanded beyond those arenas. Increased focus should be brought to reducing misalignments and creating an environment where conflict, if it does arise, is dealt with expeditiously before intensifying and ossifying into a costly dispute.

[Authors' draft]

Hard-Wired for Conflict: Cognitive Bias That Stokes Strife

Like any relationship involving human beings, business relationships can get messy.

The conditions under which joint ventures and other commercial enterprises are formed change. Personnel come and go, and the original spirit of the alliance is frequently challenged by events unforeseen and unforeseeable at the time the contract is signed. Change requires quick, sometimes instinctive response, and there is no guarantee that business partners will view each other's improvised maneuvers as optimal, or even trustworthy.

Indeed, our cognitive structures are such that we are prone to viewing our partners' actions through a skeptical lens.

Take three of the most common cognitive biases that social scientists have documented in countless observational studies: the self-serving bias, or the tendency to "conflate what is fair with what benefits oneself," as defined by economists Linda Babcock and George Loewenstein;[3] the planning fallacy, or the tendency for people to consistently underestimate both the time and costs for completing projects;[4] and the fundamental attribution error, or the tendency to attribute others' behavior to character traits while ignoring situational factors.[5]

Each one undoubtedly kept our early ancestors alive and assertive; but, as the impetus for an overly sharp email or misinterpretation of a counterparty's commercial efforts, they collectively have the potential to send a promising business deal fatally off-course.

Given the array and power of the cognitive biases that transform our everyday experience into grist for an adversarial mill, it is perhaps no surprise that over 50% of joint ventures end in failure and that business relationships are so frequently marred by strife.

Taking Dispute Prevention Seriously: Begin at the Beginning

Given the enormous damage and distraction disputing entails, it might seem odd that more attention is not paid to prevention at the very beginning of commercial relationships. But, the fact remains, we in the legal field are more accustomed to speeding to the scene of a car crash with high-tech medical equipment and surgeons in tow than working in advance to erect speed bumps and warning signs where the road winds precariously.

The first step in adopting a dispute prevention mindset is to begin focusing on the potential for conflict before tensions or misalignments have emerged. That is, counsel should view their role as surveyors, mapping the deal landscape with an eye for danger zones.

Where do falling rock or quicksand make passage hazardous? What internal or external conditions put the deal at risk? Where are each deal partner's capabilities strained?

What measures can be put in place to manage the foreseeable risk, and what mechanisms can be adopted to help the parties deal constructively with those risks that cannot yet be anticipated?

Shifting Cultures

To effectively perform the work of dispute prevention, a culture shift is necessary.

The attorney must reframe the imperative of zealous advocacy to include counseling the client on mechanisms to maximize the value of relationships established. It is not enough to fight to protect the client against every risk; instead, she must be compelled to build a relationship that is meant to endure and maximize the expected value of the deal.

A single-minded focus on extracting maximum profit for her client often puts the relationship and the deal on fragile footing. The savvy dispute prevention lawyer knows that trade-offs are necessary and educates her client accordingly.

Dispute Prevention: The Mechanisms

So, what tools does the dispute-preventing lawyer have at her disposal?

They are several, which can be grouped into four different categories: contractual mechanisms, governance and relationships, incentives and metrics, and third-party neutrals.

1. Contractual Mechanisms

Attention to the potential for conflict and its skillful management should be an integral part of the contracting process, not an afterthought. As Danny Ertel wrote in a Harvard Business review article, "Getting Past Yes: Negotiating as if Implementation Mattered," the negotiation process should be oriented not toward getting a deal closed, but toward creating a relationship that will yield value for all participants.[6]

At all times, deal negotiators should be thinking about how the process of putting the deal together will affect the partners' ability to work together going forward and whether the deal terms and conditions are capable of being successfully implemented.

This focus suggests that traditional aggressive negotiating moves such as keeping critical information close to the vest, capitalizing on the element of surprise, and working to push all anticipated risk onto one's deal partner are unlikely to result in a successful partnership and will ultimately backfire.

Rather, deal partners should share information forthrightly, talk through internal vulnerabilities or changes in the business environment that might impair capacity to meet contractual obligations, and allocate risk to the party best able to manage or insure against it.

Rather than seeking to win the negotiation, with the end goal being a document that offers advantage to one's own side at the expense of the other, deal negotiators should view the end goal as a deal that is fair and optimizes value for both sides. As a senior vice president of Procter and Gamble notes in the Ertel article, "Leaving some money on the table is OK if you realize that the most expensive deal is one that fails."[7]

Deal partners should consider memorializing their intent to give one another the benefit of the doubt, communicate openly and invest in the relationship by adopting a formal covenant of good faith and fair dealing.

Relational contracts go one step further. They include all the standard features of a traditional contract, but contain language devoted to sketching out the type of relationship the parties envision, how they intend to communicate and share information, and their larger goals for the partnership.

In addition to key performance indicators, pricing and service requirements, a relational contract includes a formal statement of intent, a jointly developed shared vision, guiding principles and a model set of behaviors that will guide the parties' interactions. The key to these contractual mechanisms is to continue to reinforce the principles enshrined in paper through relationship building and other alliance mechanisms, discussed below.

An additional contractual mechanism effective in containing conflict is a step-negotiation or escalation clause. These clauses direct those individuals most directly involved in the emerging disagreement to sit down and try to work out a reasonable solution. If those closest to the issue cannot reach agreement, their superiors — hopefully a step removed from the emotions of the conflict — then put their heads together to resolve the problem.

These clauses have built-in time frames to avoid delay and the frustrations that occur when problems are allowed to fester. Embedded in this step-negotiation structure are incentives for front-line employees to work together productively so that they can preserve their reputations as effective problem-solvers and avoid calling their higher-ups into the fray.

2. Governance and Relationships

Beyond the contracting stage, various governance measures exist that can help parties create effective communication channels, and anticipate and untangle workflow knots before they create problematic delays, shortages or costs.

Partnering is a team-building effort in which the parties take steps to intentionally establish a cooperative working relationship. Typically, key personnel from both deal partners gather at the onset of the relationship at an off-site retreat where they identify common goals and work to understand each organization's expectations and values.

Participants may choose to develop a deal overview identifying the purpose of the deal, mutual objectives, key personnel, risks and potential challenges.

Additional formal governance mechanisms may include designating individuals in comparable roles at each organization to serve as alliance managers who initiate discussions, engage in joint governance committees, and ensure a regular cadence of information exchange, operations review and discussion of emergent issues.

3. Incentives and Metrics

The thoughtful use of incentives and metrics can be used to encourage behavior that prevents disputes.

For example, each organization could decide to allocate dispute charges to the budget of the subdivision that generated the dispute. This educates the organization and key personnel in departments where conflict tends to spiral about the true costs of such disputes.

Additionally, incentives can be instituted that align interests, encourage excellence and discourage disputes.

In a dual- or multiparty transaction, bonus pools can be established to reward achievement of specified benchmarks. Importantly, the bonus can be structured so it is payable only if the participants from all organizations meet the assigned goals; the bonus is paid either to everyone or to no one.

This incentivizes all individuals to work together as a group and discourages an overly individualized or atomistic approach; it moves project participants from "what's in it for me?" to "what's in it for we?"

4. Use of Third-Party Neutrals

A third-party neutral is an outsider selected prior to the parties signing a contract who is available to assist in resolving conflicts and misalignments before they become a dispute. This individual is formally embedded into the parties' ongoing governance and will meet with the parties in real time to keep a pulse on the dynamics of the relationship.

Should the parties choose to deploy a third-party neutral, they should consider together who the right person is for this role. They might consider factors such as identifying someone who understands their business and the kind of conflicts that might arise, has the skills and experience to facilitate the parties working through their conflicts, and will be respected by both parties in this role.

This exercise of sitting down and conducting a conflict audit — thinking through where tensions might arise and what skills and experience a third-party neutral would need to resolve them — can also sensitize the parties to the potential for relational turbulence and reinforce the commitment to communicate effectively and behave collaboratively wherever possible.

Once the neutral has been identified, the parties must define what kind of relationship they want with the neutral. Do they want the neutral only to be available when needed as a standby neutral, or should they be embedded in the ongoing relationship between the parties as a standing neutral?

In either event, the parties should jointly brief the neutral on the nature, scope and purpose of the business relationship or venture. They should also determine how the neutral will be used, what authority the parties wish to vest in the neutral — for example, the authority to issue a nonbinding or binding decision to resolve any disagreements — and be prepared to equally absorb the costs and expenses of the neutral.

Conclusion

The last three years have served up a cornucopia of disruption: plague, war, storm and political turmoil.

But, to twist Shakespeare's words just a bit, the course of human affairs never did run smooth. Change and uncertainty will always be with us — and the conflict that follows in their wake.

It is past time for companies, and their counsel, to turn their attention upstream and attend to conflict before it escalates to dispute. Such a shift will require a change in culture, a reordering of priorities and the adoption of the mechanisms detailed above.

The quote "an ounce of prevention is worth a pound of cure" is attributed to the American

master of the epigram, Benjamin Franklin. But the wisdom of the phrase goes back further, to the Dutch humanist Desiderius Erasmus, speaking in the 16th century.

The wisdom of investing a little in the beginning to avert cost, delay and pain later is as true today as it was 500 years ago. Perhaps it is time we listened.

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[1] Norton Rose, 2023 Annual Litigation Trends Survey, (January 18, 2023) at 5.

[2] Ibid.

[3] Linda Babcock and George Loewenstein, "Explaining Bargaining Impasse: The Role of Self-Serving Bias," 11 Journal of Economic Perspectives 109, 110 (Winter 1997).

[4] Daniel Kahneman, Thinking Fast and Slow 255 (2011).

[5] Edward E. Jones & Richard E. Nisbett, The Actor and the Observer: Divergent Perceptions of the Causes of Behavior, in Attribution: Perceiving the Causes of Behavior 79 (Edward E. Jones, David E. Kanouse, Harold H. Kelley, Richard E. Nisbett, Stuart Valins, & Bernard Weiner eds., 1971).

[6] Danny Ertel, Getting Past Yes: Negotiating as if Implementation Mattered, Harvard Business Review (2004).

[7] Quoting Tom Finn, senior Vice President of Strategic Planning and Alliances in Ertel at https://hbr.org/2004/11/getting-past-yes-negotiating-as-if-implementation-mattered.

Alternatives

TO THE HIGH COST OF LITIGATION

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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.

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

(continued on page 181)

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CPR News

THIS NEWSLETTER, NOW ON YOUR IPHONE AND IPAD

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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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

(continued on next page)

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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.

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.

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

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.)

ADR Procedures

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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.

* * *

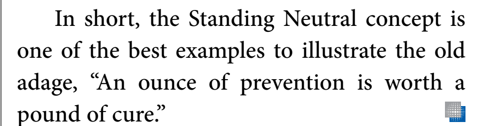
The reasons why parties choose to have a Standing Neutral, or the contexts in which parties may use a neutral, or the role that the neutral is assigned, are as varied as there are types of business relationships. But parties normally expect that every Standing Neutral arrangement will serve three broad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

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 precommencement/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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CPR News

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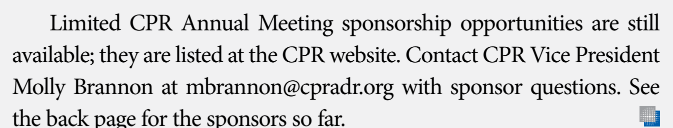
Miers' nomination was withdrawn when opponents raised questions about her trial work and close ties to the president.

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.

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

Want To Avoid Contractual Disputes? Amgen's General Counsel Suggests Civility And Humility

Kate Vitasek Senior Contributor

I cover the art, science and practice of collaborative relationships

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Civility and humility are key for avoiding contractual disputes. GETTY

The International Institute for Conflict Prevention and Resolution — CPR is a world-wide provider of mediation and arbitration services. But CPR's CEO Allen Waxman says the best way to ensure your company stays out of court is to deploy dispute prevention

practices and avoid disputes with business partners in the first instance.

BETA

Amgen's Executive Vice President, General Counsel, and Secretary Jonathan Graham agrees — and adds civility and humility as two key ways to avoid value-depleting disputes. CPR recently lauded Graham with the 2022 Corporate Leadership Award for leadership in dispute prevention and resolution.

'Less Conflict' Mantra Is Getting Traction

CPR's mantra of "less conflict" is advancing rapidly as companies such as Amgen lead the dispute prevention movement. Waxman notes that Amgen has shown leadership in conflict resolution best practices for almost three decades. In 1994, Amgen signed the CPR pledge, where parties agreed to consider negotiation before entering into litigation. Amgen later signed CPR's 21st-century "Corporate ADR Pledge," and most recently Amgen signed the dispute prevention pledge for business relationships. (21st Century Corporate ADR Pledge and Dispute Prevention Pledge)

Graham has been at the center stage of Amgen's dispute prevention efforts since he took the helm of Amgen's legal department in 2015. Graham — a graduate of the University of Texas School of Law, Pitzer College and a Legends in Law recipient — has garnered a reputation for his work championing dispute prevention.

Graham has been a long-time advocate for Alternative Dispute Resolution (ADR) techniques for settling disputes. "Alternative Dispute Resolution success is almost always preferable to a litigation expense," he says, "because it stresses the value of compromise in dispute resolution."

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But Graham's efforts go far beyond traditional ADR techniques such as mediation and arbitration which focus on dispute settlement and not dispute prevention. He has taken prevention to a new and somewhat unexpected level by emphasizing individual and corporate humility and civility in dispute prevention.

In Graham's acceptance speech at the CPR awards gala in New York City, he explained the logic. "There are two background conditions that are really important to resolving disputes. One is the characteristic of civility, which we need a lot in our society right now. And the other is humility, especially 'intellectual humility.'"

Applying Humility and Civility to Prevent and Resolve Disputes

Humility — defined as the freedom from pride or arrogance — is critical to preventing and resolving disputes. Graham recommends you start by getting out of the "trench warfare" mindset when it comes to conflict. This is because companies and individuals tend to get wrapped up in being right when they have a conflict.

Graham expresses humility in the term of what he calls intellectual humility. "What I mean by intellectual humility is the willingness really to listen to the other side and to not believe that you're always right yourself. The other side might have a point."

BETA

When people find themselves in a disagreement, the common approach is to try to prove the other side wrong. This tends to breed anger and frustration. Checking your ego at the door and letting go of the need to always be right or to "win" can be the secret sauce for collaborating while issues are still small — long before they become a dispute.

Graham admits that humility is often very difficult for an audience of lawyers — especially litigation attorneys — whose job is to protect their clients from risks and win in court. "Most lawyers are trained in law to fight to be right. When you apply humility, you must slow down and force yourself to have a more open and candid discussion. But this vulnerability creates an authenticity that fosters a much more conducive environment for collaboration and creative problem solving for working through how to solve issues before they become a dispute."

Graham's next tip? Be civil. Civility comes from the word *civis*, which in Latin means citizen. The definition of civility refers to politeness or etiquette. Examples of civility include treating others with dignity, courtesy, respect, politeness, and consideration. It also means speaking in tones of voice appropriate for the circumstances and being respectful of others' right to express their views, even if you disagree.

When you are in conflict with someone, it is easy to become frustrated and angry. Graham explains. "Your anger and frustration with the other side just get in the way of thinking logically and collectively about what a better solution might be for both sides." He adds: "I've certainly become convinced that civility is incredibly important," adding that "it's a lot easier to resolve a dispute if you've been unfailingly civil to the other side." Equally important is that it is much easier to prevent a dispute when you are civil.

While Graham's ideas on humility and civility might seem incongruous to include in the dispute resolution toolbox, they are

increasingly important for collaborative long-term business relationships.

BETA

Professor Thomas D. Barton (California Western School of Law), a leading thinker on preventive law practices, is pleased to see organizations such as Amgen and CPR shifting their focus to educating their members on more preventive concepts. Barton — author of *Preventive Law and Problem Solving: Lawyering for the Future* — shares his perspective.

"I applaud Graham's advice to fellow lawyers about the power of humility and civility in preventing and resolving legal disputes. Without intellectual and personal humility, we are unlikely to imagine fully the potential friction points of an institutional or social environment, nor how to smooth them preemptively through small interventions or broader re-design. Without civility toward others, we are unlikely to develop the relationships of trust that are crucial to implementing preventive measures or creative resolutions."

Proven Preventive Practices

Barton — a long-time advocate of preventive law practices — points out that dispute prevention techniques are not new. "While preventive practices are not new, what is new is that companies like Amgen have been practicing prevention techniques more proactively. I applaud Amgen for their commitment to CPR's dispute prevention pledge for business relationships."

He adds, "I am hopeful that as more people such as Jon Graham get behind CPR's 'less conflict' mantra you will start to see a positive shift to using more proven preventive practices."

Just what are proven preventive practices? Here are ten of the most notable techniques:

1. Realistic Risk Allocation

2. Formal (not implied) Covenants of Good Faith and Fair Dealing clauses
3. Partnering
4. Deal Architect
5. Formal Relational Contracts
6. Aligned Incentives
7. Dispute Evaluation Systems and Metrics
8. Formal Governance Mechanisms
9. Step-Negotiation Process
10. Standing (or Standby) Neutral

BETA

CPR is keen to understand how companies are applying dispute prevention practices and is launching a research initiative with the University of Tennessee to understand the extent to which organizations are using dispute prevention practices.

The Bottom Line

The bottom line? It is your bottom line. Conflict prevention practices pay off. Graham sums it up nicely. "Sometimes you have to be in court, but there are many times there are many better ways to solve your disagreement — and even prevent disputes altogether. I am a firm believer that the tactics and strategies of prevailing without going to court are just as important as those inside the courtroom."

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In-House Practice

The Ten Commandments for Teaming Up in an ADR Proceeding

BY NICOLAS E. LOPEZ & GUSTAVO SANTOS KULESZA

An Argentinean and a Brazilian walk into a coffee shop to complain about their problems. …

That could be the opening line of a reasonably good joke, but it is actually how this article began. The authors—an in-house attorney from Argentina and outside counsel from Brazil—engaged in an interesting conversation on alternative dispute resolution and, in particular, on the most important relationship within an ADR proceeding: the attorney—client relationship.

Hours later, and enough coffee to wake up the dead, we came up with what we have called the "Ten Commandments for Teaming Up in an ADR Proceeding." Far from the religious Ten Commandments, ours intend to improve the relationship between corporate counsel and in-house lawyers.

They are rules that might seem obvious and self-explanatory but that, as is frequently the case with the biblical Ten Commandments, can sometimes be forgotten.

In sum, the idea of this article is to provide a short and unpretentious list of 10 rules for helping in-house and outside counsel to team up more efficiently and effectively when seeking to resolve a dispute through an ADR proceeding, taking advantage of our firsthand experiences from each side of the table, as in-house and outside counsel.

Lopez is Director, Legal Affairs & Business Development for Otis Latin America in São Paulo, Brazil. Kulesza is a senior associate at Barbosa, Müssnich & Aragão, also in São Paulo, and is a member of the CPR Y-ADR Steering Committee. This article won the 2019 Y-ADR Annual Writing Award for Efficient and Effective Collaboration between Corporate Counsel and Outside Counsel. See the accompanying CPR News box on pages 167–168 for details. The authors advise that the contents do not constitute legal opinions and reflect their personal opinions only and not the company and law firm with which they are affiliated.

We have divided our Ten Commandments into three parts following the life cycle of an ADR proceeding. The first part is directed at the beginning of the relationship between corporate and outside counsel. The second part contains rules that apply when the ADR proceeding has already started. The third and final part is targeted at the end of the ADR proceeding and its afterlife.

PART I— BEFORE THE DISPUTE STARTS: WINTER IS COMING

First Commandment: You shall know your client before they become a client.

* * *

"If you wanna be my lover, you first gotta be my friend."—*Spice Girls, with minor tweaks*

* * *

There is no excuse for not doing our homework before that first meeting between corporate and outside counsel to discuss a new ADR case.

There are no more blind dates. Social media and software can give us enough information to create a virtual city. Research tools are only a mouse-click away. Google, LinkedIn, Bloomberg, you name it.

You cannot overstate the power of that first impression. Corporate counsel values seeing from the outset that the firm counsel it is meeting has taken the time to prepare.

Now, what is the actual homework that one should do? Basically, it is profiling your potential client as deeply as legally possible. The due diligence should mainly encompass:

- Conflicts of interest;
- Background check on the company, its in-house counsel and the people that will attend the meeting;
- The company's core business, markets and competitors;
- Relevant current issues (e.g., litigation, claims, transactions) which are available to the public, and
- Law firms that have represented the company in the past.

In preparation for the meeting, outside counsel also should make a short list of questions to bring to the meeting. Corporate counsel expect outside counsel to have doubts, be thorough and, most important, show interest.

Another tip on courtesy for the outside counsel: ask whether the meeting could be held at the company's offices. That is a gesture often overlooked. In addition, outside counsel can request a visit to the client's factory or headquarters in order to understand the business and thus better represent the company in a dispute.

This commandment will allow outside counsel to conduct a more efficient first meeting, better understand the company's culture, and start off on the right foot.

Second Commandment: You shall not wait for the smoke to turn into fire.

* * *

"The farther backward you can look, the farther forward you can see."—*Winston Churchill*

* * *

One relevant decision that may have a long-lasting impact on the outcome of the dispute is when to involve outside counsel. In-house counsel does not need to have outside counsel's

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In-House Practice

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opinion on every step the company takes. Knowing when to bring outside counsel to the discussion, however, may be paramount. Actions taken at the outset of a case may later become the smoking gun the counterparty needs to win the dispute.

A golden rule for a successful outcome in dispute resolution is to build a strong case from the beginning. The beginning is actually when you are negotiating the contract—"contracts are negotiated in time of peace, for time of wars," as the old saying goes.

Without outside counsel's assistance, parties may treat the dispute resolution provision as a "midnight clause" when closing their deal, and end up not only forgetting to provide for ADR, but getting a choice-of-forum clause that obliges them to solve their conflict before the courts of Alaska for a sale that took place in Argentina.

Once a contract is signed, depending on the dynamics and praxis of the relevant market or industry, parties may pay little attention to it. Part of the in-house counsels' mission is to remind the company's members that those agreed rules cannot be ignored.

When a potential dispute is on the horizon, in-house counsel may need support from outside counsel to reinforce the contract's relevance, as well as to interpret it. Especially when one considers that most disputes boil down to contract interpretation.

An important reminder is that in today's digital society, parties produce tons of written involuntary evidence (for example, emails, minutes of meetings, letters, cellphone messages etc.) that may later be used to back the arguments of your client—or, worse, the opposing party's arguments. Therefore, in-house counsel should count on the assistance of outside counsel to build a strong paper trail from the outset of the dispute.

Third Commandment: You shall have a clear strategy.

* * *

"Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win."—*Sun Tzu*

* * *

That efficient collaboration that started with the first meeting should translate into a structured strategic plan, which should be tailored to meet the goals conveyed by the corporate counsel as well as those deemed achievable by outside counsel.

Getting Together

The challenge: How to make in-house attorneys and their outside counsel work together more effectively.

The good part: Outside-inside teams are simply standard business practices. …

The bigger challenge: … and with that, the melding process is taken for granted. Leaving agenda-laden professionals from different organizations to figure it out between them because of a common cause is not a step in resolving the dispute. Team-building here isn't touchy-feely consultant-speak. It's fundamental conflict resolution—ADR 101.

In the pursuit of designing the most adequate plan, it is often (wrongly) believed by the outside counsel that the counsel is the one who should create and execute the strategy alone. This commandment requires that both outside counsel and corporate counsel work as a team when preparing the master plan.

For this task, outside counsel and corporate counsel should understand their place in the team, and should each contribute with their strength and skills.

Here are points on outside counsel's role in designing the strategy:

- Convey clear expectations and goals while asking the hard questions to the client;
- Present different scenarios (possible outcome, cost for each, timing etc.);
- Explain applicable ADR rules and how they will be used to best advance the client's interests;
- Explain what the law applicable to the merits is, and
- Drive the strategy from the perspective of the outside counsel.

Corporate counsel's role in designing the strategy includes:

- Tell the whole story without holding back information from outside counsel, especially where such information may endanger the case;
- Convey to outside counsel the client's ADR process goal;
- Bring in relevant people—identify key technical people involved in the dispute;
- Clarify whether settling is an option;
- Have in mind the reputational impact of the dispute,
- Have broad vision of the situation (and not to stick solely to the legal aspects), and
- Drive the strategy from the company's perspective.

The tasks outlined above should enable in-house and outside counsel to jointly define a successful roadmap for the case. The plan should include relevant milestones, and encompass actions, persons in charge, and due dates.

Finally, outside counsel should be ready to propose out-of-the-box strategy ideas—sometimes the boilerplate is not enough. It is true that trying something unconventional could be risky, but still needs be to put forward for consideration. Good outside counsel is expected to think out of the box.

Fourth Commandment: You shall tailor your team to the case at hand.

* * *

"The strength of the team is each individual member. The strength of each member is the team."—*Phil Jackson*

* * *

One fundamental strategic aspect frequently overlooked by outside counsel is the composition of the team that will work on the case.

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Once outside counsel has been able to fully understand the case with the help of corporate counsel, the law firm attorney must dedicate herself or himself to building the best possible team, taking into consideration the case's specific features and the client's idiosyncrasies.

That team should remain the same throughout the process. Any change must be explained to corporate counsel. Learning how to tailor your team and keep it together until the end is key for success.

During that team-building process, outside counsel must consider diversity in all of its forms. Diversity enhances performance. A study by consulting firm McKinsey & Co.—see Vivian Hunt, Sara Prince, Sundiatu Dixon-Fyle Lareina Yee, "Delivering through Diversity," (McKinsey & Co. January 2018) (available at https://mck.co/2Ldaf1s)—confirmed the firm's earlier findings that there is a strong correlation between a more diverse team and financial performance.

The same holds true for legal performance. "Two heads think better than one," as the saying goes. That is especially accurate when the two heads have little in common.

Another relevant aspect concerning team tailoring is seniority. Outside counsel should be able to assemble a team with different seniority levels, bearing in mind the complexity of the case and the client's budget.

Senior members of the firm should remain available for discussing high-level issues with in-house counsel. Senior outside counsel must avoid giving an in-house peer the impression that outside counsel was solely interested in bringing the case in, only to vanish afterward.

Having stated that, outside counsel should bring young practitioners to the grown-up table. Indeed, based on the relevance of increasing opportunities for junior lawyers, the CPR Institute, which publishes this newsletter, launched its "Young Lawyer Rule," which aims at allowing younger practitioners to take a more active role in arbitration. The initiative aligns with this commandment uniting the team, as the authors know from experience that young lawyers can play an essential role in ADR proceedings.

The team should remain the same throughout the process. Any change must be explained to corporate counsel. Learning how to tailor your team and keep it together until the end is key for success.

PART II—DURING THE DISPUTE: ON THE BATTLEFIELD

Fifth Commandment: You shall communicate at all times, even when you have nothing to say.

* * *

"The two words 'information' and 'communication' are often used interchangeably, but they signify quite different things. Information is giving out; communication is getting through."—*Sydney J. Harris*

* * *

This commandment is embedded in all of the others. It is only by means of clear, honest and constant communication that we build a successful relationship between corporate and outside counsel.

This communication requires mutual respect from both sides, as well as understanding the best channel to communicate. In today's era, the sender should bear in mind that the message will be fighting for attention with the thousands of other messages that daily arrive at the recipient's inbox.

That means accepting that you should not consider to duly notify someone on an important matter by just dropping an email. You need to set all the alarms, especially in an ADR proceeding with peremptory deadlines.

In the pursuit of efficient communication, we also must consider the ever-applicable rule that "good news travels fast, bad news has wings." Corporate counsel should be constantly informed on how the case is going, so the company may forecast any potential impact.

Sixth Commandment: You shall constantly revisit your strategy.

* * *

"The pessimist complains about the wind; the optimist expects it to change; the realist adjusts the sails."—*William Arthur Ward*

* * *

Once the proceeding has started, in-house and outside counsel may switch to automatic pilot mode and forget to be constantly reassessing the situation and/or recalibrating the strategy. In-house and outside counsel should be alert and ready to adjust the sails as the wind changes.

At each case milestone, in-house and outside counsels should go back to the initial plan and check if the new reality demands any adjustments. Outside counsel should constantly discuss with in-house attorneys if the company's goals have changed—in some instances, even though outside counsel is able to find strong legal arguments to defend a case, the outside attorneys may be unaware of developing business information.

Part of this reassessment process should involve discussing whether to approach the opposite side to initiate settlement talks. The CPR Institute's 2019 Administered Arbitration Rules and 2019 CPR Rules for Administered Arbitration of International Disputes expressly provide that either party may propose settlement negotiations to the other party at any time during the proceedings (Article 21.1).

And if the parties agree, the arbitral tribunal may request for the CPR Institute to arrange for mediation (Article 21.2). Counsel should know how to take advantage of this unique feature of the CPR Rules. (Available at www.cpradr.org/resource-center/rules/arbitration.)

As noted, both counsel should work together to adjust the strategy along the process. One important hallmark when making the assessment is the presence of the evidentiary hearing. Arbitrators tend to decide the case at the evidentiary hearing.

Given hearing's importance, outside and in-house counsel should share responsibility with regard to the hearing preparation. While the former may be responsible for preparing the opening and closing statements as well as

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In-House Practice

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drafting questions to the witnesses, the latter may undertake to prepare the first roster of potential witnesses and check with employees and executives about their levels of involvement in the matter.

Both in-house and outside counsel should decide together whether a mock hearing is needed and, if so, who should participate.

Seventh Commandment: You shall keep within budget.

* * *

"We must consult our means rather than our wishes."—*George Washington*

* * *

As in many aspects of a company's life, the decision to take part in an ADR proceeding is also about resources allocation, defined by the corporate counsel in the form of a budget. As with any other investment, ADR proceedings have a budget and an expected return. Both elements should be clearly discussed in advance by in-house and outside counsel.

All costs should be on the table. Apart from the outside counsel's fees, in-house counsel should be informed of all other potential expenses for the case, including administrative and mediator/arbitrator's fees, document disclosure, experts' fees, etc.

From the in-house counsel's perspective, outside counsel should be ready to accommodate a request for capped fees. As a counter-condition, corporate counsel should be willing to clearly limit the scope of the work and avoid stepping outside such bounds. Any change of conditions should be discussed in advance to avoid surprises.

When outside counsel fails to timely communicate that the costs of the ADR proceeding are about to exceed or has exceeded the budget, even an eventual big win could be overshadowed.

PART III—AFTER THE DISPUTE: SOMETIMES THE END IS THE BEGINNING

Eighth Commandment: You shall share responsibility for the outcome.

* * *

"With great power comes great responsibility"—*Ben Parker, Spiderman's uncle*

* * *

In-house and outside counsel should celebrate their wins but also share the pain of their (hopefully rare) losses.

Once the case has come to an end, in-house and outside counsel should both share responsibility for the outcome—especially if the case ends with a defeat, as it is easier to share the praise from a clear-cut win. If the above seven commandments have been followed, in-house and outside counsel should finish the ADR proceeding as a united team and the sense of shared responsibility will come naturally.

From the outside counsel's perspective, nothing is worse than being left alone in the battlefield during the ADR proceeding and later having to put up with in-house counsel complaining—with the benefit of hindsight—that a different strategy should have been adopted.

As to in-house counsel, when the ADR proceeding is over for the outside counsel, the in-house lawyer still has to deal with it internally and perhaps take measures to comply with the unfavorable decision. Instead of moving straight to the next case, the outside counsel should make himself or herself available to assist corporate counsel explaining the outcome to the client's top management, as well as jointly thinking on strategies to deal with the negative decision.

> The decision to take part in an ADR proceeding is about resources allocation, defined by the corporate counsel in the form of a budget. As with any other investment, ADR proceedings have a budget and an expected return. Both elements should be clearly discussed in advance by in-house and outside counsel.

Ninth Commandment: You may lose the case, but never the lesson.

* * *

"Making a mistake once is a lesson. Making a mistake twice is a choice."—*Our grandparents*

* * *

Outside and in-house counsel should meet after a dispute is resolved to review what could have been done differently and better—even when the result is positive. The process of assessing the outcome should involve looking at lessons learned for future cases.

Reviewing the process with the benefit of hindsight usually provides the reviewer with useful insights. Outside and in-house attorneys should take advantage of that and review the process to verify what worked and what didn't. Not surprisingly, some steps are considered adequate by outside counsel and inadequate by the in-house … and vice-versa.

Once a joint list of successful tactics and lessons is put together, in-house and outside counsel should investigate whether it would be useful to organize a short workshop to provide the other members of the client's team with insight. The idea is to allow them to become aware of—and therefore avoid—the mistakes, and share—and, therefore, incorporate—the successful strategies.

Tenth Commandment: You shall keep in touch.

* * *

"We cannot expect you to be with us all the time, but perhaps you could be good enough to keep in touch now and again."—*Sir Thomas Beecham*

* * *

In-house and outside counsels should always keep their radar on for future opportunities to work together. Keeping in touch is key for any relationship. After reading this piece, why not call your fellow in-house/outside counsel for a casual discussion on whether any of these commandments could improve your next ADR matter?

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Check for updates

The Master Mediator

(continued from previous page)

I often revisit the three questions of Rabbi Hillel stated at the outset of this column when I am at a fork in the road, or making decisions which affect my life and may affect others. When I have been asked over the years to serve as a mentor or to accept interns, these three questions provide an easy answer.

The responses to questions one and two are the same: mentoring is for yourself and others. It is a singularity and not a duality; not a transformation but the rare opportunity to transcend conceptional boundaries. I have chosen now to bask in the richness of the mentoring partnership.

* * *

When the Master Mediator column returns in February, Bob Creo discusses how he has worked to deploy the professional code advisories in mentoring new practitioners.

International Negotiation

Doing Business Over There Requires Savvy Conflict Resolution Management Here

BY JAMES CUNNINGHAM

Commercial diplomacy—that is, leveraging the resources of the sovereign government in your firm's location to ensure a level playing field in the foreign markets in which the firm does business—is often an effective means of resolving, and in some instances preventing, disagreements that might otherwise fester into disputes.

And those disputes can be even more protracted and expensive than the ones you face in your home market because of their international nature.

For example: In Countries A and B, the governments refuse to consult with businesses like yours on important decisions and persist in passing dead-of-night emergency ordinances that disadvantage your operations to the benefit of local competitors. Meanwhile,

- Your operations in Country C have been severely threatened by prohibitive regulations recently implemented;
- Your firm's assets in Country D have been expropriated by a state-owned company of the country, and
- In Country E, you have lost a bid for a government contract which you were bound to win were the selection process conducted transparently.

The author volunteered with *Alternatives'* publisher, CPR, this year while working on his LLM in dispute resolution at the University of Missouri-Columbia School of Law. He is a former senior U.S. diplomat with expertise in negotiating with foreign governments on behalf of U.S. businesses. His positions have included Regional Senior Commercial Officer for Andean countries and Panama, Senior Commercial Officer at the U.S. Consulate General in Hong Kong, and Regional Senior Commercial Officer for Southeast Europe at the U.S. Embassy in Bucharest, Romania.

How to respond?

File suits? Go for arbitration at the World Bank's International Centre for Settlement of Investment Disputes? Divestiture?

Perhaps, eventually. But, presented with such situations, companies doing business overseas might also consider the route of commercial diplomacy as a means of resolving—and in some cases preventing—differences.

While directly lobbying relevant decision-makers of the host government of the respective countries in which you are doing business in some instances will yield the changes you want, your firm may well benefit from leveraging the resources of your firm's home government to affect change.

Enlisting the help of the embassy of your firm's home government is often an effective means of stemming disputes while preserving your relationships with key host government decision-makers (i.e., putting the rifle on the shoulder of your embassy representative).

On resolving international investment disputes, "methods such as mediation and commercial diplomacy focus on negotiating with governments to seek constructive conditions that are persuasive for both investor and State." Marike Paulsson, "Commercial Diplomacy as a Ways Forward to Resolving Disputes When They Arise in International Trade," *Kluwer Arbitration Blog* (Aug. 22, 2018) (available at https://bit.ly/3jYk2tD).

Familiar Framework

The executives of multinational corporations as well as small- and medium-sized enterprises doing business overseas are well familiar with the framework used in deciding how, when and whether to use the resources of their firms' home governments to help resolve differences overseas.

They will consider a variety of factors including an analysis of the bilateral relationship between their home government and the host government of the countries in which their firm is doing business:

- Has the relationship traditionally been positive and enduring? Countries with traditionally positive bilateral relations—especially over a long timeframe—tend to look at the bigger picture, which in some cases will facilitate the resolution of the dispute.
- What is the trend line in that relationship? Have relations been improving—perhaps to the extent that the host government is less likely to allow a commercial dispute to interfere with that trend? Or, conversely, is the trend downward, leaving your firm vulnerable to the host government using your dispute to send a message to your capital?

- What is the current state of affairs in the bilateral relationship? In the film that depicts the bilateral relationship, what does the freeze frame taken today look like?
- Are there current issues causing turbulence? Troubled waters in one area of the bilateral relationship may in some circumstances invite a *quid pro quo* by the host government. Or, on the other hand, the largess of your home government may give rise to reciprocation by the host government.
- Is the host government dependent in one way or another on your home government? A nation with significant military or economic power—perhaps to the benefit of a smaller host government—holds considerable implicit sway over the latter. This is certainly not to say that the more powerful country will explicitly leverage the aforementioned power with a threat for example. But that understood or implicit power can play an important role in the dispute resolution process, especially if the more powerful country plays the role of its counterpart's protector (economically, militarily or otherwise).

In short, exercise care regarding the possibility of allowing a sour bilateral relationship to taint your efforts to resolve your dispute. Where bilateral government relations are thorny or outright hostile, you may well be better served going it alone.

For example, a U.S. citizen or company doing business in Venezuela or Russia—irrespective of sanctions—might think twice in deciding whether or how to employ the services of the U.S. embassies in Caracas and Moscow or using other Washington, D.C., resources.

But if your home government has positive bilateral relations and holds some sway with the host government, you may be well served by approaching the ambassador or the economic and commercial sections of your embassy in-country.

That same U.S. firm with operations in Russia and Venezuela should have a completely different approach to using the U.S. government's diplomatic resources to help resolve commercial disputes with the governments in neighboring Romania or Colombia, where U.S. military, law enforcement and economic cooperation with those host governments has been, and still is, considerable.

"Diplomats can facilitate dispute resolution by functioning as mediators and by pressuring host states to address investors' complaints by linking individual disputes to the broader diplomatic relationship," says Brookings expert Geoffrey Gertz, "Commercial Diplomacy and Political Risk," Brookings Global Economy & Development Working Paper 106 (August 2017) (available at https://brook.gs/3CQB5Xh).

Leveraging Relationships

A former senior colleague recently recounted a case in which she did not have an especially close working relationship within the finance ministry of an African country, but she leveraged the excellent bilateral relationship between the U.S. and that country, particularly in foreign assistance (for which the finance ministry was the key interlocutor).

That government had been planning to impose a retroactive tax and seize equipment belonging to a small U.S. company, but she and embassy colleagues were able to prevent that by reminding the finance ministry of the broader context and their desire to attract more U.S. investment.

You might inquire of your embassy representative their familiarity with the concern at hand, whether this concern has presented itself at other times with other companies or industries and how the concern may have been previously resolved—or left to languish.

Determining whether the issue central to the dispute is an easily fixed anomaly, on one extreme, or, on the other extreme, yet another example of a regular discriminatory practice by the host government may give you an indication of how intractable your problem is. It may help you shape the strategy for surmounting the root cause of the dispute.

The government of one country in which I served had the rather opaque practice of awarding government contracts to firms with only scant regard for the regulations governing such awards. I regularly met with U.S. companies of various industries to hear their grievances about the lack of transparency and the unfair decision-making processes in these government procurement tenders that were precluding the firms from considerable revenue.

Routinely, after informing the firms that the opaque award process was part of the country's common practice of favoring crony firms, I communicated our concerns to the relevant ministry. That often yielded the not entirely unfavorable response by the host government of postponing, reorganizing or even canceling the tendering process in question.

But recognizing that modifying the tenders did little to earn revenue for our firms and noticing the consistency of the untoward selection process, we later created a broader strategy, over a longer time horizon and in concert with competitor nations to achieve reforms.

Check on the Legal System

Commercial diplomacy is often effective when the legal system in a foreign country fails to act. In an interview, former U.S. Foreign Service Officer Amer Kayani said that enforcement of legal protection is often impeded by the judicial system in some of the countries.

Kayani recalls a case in which the country's copyright law provided deterrent penalties for infringements, but the courts failed to impose those penalties against counterfeiters, particularly in apparel and designer brands, causing millions of dollars in losses to U.S. fashion houses.

After one of the affected companies sought the embassy's help, Kayani successfully advocated with the government to take more aggressive domestic and border enforcement actions such as criminal convictions and deterrent penalties to decrease counterfeiting and piracy. Over the next 12 months, the embassy succeeded in getting the government to amend its laws to ban street sales of counterfeit products.

Kayani points out another tool that U.S. companies have used to ensure foreign governments take action to protect intellectual property: the Office of the U.S. Trade Representative's annual "Special 301" reviews conducted pursuant to Section 182 of the Trade Act of 1974, as amended (the Trade Act, 19 U.S.C. § 2242 (available at https://bit.ly/3qeWKEJ)).

The Special 301 Report provides an opportunity for the U.S. government to identify foreign countries that fail to provide adequate and effective IP protection and enforcement for U.S. inventors, creators, manufacturers, and service providers. Within its Special 301 Report, the USTR creates a Watch List and a Priority Watch List of offending countries and

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International Negotiation

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then develops action plans for constructive engagement with those countries.

For countries failing to implement the terms of the action plans, the Trade Act also enables the U.S. government in some circumstances to impose trade sanctions such as the revocation of unilaterally granted tariff preferences, as well as the initiation of dispute settlement proceedings at the World Trade Organization.

Thus, the stick of trade sanctions incentivizes compliance with the carrot of the USTR's action plans.

Strategizing with The Embassy

It bears repeating the obvious: not all embassy representatives have equal skills nor are they equally willing to ply their trade and engage on your problem. Much as you wish to maintain positive relations with host government officials, so too may your embassy representative. (And so too will many host government officials be reluctant to alienate foreign investors).

When strategizing with your embassy representatives, get a feel for their willingness to carry the water for you vis-à-vis the host government. Do not be afraid to ask the embassy staff what strategy they recommend, and offer your suggestions, especially if you feel their recommended strategy falls short of what is necessary to resolve your problem. Be proactive in mapping out and implementing the strategy in conjunction with your home government.

Do bear in mind, however, that as in any inter-institutional dispute, organizations have differing hierarchies and internal protocols for doing business. And the resolution strategy may be affected by external protocols (i.e., the host government's rules system for communicating with other sovereign nations).

Some host governments take a severely formal approach to communicating with sovereign counterparts and require communications through rather stylized *notes diplomatique* that conform with a strict etiquette.

Many host government and embassy officials—particularly at the senior levels—relish the more formal decorum of diplomacy, which can play into their egos. Whereas some host governments require correspondence only at the appropriate rank, others are far less formal and are comfortable with, say, a mid-level embassy official communicating directly with a host government minister or another official senior in rank.

The upshot is to pay close attention to the etiquette of the host nation and personal styles of its decision makers without assuming that a more casual and direct approach—occasionally used by U.S. and some European executives—will lead to a more expedient and effective resolution of your problem. A more nuanced and indirect strategy will frequently yield better results than an overly aggressive one, especially in high-context and collectivistic cultures.

Carefully consider the array of host government officials that might be called upon to resolve a dispute. Here, too, ego may play a significant role in the settlement of your disagreement.

For example, suppose the issue at the heart of your dispute has overlapping jurisdictions and Minister X has partial jurisdiction over the issue in question but you have opted to pursue a different tack by appealing to Minister Y (also possessing partial control of the matter). You may be ruffling the feathers and inadvertently creating an adversary of Minister X by excluding her from the resolution process.

Such an alienation could result in inaction—or outright opposition—by Minister X on the matter at hand should she later be called into the decision-making process. And the slight could damage relations with her to the extent that it affects her views on future decisions concerning your operations. As one senior diplomat said, "Companies don't have disputes with countries—people have disputes with each other."

Another consideration that may affect your embassy's ability or willingness to engage is the reciprocity of the reform being sought. Your embassy, at least in theory, will not ask its counterpart host government to make changes that run contrary to its own policies and practices.

Nevertheless, some embassy officials have advocated for their host government counterparts to eliminate opaque practices, for instance prohibiting the use of "emergency ordinances" which, in fact, function similarly to presidential executive orders in their own governments.

You are also well served to survey other stakeholders in the market to see if the issues giving rise to the dispute also affect these stakeholders. If so, it may be to your advantage to gain leverage through strength in numbers.

If your competitors are affected by the host government's actions (or inaction) on the matter at hand, it may be worth considering joining forces with the competitor—if only temporarily and for purposes of the dispute at hand.

Is your competitor company of a different nationality than your company? If so, you may gain the added benefit of commercial diplomacy engagement from the embassy officials of their country.

Host government officials dread hearing the same complaint from embassies of different stripes as this commonality lends credibility to the grievance in question, as discussed below. Yet exercise some care. A firm does well to avoid the perception on the part of a host government agency that it has been ambushed or set up by a firm that has poisoned the well and spread discontent through an industry and their respective embassy officials.

Perhaps the issue causing the dispute cuts across industry sectors. If so, how are companies in other industries affected? And are there industry associations or chambers of commerce in-country that share your interests

Long Distance Relationships

The deals: Operating internationally, and seeking a level playing field.

The subject: Commercial diplomacy is a part of doing business. Governments—yours and theirs—can help you conduct business more effectively, especially when conflict arises.

Why wait? The default discussion in this area is international arbitration, with a big legal-industry infrastructure. Commercial diplomacy can boost prevention prowess so the problem never reaches the adjudication stage.

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regarding the issue at hand? Consider enlisting their help in lobbying the host government.

Consider other stakeholders and whether they fortify your alliance. As with inter-organizational dynamics in general, be aware of the risk of creating an unmanageable coalition with an excessive number of allies with which you need to build consensus before proceeding. Beware of paralysis by analysis and possibly by dissent, too. But you may find strength in numbers by building a broad alliance.

Another country in which I served exhibited what appeared to be unwillingness to consult with the business community in advance of passing laws and regulations or instituting policies that affected companies. Obviously, such an uncommunicative environment tends to allow disputes to fester.

After several individual attempts by the U.S. Embassy failed to generate any significant changes, we expanded the effort to include the embassies of other nations, business associations, chambers of commerce and eventually global nongovernmental organizations such as the Organization for Economic Co-operation and Development and the World Bank Group.

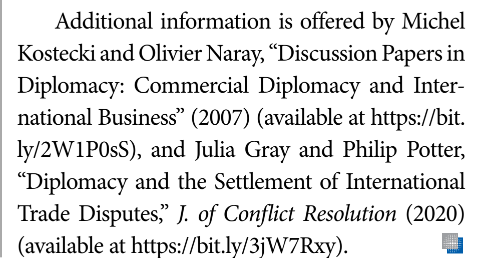
Almost certainly, the breadth of this ad hoc group compelled the government to signal its willingness to work toward resolving the problem.

Not long into the reform process, it was clear that the absence of consultation was at least in part due to a sincere lack of familiarity on the part of this relatively new democracy about how to effectively conduct consultation. And that lack of familiarity was only exacerbated by the absence of a lobbying law (at that time) to provide a framework in which officials could properly talk with executives without being accused of corruption.

The ad hoc group worked with the government to build capacity for conducting regulatory impact assessments (in advance of passing laws and regulations), systematize consultation between the government and industry, and create other dispute prevention and resolution mechanisms which created a more stable and transparent business environment that encouraged additional investment.

* * *

A well-crafted and well-executed commercial diplomacy strategy offers firms a dispute prevention and resolution mechanism through which positive bilateral government relationships are leveraged to improve the business landscapes of overseas markets, while preserving firms' relations with host government officials of those markets.



Additional information is offered by Michel Kostecki and Olivier Naray, "Discussion Papers in Diplomacy: Commercial Diplomacy and International Business" (2007) (available at https://bit.ly/2W1P0sS), and Julia Gray and Philip Potter, "Diplomacy and the Settlement of International Trade Disputes," *J. of Conflict Resolution* (2020) (available at https://bit.ly/3jW7Rxy).

Deal ADR

(continued from front page)

kinds of business transactions. It was a world where—except in the case of defending against a hostile takeover—the words we consistently heard from the top executives of our clients were, "Let's get this deal done."

As a result, those of us in the trenches—the financial mavens, the investment bankers, the lawyers—were all imbued with a "can-do" mentality. For some folks, like the investment bankers, the message from on high was reinforced by the realization that they were only paid if the deal got done.

So, we all behaved constructively and looked for ways to resolve impasse—to find compromises to thorny issues, to formulate outcomes that both sides could live with. Here's what I had to say about the process in my book, *Anatomy of a Merger*:

> [T]o call off a deal is not trouble at all, but it requires some real ability to hold together the pieces of a difficult acquisition and accomplish it in a way that satisfies all parties. … [T]he adept negotiating lawyer does not allow a seeming impasse to sabotage an otherwise viable deal, but instead devises a workable compromise (which itself can possess aspects of creativity) fulfilling the needs of both sides without subjecting either to serious adverse consequences.

James C. Freund, Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions (Law Journal Press 1975).

In addition to looking out for the interests of our own clients, this sometimes required us to help the other side solve its problems in order for the deal to get done. A sense of impending resolution pervaded the scene. Even when negotiations bogged down, we figured we could ultimately work things out. After all, the fact that the parties were there voluntarily and still talking was proof that they wanted to do a deal. And the top executives, although frustrated, weren't really irate at each other, and could still negotiate their differences in (mostly) civil terms.

Knowing why I'd been hired, I always felt a sense of responsibility to deliver a favorable outcome. Here's how I expressed that thought, as part of my personal credo:

> It goes against my grain to see deals muffed that should be made—whether because of intransigence, overtrading, miscalculation, erroneous assumptions, or whatever. I recognize that some deals simply don't make sense. But when one is itching to occur, I feel a sense of failure if I can't concoct and carry out a strategy to bring the two sides together."

James C. Freund, Smart Negotiating: How to Make Good Deals in the Real World at 29 (Simon & Schuster 1992).

Crucial Factor

The crucial factor in deal-making is that if the negotiations prove unsuccessful, the parties can simply walk away from the table, terminating the talks with no further responsibility. As a result, unless your leverage is commanding, you don't take extreme positions in a transaction that your client wants to consummate, and you can't "stick" with impunity on anything less than a real deal-breaker.

And so, we all embraced compromise—reckoning that most deals wouldn't get done

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Contract Drafting

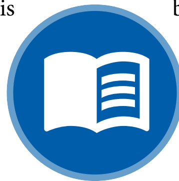
A Neutral's View of Preliminary Arbitration Issues

BY DAVID H. LICHTER

I am not a transactional lawyer. As a longtime neutral, however, I have the opportunity to review arbitration clauses at the beginning of every case, occasionally interpret them and see the effects that those differing clauses have on the conduct of an arbitration.

Those clauses come in as many variations as you might imagine: some are one sentence long and are clearly not the product of much forethought; others occupy two pages.

The key is not their length; it is the serious thought that is required when drafting these clauses given the impact they may have on the final outcome.



This article addresses some of the key preliminary issues that should be considered when mulling arbitration for your client, and drafting arbitration clauses.

MAKING THE CALL

The first decision likely involves deciding between arbitration and court. Arbitration will generally be faster than court, and should be less expensive, at least until the final hearing.

To keep it that way, the parties and the arbitrator need to work together to prevent the process from getting out of hand by placing limits on discovery (more below).

From a claimant's perspective, dismissals via dispositive motion are harder to obtain in arbitration, so a client with a somewhat weaker substantive case may have a better chance of surviving in arbitration than in federal or state court.

With that stated, however, the possibility of obtaining a higher jury verdict in court is worth more to some advocates—and clients—than the risk of dismissal.

The author is a mediator, arbitrator and special master who was a federal prosecutor and business litigator before becoming a full-time ADR neutral. He heads the Lichter Law Firm in Aventura, Fla., and works with CPR Dispute Resolution, the American Arbitration Association, the American Health Law Association, and FINRA.

Don't shy away from arbitration because you think arbitrators simply tend to "split the baby." An in-depth review by the American Arbitration Association of AAA-International Centre for Dispute Resolution awards reveals that more than 94% of commercial awards are strongly in favor of one party or another. See "Arbitration Insights: ADR Does Not Mean Splitting the Baby, *Corporate Counsel Business Journal* (March 13, 2019) (available at https://bit.ly/2TzJokZ) (citing an AAA-ICDR study).

The quality of the decider is a key factor in making arbitration a good fit. Providers themselves offer assistance to help parties and their counsel enlist neutrals with the appropriate substantive and process experience for the matter.

Let's face it: if you choose to file in court (assuming you do not have a mandatory arbitration clause), you are subject to whatever random wheel process the court employs. You may get a smart judge or one less qualified, but one thing is certain: you have no input into or control over the identity of your decisionmaker.

This is especially important if you have a matter that requires a particular expertise. Many providers qualify their arbitrators for substantive panels or rosters and the parties make their selections among a group that has a certain familiarity with the area. The same cannot be said when employing the judicial option.

The most savvy advocates also attempt to vet their arbitrators using a number of methods. This will usually include a trip to the arbitrator's website and LinkedIn page, listserv emails for organizations in which the advocate maintains membership, Westlaw/Lexis searches of court cases in which the arbitrator acted as an advocate and, for some providers like the ICC and FINRA (which publish arbitrators' awards), a review of prior decisions. Engaging in this process will better equip you when selecting your arbitrator or panel.

If you decide to proceed with arbitration, you should carefully consider the wording of your arbitration clause to ensure that all of your dispute remains in the forum of your choice. While courts in recent years are more likely to grant motions to compel arbitration than in prior decades, language matters.

For example, clauses which require arbitration "arising out of" the contract at issue "have been considered by the courts to be narrow in scope," while the phrase "arising out of *or related to* … have been broadly interpreted to encompass virtually all disputes between the contracting parties, including related tort claims." *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636-37 (Fla. 1999) (emphasis added). Compare *Cape Flattery Ltd. v. Titan Maritime LLC*, 647 F.3d 914, 922 (9th Cir. 2011) ("arising under" language limits disputes to those involving interpretation of and performance under a contract) with *American Recovery Corp. v. Computerized Thermal Imaging Inc.*, 96 F.3d 88, 93 (4th Cir. 1996) ("arising under or related to" language is a "broad arbitration clause capable of an expansive reach").

A related question for consideration is who decides questions of the arbitrator's jurisdiction or whether a particular issue is arbitrable in the first instance. Simply placing an arbitration clause into an agreement is not a guarantee that the arbitrator will be the person to decide what claims are arbitrable.

In fact, "[t]he question whether the parties have submitted a particular dispute to arbitration … is an issue for *judicial* determination unless the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds,* 537 U.S. 79, 83 (2002) (citation omitted) (emphasis added).

As a result, if you want to have the arbitrator decide questions of arbitrability, be clear about that in the agreement, because "[w]hen the parties' contract delegates the arbitrability question to the arbitrator, a court may not override the contract." *Henry Schein Inc. v. Archer & White Sales, Inc.,* 139 S.Ct. 524, 529 (2019).

It may be enough to specifically incorporate your arbitration provider's rules into

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Contract Drafting

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the agreement, as long as those rules give the arbitrator the authority to rule on his or her own jurisdiction, any objections regarding the existence, scope, and validity of the arbitration agreement or the arbitrability of any claim or counterclaim. See *WasteCare Corp. v. Harmony Enter., Inc.,* 822 F. App'x 892, 895-96 (11th Cir. 2020) (incorporating AAA rules into an arbitration clause serves as a "clear and unmistakable delegation of questions of arbitrability to an arbitrator"); *Blanton v. Domino's Pizza Franchising LLC,* 962 F.3d 842, 844 (6th Cir. 2020 ("every one of our sister circuits to address the question … has found that the incorporation of the AAA Rules [or similarly worded arbitral rules] provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability'") (citation omitted), cert. denied, *Piersing v. Domino's Pizza Franchising LLC*, No. 20-695 (Jan. 25, 2021) (Supreme Court Case page available at https://bit.ly/39Zxed1). See also Russ Bleemer, "Supreme Court's Decision on Arbitration Delegation: Case Dismissed," 39 *Alternatives* 50 (March 2021) (available at https://bit.ly/3edbPke) (noting that the latest U.S. Supreme Court version of *Henry Schein* had been dismissed earlier this year after December 2020 oral arguments as improvidently granted, and a cert petition related to *Blanton* had been denied).

Discovery: This is where most litigation fees and costs are incurred. Arbitration can provide some relief from an out-of-control discovery process. Many arbitrators, as well as their sponsoring organizations, have a mindset that arbitration is supposed to be more efficient and affordable than court, and they work to keep it that way.

Discovery often is more limited in arbitration, where the parties tend to serve fewer document requests, interrogatories and requests for admissions, if even allowed in the first instance.

For example, CPR Dispute Resolution's discovery rules provide that the "Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost effective." Rule 11: Discovery, 2019 Administered Arbitration Rules (available at http://bit.ly/2SGoW0z). [The CPR Institute publishes this newsletter with John Wiley & Sons.]

The AAA's Commercial Rules do not even provide for depositions, though they address submission of evidence in R-34 (available at https://bit.ly/2TxxCaH). JAMS Inc.'s rules permit only one deposition per side, with additional depositions allowed only upon a determination of reasonable need by the arbitrator. See R. 17(b), JAMS Comprehensive Arbitration Rules and Procedures (available at https://bit.ly/37SHFzs).

Writing Rules

The discussion: Points to consider and emphasize when drafting arbitration clauses.

The main point: Contract provisions need to be written. Tailored. Not merely retrieved and inserted.

The issues to consider: Among others, the decider, discovery, subpoena power, and choices of law, forum and rules.

When depositions are built into an arbitration scheduling order—usually by party agreement—they tend to be limited in number. The AAA's Employment Rules allow depositions "as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration," (Rule 9 on Discovery, Employment Arbitration Rules (available at https://bit.ly/37LLOFv)), and its Large, Complex Rules permit depositions "in exceptional cases" (Rule L-3(f) [available at http://bit.ly/3jWvYMj]). JAMS Employment Rules permit at least one deposition with additional depositions allowed upon a showing of reasonable need (R.17(b), available at https://bit.ly/37SHFzs)). The author's experience is that parties to arbitration generally tend to limit the number of depositions they seek.

Some arbitration clauses anticipate more complex issues and provide more generous limits on the number of depositions. In more complicated cases lacking a clause which addresses this issue, the parties may jointly seek broader discovery.

Assuming the arbitrator agrees, this will increase expenses but may give the parties the discovery they think they need. Despite the increased expense, it will still generally be easier and faster to obtain a hearing on more complex matters before the arbitrator than a judge.

Subpoena Power: This can be a significant issue, especially when non-parties possess important information and that information is located in another jurisdiction.

In 2019, the Eleventh U.S. Circuit Court of Appeals joined a number of other circuit courts in holding that parties to an arbitration proceeding under the Federal Arbitration Act may not subpoena nonparties to produce documents or appear for depositions prior to the final hearing. See *Managed Care Advisory Group v. CIGNA Healthcare,* 939 F.3d 1145, 1159 (11th Cir. 2019). Moreover, the appeals court held that nonparties can be subpoenaed to appear at a final hearing only in person and not by way of video or teleconference. Id. at 1160.

Nonparties, however, are not prohibited from agreeing to produce documents beforehand or voluntarily appearing for a deposition prior to a final hearing. It means that the nonparty cannot be forced to do so. Whether the coronavirus pandemic permanently changes the courts' views on remote appearances and production remains to be seen.

This decision does not mean one should abandon arbitration if not all of the parties or witnesses will be available in the place where the arbitration is likely to occur. Rather, the drafter might be wise to provide that the arbitration will proceed under a given state's arbitration act or the rules of one of the popular provider organizations rather than the FAA.

Costs: Court is free except for the filing and service fees. Arbitration providers usually charge a variety of administrative fees in addition to the hourly rate of the tribunal members.

While the parties generally will split the arbitrator's fees, at least initially, there are some notable exceptions in the CPR employment disputes rules, and in the AAA and JAMS forums for employment and consumer arbitrations, where the employer or the company usually foots the bill for the arbitrator's fees and most of the administrative expenses.

Furthermore, if the arbitration clause provides for three arbitrators, the whole will be greater than the sum of the parts. That is, while three heads are better than one in reaching

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an optimal decision, the parties will certainly spend more than three times the cost of a single arbitrator to produce a final award—of course, the arbitrators often confer with one another throughout the course of the arbitration, during deliberations and editing of the final award. Such costs may be more palatable for high-stakes cases, but they may be difficult to justify in smaller matters.

The AAA also offers a Streamlined Three-Arbitrator Panel option for Large Complex cases, which permits the parties in large cases where a three-member panel is required to instead work with a single arbitrator (usually the chair) during the preliminary procedural and discovery phases. The full panel joins only for the final hearing and award. (Available at https://bit.ly/3e5Imqr.)

Choice of Law: The choice of law can be outcome-determinative in a given dispute.

Drafters need to understand the choices of law that might be available to them and select the one that bests suits their client. Of course, an applicable statute may "select" the law for the matter, but that does not obviate the need to consider the types of common law claims that could be brought in tandem with such statutory claims. To take a "belt and suspenders" approach to this question, the drafter may want to place the choice-of-law provision in the arbitration section of the agreement, in addition to wherever else it may be found in the contract.

Choice of Forum: Under which provider's auspices do you want to proceed? CPR? JAMS? AAA? Purely private? As this discussion indicates, the different providers have somewhat different rules, methods of administration, options for streamlining their procedures and costs, all of which should be taken account in choosing a provider.

Choice of Rules: Do you want the arbitration forum's rules—if you are using a particular provider—to apply, or do you want to employ the more cumbersome and expensive federal or state rules of procedure or evidence?

Some arbitration clauses do not address this issue, and the parties and/or the arbitrator may be left to develop their own. Some adopt the Federal Rules of Evidence in whole or in part.

Venue: The applicable venue will affect the availability of witnesses, costs and travel time. If the choice of law is not addressed elsewhere, the venue clause might affect the choice of law.

Prevailing Party Attorney's Fees: While the prevailing party attorneys fees clauses are the most popular, some arbitration agreements specifically state that the parties are to split attorney's fees and costs regardless of which side prevails. Of course, any claims brought under a statute providing for fee shifting will likely trump whatever the arbitration agreement says.

MEDIATION FIRST?

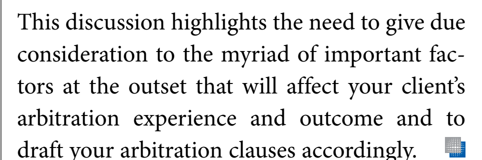
Mediation usually works, although with a somewhat lower degree of success pre-suit than once litigation and/or arbitration are underway.

Whether the slightly lower earlier success rate is a function of the need for more information or the fact that the parties have yet to feel the pain of litigation may be hard to discern.

But early mediation is still worth trying and, if unsuccessful at first, might well result in settlement at a juncture when the parties have engaged in some discovery and experienced the outflow of costs, fees and personnel time devoted to the case.

* * *

This discussion highlights the need to give due consideration to the myriad of important factors at the outset that will affect your client's arbitration experience and outcome and to draft your arbitration clauses accordingly.



ADR & Technology

(continued from front page)

Arbitrating Disputes Involving Blockchains and Smart Agreements," beginning on page 62, show examples that illustrate exactly how Blockchain Ledgers work, breaking the process down into its constituent parts.

The authors examined these issues last fall, and have expanded from their original article to create this three-part *Alternatives* guidebook. The earlier article can be found at Peter L. Michaelson & Sandra A. Jeskie, "Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts," 74(4) *Dispute Resolution Journal* 89 (American Arbitration Association October 2020) (available at https://bit.ly/3obooh3).

Absolute Trust on the Blockchain

Trust is essential. All transactions are based on counterparties trusting each other.

Parties will not transact with each other if they cannot establish sufficient trust in each other—either directly or indirectly. Where counterparties have either insufficient or no prior knowledge of each other—and, hence, little or no trust in each other—they will traditionally employ an intermediary each party trusts. Whether that intermediary is an attorney, accountant, bank, underwriter, surety, or other person or institution will depend on the specific transaction's specific nature.

Over time, financial ledgers, which are predicated on human-based accounting systems, have repeatedly been corrupted by fraudulent actions taken by individuals or institutions specifically entrusted to maintain the ledgers, thus substantially undermining their accuracy and reliability, and often causing significant financial injury to others.

Consequently, a profound need exists for accounting systems that can provide undeniable trust. Systems based on Blockchain Ledgers can not only do so but also create, through

(continued on next page)

Rebuilding Trust

The deep technical dive: You have heard about Blockchain Ledgers. Here's everything you need to read up on for familiarity now, and the fluency you'll develop later.

Why this, why now? Financial ledgers, 'predicated on human-based accounting systems, have repeatedly been corrupted by fraudulent actions taken by individuals or institutions specifically entrusted to maintain the ledgers.'

The ADR component: Wait for it, coming up later in this three-part series. 'Arbitration,' the authors note, 'is the only viable approach for blockchain-based disputes.'

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Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

VOL. 40 NO. 5 • MAY 2022

ADR Research

Never Assume What Your Clients Know About Mediation and Arbitration

BY KRISTEN M. BLANKLEY, ASHLEY M. VOTRUBA, LOGEN M. BARTZ, & LISA M. PYTLIKZILLIG

The alternative dispute resolution revolution is certainly present in the U.S legal system. Many legal disputes are subject to mandatory mediation, whether by contract, statute, court rule, or court order. See, e.g., Ben Barlow, "Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?" 52 *Cle. St. L. Rev.* 499, (2004-2005) (discussing mandatory mediation in the context of family cases); Michael Z. Green, "Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation," 105 *Dick. L. Rev.* 305 (2001) (discussing mandatory mediation of employment claims).

Arbitration agreements are "ubiquitous" in consumer contracts. See Nicole A. Rossini, "Lost in Dicta: The Curious Case of Nonstatutory Grounds of Vacatur in an Era of Ubiquitous Consumer Arbitration," 52 *Suffolk L. Rev.* 343, 346 (2019) (describing the rise of mediation agreements in consumer contracts), and, to a lesser extent, employment contracts. See Stephen L. Hayford, et al., "Employment Arbitration at the Crossroads: An Assessment and Call for Action," 2014 *J. Disp. Resol.* 255, 257-59 (2015) (discussing arbitration in employment cases).

Lawyers and judges today are familiar with litigation alternatives and may suggest them on a voluntary basis as well.

Despite the increased use of ADR by practitioners, a question remains: Does the general public know what these processes are?

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This is the question that we sought to answer in a research study conducted between 2019 and 2021. Our study, detailed in "ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration," 99 *Neb. L. Rev.* 797 (2021) (available at https://bit.ly/3MxbI1F), confirmed that neutrals and lawyers largely agree on key ADR process features but the general public does not. This latter finding raises concerns for how ADR and legal professionals interact with their clients and the general public.

Part I of this article briefly outlines our study and its conclusions, focusing on the general public's understanding of various processes. Parts II and III consider ethical and practical considerations of these findings for lawyers and ADR professionals, respectively. Ultimately, the authors recommend that professionals should not assume familiarity with alternative processes, such as mediation and arbitration, and should educate their clients about the processes to ensure that clients use a process to best meet their interests.

The Study and Conclusions

Our study sought to determine the public's knowledge of ADR processes, and how that

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Prevention

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Lande, "The Next New Normals—In General," *Indisputably.org* blog (April 13, 2020) (available at https://bit.ly/3BvEN6U).

After the pandemic is brought under control, we may resume some parts of the old normal, but the crisis also presents the opportunity to discard some old routines, and we will undoubtedly continue some new routines developed since the pandemic hit. In this period of flux during and immediately after the pandemic, people may be open to considering other changes, unrelated to the pandemic.

The routine use of video, in particular, has collapsed space and time so that it has become normal to communicate with large numbers of people simultaneously all over the globe—and also promote useful asynchronous communication. As Omaha, Neb.-based Creighton University School of Law Prof. Noam Ebner, has described, negotiating is changing—as are dispute processes generally. John Lande, "Drop Everything and Read Noam's Masterpiece Right Now," *Indisputably.org* blog (Feb. 11, 2017) (available at https://bit.ly/3bv7t5d).

Lawyers, neutrals, and courts have functioned virtually, sometimes in sweatpants or as cat avatars. People notice what they appreciate about interacting in person—as well as doing so by video. Presumably, after people feel safe to regularly interact in person, people will selectively choose in-person, video, and perhaps some other communication modes.

As Michael Buenger and Noam Ebner suggest, the technological changes are only one part of a wide range of major changes now affecting how people live, think, deal with each other, handle problems, and resolve disputes. This period of flux provides opportunities to initiate culture changes.

* * *

Proponents of EDR innovations display a combination of idealism and pragmatism. They promote methods of handling disputes that satisfy clients' interests—as well as their own professional interests in producing the "better way" that Chief Justice Warren Burger called for. Based on their extensive experience, they have succeeded in handling disputes that produced real benefits for parties and society.

Yet there is a yearning to do more, to realize more of the unfulfilled potential of EDR methods. This two-part article suggests several possibilities for advancing these aspirations.

We may be in the middle of a period of multiple changes, after which we may settle into a set of new normal routines for an extended period of time. If so, this is a good time to undertake change strategies.

EDR proponents might consider starting with initiatives to get "low-hanging fruit" that can be achieved relatively easily and quickly. This can provide a sense of accomplishment, momentum, and motivation to continue.

ADR Research

(continued from front page)

knowledge compared with those who practice in the area. In the study, we sampled both laypersons as well as dispute resolution experts. Our community sample included 632 community participants from Amazon's Mechanical Turk ("MTurk," available at https://www.mturk.com) crowdsourcing marketplace, recruited using the CloudResearch Platform (available at https://www.cloudresearch.com).

Key demographics of the community members include an average age of roughly 40; a male-to-female breakdown of 55% to 44%; a self-reported racial composition of 65% White, 8% Black, 5% Latinx, 18% Asian, and roughly 3% multi-racial participants. The expert sample was recruited through ADR-related listservs. The survey produced an expert sample of 254 participants with an average age of 56 years. Self-reported demographics of this sample indicated the following breakdowns: 51% male, 42% female, 62% White, 7% Black, 5% Latinx, 16% Asian, and roughly 3% multi-racial participants.

We started by asking each survey taker to self-identify their familiarity with, knowledge of, or experience with five types of dispute resolution processes: litigation, negotiation, arbitration, evaluative mediation, and facilitative mediation. Although we considered more simply assessing familiarity with "mediation," the variation of practices (primarily among experts) within mediation necessitated our breaking mediation into two categories.

At no point in the study did we define any of these processes. Instead, we asked participants who self-identified as having familiarity with, knowledge of, or experience with these processes to rate whether the processes contained 23 key features that we drew from the ADR literature.

With this study, we sought two ends. First, we confirmed that ADR professionals generally agree on the key features of the processes and how they differ from one another in a way consistent with the literature. Second, we discovered a low level of public knowledge of arbitration and mediation, as well as confusion regarding those processes' characteristics (compared to greater understanding of litigation and negotiation).

For example, we asked whether the parties "decide how to resolve the dispute" to gauge participant views of self-determination, and we asked whether the parties "decide for themselves whether to participate" to gauge voluntariness. For each of the features, participants ranked how often the feature applied on a 10-point scale from "never" to "always."

One of the most interesting study results is the community participants' self-described lack of awareness of facilitative and evaluative mediation. The lack of awareness may be due to the modifiers "facilitative" and "evaluative," as neither category garnered more than 25% awareness, compared with the 97% of participants with at least some familiarity with negotiation, the nearly 90% of

Spreading the Word

The perception: ADR's presence in the legal system means it has settled in, and users know what they are getting into.

The reality: ADR indeed is present. But litigants' misperceptions about the process abound.

The surprising reality: Practitioners don't really understand the gaps in their clients' knowledge. Extra care is needed.

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Figure 1. Community Participants' Familiarity with Dispute Resolution Processes.

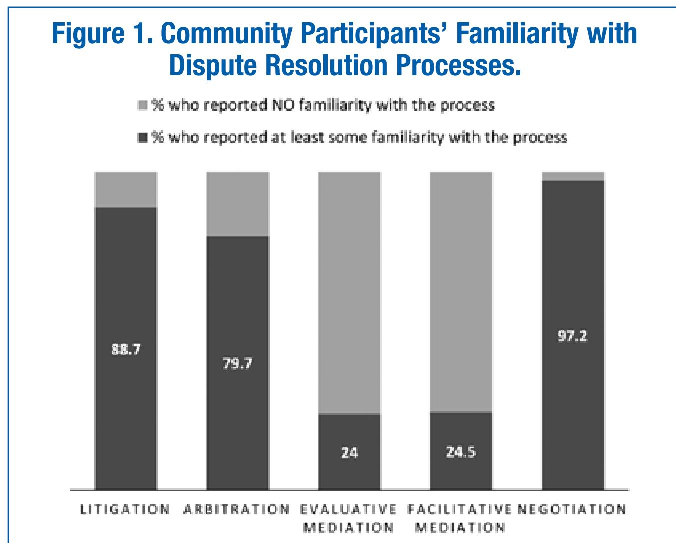
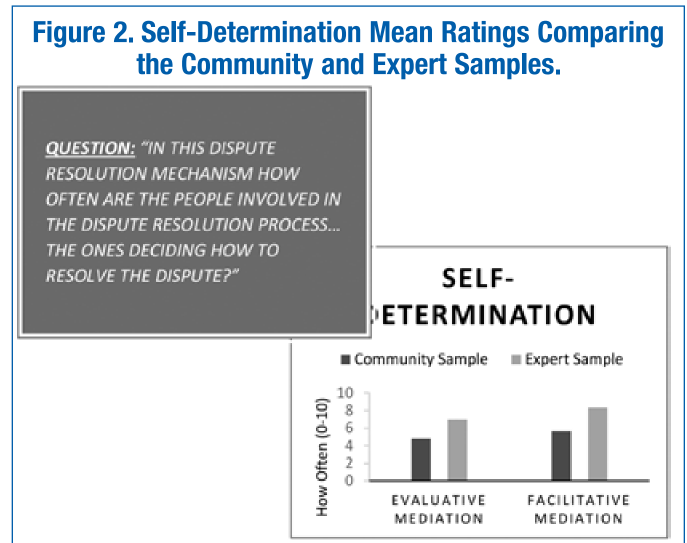


Figure 2. Self-Determination Mean Ratings Comparing the Community and Expert Samples.



participants who had at least some familiarity with litigation, and the almost 80% of participants who had some familiarity with arbitration.

Figure 1 above shows these levels of familiarity in more detail. Only 86 out of the 632 community sample participants (13.6%) reported at least some familiarity with *all* five dispute resolution processes. Even when participants were familiar with these processes, they self-reported little knowledge of the processes and even less actual experience.

The community participants, unsurprisingly, were most knowledgeable about and most experienced with negotiation and litigation. The participants reported much less knowledge and experience relating to arbitration and the two forms of mediation.

Even when the community participants reported knowledge and awareness of the types of mediation and arbitration, their answers to questions regarding the key features of these processes demonstrates that they possess *misconceptions* about what these processes entail.

Most concerningly, the public sample shows disagreement with the experts (and the literature) regarding the key features of self-determination, voluntariness, and ability to collaborate within the processes of mediation and arbitration.

As it relates to self-determination, community members had statistically significantly lower perceptions of the parties' ability to control the process and outcomes in mediation compared to experts. The mediation processes is built on the idea of party autonomy and the ability to direct not only the outcome of the mediation but also the process (Model Standards of Conduct for Mediators, Standard I(A) (2005)).

Interestingly, community members and experts' perceptions of self-determination for the other processes is relatively similar, indicating that the mediation process (compared to the other processes we explored) is most commonly misunderstood on this point. Figure 2 shows the differences in responses regarding self-determination between the expert and community samples.

Regarding perceptions of voluntariness of dispute resolution processes, the community sample generally assumed that litigation, negotiation, and both types of mediation were less voluntary than the expert sample considered them to be.

The greatest difference of opinion lies in the area of facilitative mediation, but the difference was also statistically significant for evaluative mediation, litigation, and negotiation. These differences suggest that members of the public may not understand their own ability to control the circumstances and to terminate the processes, particularly for mediation.

Alternatively, these findings may show that the community sample and the expert sample have different ideas of what constitutes voluntary participation (particularly given the rise of "mandatory" dispute resolution). Figure 3 on page 84 shows the differences in perceptions of voluntariness between the community and expert samples.

Interesting trends also arose in the perceptions of how collaborative dispute resolution processes are. Both the community sample and the expert sample contained strikingly similar perceptions of collaboration in litigation, but significant differences arose in the perceptions of arbitration, facilitative mediation, and negotiation.

The community sample considered arbitration and, to a lesser degree, negotiation, to be more collaborative than the expert panel perceived those processes to be. On the other hand, the expert sample perceived facilitative mediation as significantly more collaborative than the community participants.

In other words, the community sample appears to be wrong about both arbitration and mediation, viewing arbitration as more collaborative than experts (including arbitrators) consider it and mediation as less collaborative than experts (including mediators) consider it. Figure 4 on page 84 depicts the perception of collaboration in dispute resolution mechanisms.

This study leads us to two important conclusions. First, the average person living in the United States has little knowledge of, familiarity with, or experience with alternative forms of dispute resolution. Second, even when community members claim to be familiar with all five of the processes included in this study, their perception of important characteristics differs from the perception of those same characteristics by professionals performing those services. These two findings have great implications for lawyers and ADR professionals.

Ethical Considerations for Lawyers Representing Clients in ADR

If the lay population is not familiar with, or worse, misunderstands dispute resolution

(continued on next page)

ADR Research

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processes, lawyers may need to take additional steps to ensure that they provide competent information and representation to their clients.

This section considers lawyers who work with clients who are not sophisticated users of legal services, including dispute resolution services. Certainly, some clients have significant exposure to mediation and arbitration and know what to expect. These recommendations primarily consider those who are unfamiliar with the process.

This study suggests that lawyers may need to use extra care to explain the processes of mediation and arbitration to their clients—particularly clients who are not regular users of ADR processes. Lawyers already have a duty of communication with their clients on matters requiring informed consent as well as reasonable consultation on the process used in the service of seeking client goals. See Model R. of Prof. Conduct R. 1.4 (requiring communication for decisions requiring informed consent and consultation on the means of obtaining client goals); see also R. 1.4 comment 5 (providing additional guidance on how much communication is necessary to determine the means by which the client ends should be obtained).

Lawyers should not assume that parties know what mediation and arbitration are or how those processes operate or differ from each other. Although these processes are now familiar to attorneys, lawyers should not assume that the general public understands them.

Communication is also essential to ensure that the attorney and client share the same vision of not only the ends of the representation but also the means. Although legal ethics generally provides that clients determine the goals of the representation and their lawyers determine the means—see Model R. of Prof'l Conduct 1.2(a) (providing that the client determines the objectives of the representation and the lawyer, in consultation with the client, determines the means to achieve the goals)—the choice of process may protect or achieve various client goals in different ways than litigation.

Lawyers should explore with clients how processes such as arbitration and mediation might meet varied client goals—such as confidentiality, finality, cost efficiency, maintenance of relationship, etc. Robert P. Burns, "Some Ethical Issues Surrounding Mediation," 70 *Fordham L. Rev.* 691, 699 (2001) (Noting as an example that a client may have a strong desire that the negotiation follow certain norms, such as stringent ethical considerations, such that they are better classified as "ends" rather than "means.").

These conversations will take different forms for lawyers in different practice areas. Lawyers working in commercial disputes may find the availability of confidentiality in mediation and arbitration important in choosing a dispute resolution process.

For example, lawyers working with sensitive business information, including financial information, trade secrets, or competitive analyses, may want a process completely outside of the court system.

Family lawyers and even probate lawyers should discuss with their clients the opportunity to work collaboratively and privately in mediation, which may be able to preserve relationships and reduce continuing conflict.

Given the lack of understanding of ADR processes, lawyers should take additional care to explain these processes to their clients—particularly clients who do not have much contact with the legal system. Lawyers should also be mindful of client goals to determine whether processes such as mediation and arbitration would meet those goals.

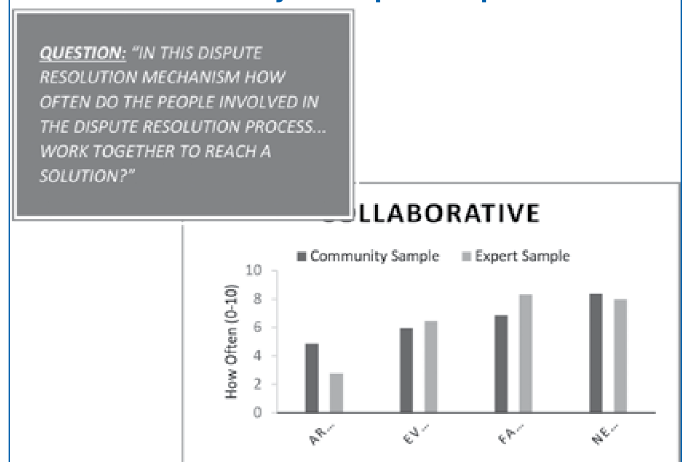
Ethical Considerations For Neutrals

In addition to impacting lawyers, these results affect neutrals, ADR providers, and even court systems. Most ADR processes rely on informed consent, particularly mediation. Donna Shestowsky, "When Ignorance is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs," 22 *Harv. Negot. J.* 189, 216-17 (2017) ("[T]he animating impulse behind most of the 'ADR movement' has advocated for client choice in dispute resolution and 'self-determination' in mediation.").

ADR processes provide more participation opportunities, so it is important that participants understand their role and any

Figure 3. Voluntariness Mean Ratings Comparing the Community and Expert Samples.

Figure 4. Collaborative Mean Ratings Comparing the Community and Expert Samples.



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expectations of the neutral. See Jacqueline Nolan-Haley, "Does ADR's 'Access to Justice' Come at the Expense of Meaningful Consent?" 33 *Ohio St. J. on Disp. Resol.* 373, 391 (2018).

Informed consent relies on the twin principles of "disclosure and consent." Jacqueline M. Nolan-Haley, "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking," 74 *Notre Dame L. Rev.* 775, 778 (1999) ("At a minimum, the principle of informed consent requires that parties be educated about the mediation process before they consent to participate in it, that their continued participation in mediation be voluntary, and that they understand and consent to the outcomes reached in mediation.").

In other words, the consent is only "informed" if it is given with understanding. Model Rule of Professional Conduct 1.0 defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Mediators, courts, and provider organizations may want to provide additional information to parties regarding the aspects of the process that the clients influence. For example, the parties retain not only the power to decide whether to settle and on what terms but also process issues—such as taking breaks, making offers, providing information to the other side, and countless other decisions. Because of the emotional nature of resolving disputes, parties may need additional time to internalize how to proceed.

Providing educational documents or meeting with the parties separately, in advance, may help meet this need. Provider organizations and individual neutrals may want to give parties brochures or other written materials to present them with an expectation of what the process entails.

Our study suggests that ADR providers cannot rely on lawyers to provide this information, and it is a best practice for clients to hear about the process from both their own lawyers as well as the providers they will be working with.

Neutrals working with pro se parties should take particular care in explaining the process. Neutrals should never assume that pro se clients understand the process and how it might be different from court.

Neutrals may need to provide more comprehensive information to pro se clients at the beginning of the process than they provide to represented clients. Furthermore, the neutral should be mindful that additional information may be needed throughout the process so that the clients can participate meaningfully.

Unlike mediation, the arbitration process also involves consent, but only consent to begin the process. Parties agree to arbitrate by contract—see the Federal Arbitration Act at 9 U.S.C. § 2 (2022) (making arbitration agreements enforceable by the courts)—but they relinquish their control over the decision-making when they give the neutral the power to resolve the dispute.

Although the arbitration process is flexible, few parties take advantage of their process options, such as limiting discovery, limiting damages, placing qualifications on the potential arbitrator pool, and others. Increased information to parties by lawyers, neutrals, and provider organizations may help parties use those processes more efficiently. See Clark Freshman, "Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration," 56 *U. Miami L. Rev.* 909, 929–30 (2002) (noting that parties likely do not know what options they have in arbitration so they do not ask for any).

Provider organizations and courts could increase public education regarding alternative processes, such as mediation and arbitration. Additional information about ADR could be provided in a variety of innovative formats, including video and audio content, in addition to text-based information. Particularly creative and innovative providers might consider commissioning public service announcements, bulletin boards, and other avenues to attempt to increase knowledge.

* * *

The research summarized here confirms what most ADR professionals already know—the public generally lacks awareness of ADR processes and their intricacies. Because ADR, as a profession, is built on informed consent and flexible processes, increased understanding should lead to process efficiencies. In the meantime, lawyers and ADR professionals should assume that their clients need additional information regarding whatever process they will employ.

ADR Systems

(continued from page 74)

report of John Swift QC into the most recent public exercise of this type: nine banks' review of and compensation offers for the sale of interest rate hedging products—IRHPs—to businesses. Lessons Learned Review Commissioned by the Non-Executive Directors of the Financial Conduct Authority into the Supervisory Intervention in Interest Rate Hedging Products (IRHPs), Report Of The Independent Reviewer John Swift QC (Nov. 26, 2021, amended on Feb. 2, 2022) (available at https://bit.ly/366I3w1). Swift heavily criticized the way in which a combination of the Financial Services Authority and its legal successor, the Financial Conduct Authority, designed and implemented the scheme.

From an international perspective, perhaps the most noteworthy element of this review was the way in which a public body effectively gave businesses a right to compensation that they could not have pursued in the courts or the Financial Ombudsman Service. All too often, their cases would not have worked as a matter of law. Swift at 74-80.

Many of the businesses affected were too big to be eligible to bring complaints to the Financial Ombudsman Service. Id. at 84. Anyway, its maximum award limit was too low at the relevant time (£150,000) to compensate customers fully. Id at p. 95.

The regulator's efforts generated compensation of around £2.2 billion, about $2.5 billion, paid over a four-year period. No customer had to even make a complaint to receive compensation. They just had to accept an invitation to have a review. *Davis v Lloyds Bank Plc* [2020] EWHC 1758 (Ch) (available at https://bit.ly/3KR2lbs), affirmed in *Davis v Lloyds Bank Plc* [2021] EWCA Civ 557 (available at https://bit.ly/3aKxy0s).

The Pensions Reviews

These types of unilateral disputes schemes go back to the mid-1990s.

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Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute for Conflict Prevention & Resolution

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Prevention/Part 1 of 2

A Survey of Early Dispute Resolution Movements

BY JOHN LANDE

In most social movements like the abolitionist, civil rights, pro-choice, pro-life, and evangelical movements, members typically self-identify as belonging to those movements. And outsiders generally recognize the movements as such.

By contrast, probably no one would recognize an early dispute resolution—EDR—"movement," including people who are part of the movement. It would deal with a wide range of civil cases including family, garden-variety civil cases, and large complex cases and include judges, court administrators, lawyers, and neutrals. John Lande, "What Is (A)DR About?" *Indisputably.org* blog (Jan. 13, 2015) (available at https://bit.ly/3113Y4R).

It would be more accurate to refer to a set of EDR movements that share common values but operate in different contexts. Collaborative practitioners, federal judges conducting Federal Rule of Civil Procedure 16 conferences, court administrators running EDR programs, civil mediators, and corporate inside counsel designing EDR systems belong to distinct EDR movements.

Members of each movement promote the intentional exercise of responsibility for handling legal disputes from the outset of the cases as opposed to passively allowing them to run their course, often out of inertia or habit.

But they read their own publications, attend their own conferences, and probably don't interact much with members of other EDR movements. Typically, their activities blend into the ADR, judicial, or legal fields rather than being distinct elements in those fields.

This two-part article grows out of a presentation to the ABA Section of Dispute Resolution Early Dispute Resolution Committee, focusing on legal disputes in which the parties are represented by lawyers. "The EDR Movement," ABA Section of Dispute Resolution Early Dispute Resolution Committee (March 2, 2021) (available at https://bit.ly/3BbJpir). This month is a review of EDR movements, and the article concludes next month with suggestions about possible future directions.

Much of my academic career has focused on EDR, and this post provides a travelogue of my intellectual journey studying these movements. Readers who would like to learn more about the issues can consult sources cited in the publications linked in this article.

The Litigation Interest and Risk Assessment book, described below, includes an extensive bibliography. See John Lande, "How to Calculate and Use BATNAs and Bottom Lines With LIRA," *Indisputably.org* blog (Jan. 27, 2020) (available at https://bit.ly/3FyGQtR).

1. Goals and Limitations of Early Dispute Resolution

Litigation provides numerous benefits to litigants and society.

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Lande is the Isidor Loeb professor emeritus at the University of Missouri School of Law, in Columbia, Mo. This two-part article is expanded and adapted from a paper he published at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832282.

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It can help parties solve difficult problems, make relationships and institutions function properly, and promote justice. It enables parties to enlist legitimate, independent government officials to resolve disputes when the parties can't resolve disputes themselves. Indeed, litigation provides mechanisms for structuring dispute resolution processes that enable most parties to ultimately settle disputes themselves, without court adjudication.

Litigation is essential to enforce the rule of law, deterring potential lawbreakers who would behave with impunity if they had no fear that they would pay a price for acting illegally. It also provides some remedies for parties who have been harmed and contributes to the development of legal doctrine.

Yet, many—perhaps most—litigants experience litigation as extremely stressful and unpleasant, so they desperately seek resolution of their disputes. The process generally imposes substantial out-of-pocket expenses to pay lawyers and other professionals as well as numerous intangible costs such as stress, damage to relationships and reputations, diversion of energy, and loss of opportunities. Judge Learned Hand famously wrote, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."

There are many obvious potential benefits to managing and resolving legal disputes at the earliest appropriate time, including:

- Helping parties make good decisions;
- Tailoring dispute resolution processes to fit parties' needs;
- Improving outcomes;
- Reducing tangible and intangible costs;
- Reducing sunk-cost bias, and
- Reducing adversarial dynamics.

Consider the counterfactual: the classic settlement "on the courthouse steps." After an extended period of pretrial litigation, parties gear up for trial but end up settling in a frenzied, slapdash process minutes before the trial is set to begin. Parties often don't expect to settle that day and feel rushed to make decisions.

The judge and/or lawyers may pressure parties to settle, possibly adding to a heightened realization that, after investing a huge amount of time, money, and emotion, they may lose in trial. As a result, they may settle, sometimes having buyer's remorse after reflecting on the process and outcome.

By contrast, EDR processes are designed to promote careful consideration from the outset of a case so that the process is designed to fit parties' procedural and substantive needs.

Making Plans

The obstacle: Planning for disputes doesn't feel compatible with conducting business.

The reality: That's what ADR is, at least in the sense that a clause is written and/or a process is invoked.

The better path: Thoroughly mapping for the disputing engagements can actually plan away the conflict by making it identifiable before it becomes a (litigation) problem.

Obviously, the sooner the parties resolve their case, the greater the savings of tangible and intangible litigation costs. They are less likely to harden adversarial attitudes or feel that they need to proceed to justify all their investments in the case.

Even if they aren't ready to resolve a case at an early stage, if they consider it at an early stage, they can manage the process to their advantage. They may not feel completely satisfied with the outcome, but they are more likely to believe that they achieved the best possible result under the circumstances.

Although resolution of disputes—especially early resolution—can provide many benefits, there also are some risks. If parties resolve cases too soon, they may not make careful decisions. They may fail to get sufficient information, consult key individuals, allow situations to ripen (such as permitting sufficient time for recovery from injury), or be emotionally ready to negotiate and settle.

In addition, practitioners and courts may prioritize early resolution over other goals, such as careful decision-making, so that parties may feel excessive or inappropriate pressure to settle prematurely. These risks are manageable, especially if the professionals involved are on the lookout for them.

2. Array of Early Dispute Resolution Processes

In "The Movement Toward Early Case Handling in Courts and Private Dispute Resolution" (24 *Ohio State J. on Dispute Resolution* 81 (2008) (available at https://bit.ly/3vDtrfP)), I described a range of EDR initiatives.

Courts use several EDR approaches to manage cases early. Perhaps most significant, federal courts and many state courts routinely meet with lawyers early in their cases to plan the litigation process. Some courts use case management systems with procedures differing based on case complexity. Some courts offer or require parties to use early mediation or neutral evaluation processes.

In the private sector, practitioners offer several EDR services. Some lawyers serve as settlement counsel, limiting their work in a case to negotiation. Their clients may or may not simultaneously retain litigation counsel.

In collaborative practice, lawyers and parties sign a binding participation agreement committing to negotiate, including a provision disqualifying collaborative lawyers from representing the clients in litigation. The disqualification agreement creates an incentive to negotiate and refrain from litigation, and it is considered to be the essential element of collaborative practice.

In cooperative practice, parties agree to negotiate but without a disqualification agreement. Collaborative and cooperative practice are described below in more detail.

The *Early Case Handling* article cited above also describes how some businesses use various devices to promote early dispute resolution. Some make general pledges to consider using ADR processes when they have disputes. Deals commonly include dispute resolution clauses to handle disputes promptly. When disputes arise, some lawyers and parties use procedures to do "early case assessments" and screen cases

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for use of mediation or other dispute resolution procedures.

A blog post last year identified four EDR processes, which are described below, as well as four approaches for dispute prevention. John Lande, "Dispute Prevention and Early Dispute Resolution Framework," *Indisputably.org* blog (April 9, 2020) (available at https://bit.ly/3m7ZfGh). As the term "prevention" suggests, these processes are intended to avoid creation of disputes, though it may be more helpful to think of them as proactively solving problems rather than merely avoiding disputes.

"Planned early dispute resolution" refers to systematic planning for handling a series of disputes, including plans to prevent disputes when possible. It is discussed below. Parties may focus on dispute prevention throughout negotiation of projects that involve continuing relationships by planning for collaboration and problem solving. This is distinct from merely adding ADR clauses at the end of the negotiation.

Partnering, which is most commonly used in major construction projects, involves developing relationships between individuals in projects that involve continuing relationships. Some contracts provide for "standing neutrals" or dispute review boards, which are engaged at the outset of a contract to help solve problems and resolve disputes on a continuing basis during the performance of the contract.

The International Institute for Conflict Prevention and Resolution has a Dispute Prevention Committee (see https://bit.ly/3nmhB5T), which is promoting dispute prevention in various ways, including recruiting businesses to subscribe to a dispute prevention pledge, available at https://bit.ly/3gfYmY7, for business relationships. [CPR publishes *Alternatives* with John Wiley & Sons.]

3. Collaborative Practice

Minneapolis family lawyer Stu Webb is credited with starting collaborative practice in 1990 when he decided to handle his cases without going to court. The International Academy of Collaborative Professionals (see www.collaborativepractice.com) was organized in 1999, and the collaborative movement took off in the 2000s, with a burst of enthusiasm of practitioners in the United States, Canada, and around the world.

According to its website, "IACP has created Standards for Practitioners, Trainers and Collaborative Practice Training. It has promulgated Ethical Guidelines for Practitioners, and continues to support excellence in Collaborative Practice through resources, training curriculum, practice tools, mentoring and a comprehensive website. ... [It] has over 5,000 members from [24] countries around the world."

There are numerous local collaborative practice groups promoting collaborative practice in their areas. Collaborative practice is used almost exclusively in family law cases despite efforts to expand it in other types of cases.

Individual coaches for parties as well as joint financial and mental health professionals often act as part of collaborative professional teams, so people generally use the term "collaborative practice" rather than "collaborative law."

In 2010, the Uniform Law Commission approved the Uniform Collaborative Law Act (available at https://bit.ly/3EbvPNL), which has been enacted by statute or court rule in 19 states and the District of Columbia.

Collaborative practitioners generally are very conscientious, and rely on a substantial body of knowledge and practice. Collaborative lawyers really are collaborative, seeing themselves as partners in helping their respective clients get the best possible process and outcome.

Participation agreements require parties to provide full disclosure of all relevant information at the outset of the case. The process involves "four-way" meetings with lawyers and clients and may include additional professionals in the collaborative team.

Practitioners try to use the best possible procedures, consulting with each other before, during, and/or after meetings with clients. For example, collaborative teams often debrief after their meetings with clients and write memos summarizing the status of the negotiations. Team meetings permit professional socialization through regular feedback and mentoring.

I started studying collaborative practice in 2002, intrigued by the idea of collaborative early negotiation. In a summary introduction of my first article on the subject, I wrote:

> [M]uch CL [collaborative law] theory and practice is valuable, including protocols of early commitment to negotiation, interest-based joint problem-solving, collaboration with professionals in other disciplines, and intentional development of a new legal culture through activities of local practice groups. Although the disqualification agreement is undoubtedly helpful in many cases, it also can invite abuse by inappropriately or excessively pressuring some parties to settle when it would be in their interest to litigate. . . . This Article also urges CL practitioners to experiment with "cooperative negotiation," i.e., using CL techniques without the disqualification agreements.

John Lande, "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering," 64 *Ohio State L.J.* 1315 (2003) (available at https://bit.ly/3Eadq3P).

In a 2010 article, collaborative lawyer and mediator Forrest Mosten and I analyzed ethical rules requiring collaborative lawyers to screen cases for appropriateness and obtain clients' informed consent to use the process.

Rule 1.2(c) of the ABA Model Rules of Professional Conduct states, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Our article states:

> [T]he authorization of "reasonable" limitations of scope of employment in Rule 1.2 of the Model Rules of Professional Conduct, which is applicable to all lawyers, establishes a requirement that lawyers screen possible CL cases to determine if CL would be reasonable under the circumstances. Similarly, ... Rule 1.7's prohibition of conflicts of interest also requires lawyers to screen potential CL cases to determine whether there is a significant risk that a conflict of interest would materially limit the lawyers' representation and whether the lawyers reasonably believe that they

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can provide competent and diligent representation.

John Lande and Forrest Steven Mosten, "Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law," 25 *Ohio State J. on Dispute Resolution* 347 (2010) (available at https://bit.ly/3jyimrA).

The screening and informed consent requirements are codified in Uniform Collaborative Law Act Section 14. Section 15 requires collaborative lawyers to make "reasonable inquiries" before prospective parties sign participation agreements about whether the prospective parties have "history of a coercive or violent relationship."

In another article, Mosten and I wrote, "The Act requires lawyers to advise prospective parties about certain issues relating to termination of a CP [collaborative practice] process, but otherwise it does not specify what information lawyers must discuss with prospective CP parties. This Article describes how lawyers can educate clients so that they can make good decisions about using a CP process." (Footnote omitted.) Forrest Steven Mosten & John Lande, "The Uniform Collaborative Law Act's Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process," 38 *Hofstra Law Review* 611 (2009) (available at https://bit.ly/30X6VmR).

My article, "An Empirical Analysis of Collaborative Practice," summarizes the empirical research that had been done to date.

> The research suggests that Collaborative clients are primarily "white, middle-aged, well-educated and affluent." . . . A small proportion of lawyers handle most of the cases. . . . Parties used professionals in addition to lawyers in a substantial percentage of cases. These professionals often provided valuable services, though clients were sometimes concerned about the additional cost. . . . The research found that the process in CP cases involves interest-based negotiation in meetings with the parties, their lawyers, and often with other professionals, which was often constructive. In some cases, lawyers and parties found CP to be too slow and cumbersome and some parties felt vulnerable and unprotected. ... Parties settle a large proportion of CP cases. In general, the settlements seemed comparable to what parties would have agreed to in negotiation in a traditional litigation process. In some cases, the results of the ultimate agreement were clearly better than what parties would presumably have otherwise agreed to, thus benefiting the parties and their children.

John Lande, "An Empirical Analysis of Collaborative Practice," 49 *Family Court Review* 257 (2011) (available at https://bit.ly/3GhRWnv).

4. Cooperative Practice

My research on collaborative practice revealed that many parties received substantial benefits from the process.

There are so many elements of CP process that it's hard to identify the critical causal factors producing the benefits. I wondered whether parties could get benefits from a similar "cooperative law" process that does not involve a disqualification agreement. I learned that the Divorce Cooperation Institute in Wisconsin had 70 members offering this process (see http://cooperativedivorce.org/) and I conducted a study of the practices and perspectives of these cooperative law practitioners, some of whom also handle collaborative cases and traditional litigation. John Lande, "Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin," 2008 *J. of Dispute Resolution* 203 (2008) (available at https://bit.ly/3vEAyoi). This study is based on interviews and a survey of DCI members, thus reflecting their biases.

DCI members describe a more flexible process than collaborative practice, which may produce both advantages and disadvantages. Cooperative practice is likely to be more efficient but provide a less-thorough process and less party engagement. From that study:

> DCI members generally see Cooperative procedures as more collaborative than litigation-oriented practice and more flexible than Collaborative Practice. The process in Cooperative cases follows a mutual understanding between the lawyers and parties, which may be in writing or oral, and sometimes is implicit. In general, DCI members try to tailor the process to fit the needs of each case. They say that they usually use four-way meetings and in some cases, most of the negotiation takes place in these meetings. They try to determine the number and length of the meetings based on the needs of the parties, believing that it is sometimes more efficient and appropriate to advance the process through conversations between lawyers outside the four-ways. In general, they say that parties are substantially involved in making decisions, though this varies depending on the clients' situations and preferences. . . .
>
> DCI members generally see Collaborative Practice as an improvement over litigation-oriented practice in increasing parties' satisfaction, especially with the outcomes. Many DCI members believe, however, that the Collaborative process is sometimes too rigid and elaborate and requires more time and money than necessary, which reduces parties' satisfaction with the process. DCI members believe that parties in Cooperative cases are generally satisfied with the outcomes and process and that the time and expenses are as reasonable as possible.

I know of only one other cooperative practice group, the Cooperative Practice Network of Minnesota. See www.cpn-mn.com. The Center for Principled Family Advocacy in Cleveland offers a "principled negotiation" option, similar to cooperative practice. See https://bit.ly/3vHXkeI. A handful of lawyers and firms that are not affiliated with cooperative law groups offer cooperative law services.

In 2005, I helped organize the Mid-Missouri Collaborative and Cooperative Law Association (MMCLA). I was intrigued by the idea of offering both processes and giving parties the option of choosing either one. By providing the option of using cooperative practice, parties who chose a collaborative process would not feel that this was their only specialized option to focus on early negotiation, and this should reduce the risks related to the disqualification agreement.

The MMCCLA included some of the most experienced and respected family lawyers in the area. It drafted model participation agreements, conducted a training, created a website,

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and publicized the availability of the processes. The group was located in a small university community where the family lawyers know each other pretty well. The family lawyers in this community generally were cooperative in their cases anyway, so they felt no need to use a new process.

None of the members were requested to do any collaborative or cooperative cases, and the group disbanded after a few years.

The difference between use of collaborative and cooperative practice is related to how much they differ from traditional legal practice. Collaborative practice is inherently different because of the disqualification agreement. In addition, a community of collaborative practitioners is committed to a distinctive process involving written participation agreements, four-way meetings, and deeply collaborative relationships between the lawyers, which collaborative practitioners find very appealing.

By contrast, cooperative practice is not necessarily different from traditional legal practice. In cooperative practice, lawyers can selectively use litigation as part of the process while seeking to ultimately resolve cases through negotiation.

Some cooperative lawyers said that they sometimes use courts to provide "reality therapy" and as "tools of cooperation." In traditional practice, many family lawyers routinely cooperate because it's in their clients' interest to maintain good continuing family relationships.

Lawyers who do a substantial amount of family law, especially in smaller communities, also often cooperate because it reflects their practice philosophy and they value their reputations as being "reasonable." So many family lawyers doing traditional practice generally don't believe that using a cooperative process adds much value to what they routinely do.

To compare the two processes and mediation, I wrote "Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases," 42 *Family Court Review* 280 (2004) (available at https://bit.ly/3mhLLIt) with collaborative and cooperative lawyer and mediator Gregg Herman.

A collection of my publications about lawyering, including collaborative and cooperative practice can be found at https://bit.ly/3b4HlOn. Some of those pieces summarize the preceding articles.

5. Lawyering with Planned Early Negotiation

Although the logic of collaborative and cooperative practice could be applied in most civil disputes, they are used almost exclusively in family law cases.

They involve negotiation process agreements, which many family lawyers feel aren't necessary or helpful. Moreover, at the outset of cases, many parties and lawyers often are suspicious of the other side and are not willing to make process agreements.

I was interested in expanding the range of cases using early negotiation processes so that they wouldn't be limited to family cases and that lawyers could initiate unilaterally, without an agreement with the other side.

In other words, I was looking for a process that lawyers would use in their normal practice. Indeed, good lawyers routinely engage in early negotiation and I wanted to document what they do.

So I interviewed lawyers who specialized in negotiation and dispute resolution in a wide range of cases, leading to the publication of my book, "Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money." See summary, reviews, and a teacher's manual at https://bit.ly/3b3BjOe. It describes a "prison of fear" keeping lawyers and parties from negotiating early in a case and suggests techniques for "escaping" from that prison.

The book discusses processes with bilateral process agreements—collaborative and cooperative practice, see above—as well as approaches that lawyers use unilaterally, including as settlement counsel.

It focuses on the importance of good lawyer-client relationships, lawyers' fee arrangements promoting clients' interests, good relationships between counterpart lawyers, constructive engagement of other professionals, and careful negotiation planning.

It also includes numerous appendices dealing with conflict analysis, early case assessment, factors affecting appropriateness of different processes, information sheets for clients, and forms developed by the MMCCLA, among others.

I later conducted a study of cases settled by lawyers who were identified as good lawyers without regard to their use of negotiation. This study, "Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better," 16 *Cardozo J. of Conflict Resolution* 63 (2014) (available at https://bit.ly/3Cbi7tz), found that the lawyers unilaterally used many of the techniques described in the Lawyering with Planned Early Negotiation book.

They typically use a strategic approach to negotiation, including plans to negotiate at the earliest appropriate time by taking charge of their cases from the outset, getting a clear understanding of clients' interests, developing good relationships with counterpart lawyers, carefully investigating the cases, making strategic decisions about timing, and enlisting mediators and courts when needed.

There is no label for these techniques. I called it "Nike lawyering"—lawyers just do them. Another term might be just "good lawyering."

I wrote another article from the same study as Good Pretrial Lawyering, titled "A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation," 16 *Cardozo J. of Conflict Resolution* 1 (2014) (available at https://bit.ly/3vEeGsY). In the article, I asked lawyers to describe settled cases starting from the first contact with their clients.

> In practice, negotiation is routinely infused in litigation from the outset of a case. Lawyers not only negotiate about the ultimate issues, such as how much a defendant will pay a plaintiff, but they also negotiate about substantive issues during litigation, such as temporary orders during divorce proceedings, as well as a myriad of procedural issues. The process of reaching such agreements often is integrated into regular communications throughout the course of pretrial litigation rather than occurring in a single dramatic settlement event to resolve the ultimate issues in a case. ...

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Despite the fact that pretrial litigation is supposed to prepare for trial, such preparation often is designed to prepare for negotiation because the expected trial outcome is a major factor affecting negotiation in many, if not most, cases. Indeed, some lawyers continuously consider how the litigation process may affect negotiation. For example, one lawyer said, "It is all negotiation from the time suit is filed. You are constantly negotiating or setting up the negotiation. It doesn't just happen. You are negotiating from the outset, setting up where you want to go. You are judging [the other side] and they are judging you." He elaborated, "Negotiations don't occur in a week or a month. They occur in the entire time of the lawsuit. If anyone tells you they aren't negotiating, they really are. Every step in the process is a negotiation. You don't call it negotiation, but in effect, that's what it is." Another lawyer expressed the same view, saying that he "prepares for settlement from day one of the lawsuit" and that there is a "constant process of evaluating the claim" throughout the litigation. A third lawyer said that he "always has an eye toward settling," taking care of matters as fast and cheaply as possible and minimizing clients' risk. (Footnotes omitted.)

Berkeley, Calif.-based disability rights lawyer Lainey Feingold wrote "Structured Negotiation, A Winning Alternative to Lawsuits" based on her experiences negotiating without filing lawsuits. See www.lflegal.com/book. This book describes how to write invitations to negotiate, establish ground rules, share information, hold collaborative meetings, use experts, resolve disputes, use mediators, and draft settlement documents to ensure that settlements are monitored and enforced.

I use the word "planned" to distinguish from unplanned early processes, which may not be effective. Planning reflects the virtually universal belief of ADR experts in the importance of preparation.

Indeed, unplanned early processes can be counterproductive if parties aren't ready to negotiate because they lack necessary information or aren't emotionally ready. This can disappoint parties, damage relationships, and increase time or cost. So a process that merely is "early" doesn't necessarily fulfill the potential for helping clients make good decisions.

6. Litigation Interest and Risk Assessment

Conducting early case assessments is critically important for early dispute resolution. These assessments enable lawyers and parties to understand the disputes and develop the most efficient and satisfying strategies for handling the disputes.

"Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions," which I co-authored with University of Saskatchewan Profs. Michaela Keet and Heather Heavin, is a guide for helping clients make thorough assessments beginning at the outset of a representation and continuing throughout the cases. See John Lande, "How to Calculate and Use BATNAs and Bottom Lines With LIRA," above.

Too often, lawyers focus exclusively or primarily on the expected court outcomes and ignore or discount the tangible and intangible costs, which clients often value greatly. See John Lande, "Lawyers Are from Mars, Clients Are from Venus—And Mediators Can Help Communicate in Space," *Kluwer Mediation Blog* (Feb. 6, 2021) (available at https://bit.ly/3FAWjt5).

The book describes reasons why lawyers and parties often make poor decisions to go to trial, methods to help parties develop good "bottom lines"—see John Lande, "What's a Bottom Line?" *Indisputably.org* blog (Aug. 26, 2020) (available at https://bit.ly/2ZCn2Gg)—and ways that lawyers and mediators can help parties use litigation interest and risk assessments in negotiation and mediation. Bottom-line calculations combine expected court outcomes and the expected tangible and intangible costs of continuing to litigate and going to trial.

Bottom lines for negotiation should incorporate any substantive interests that cannot be adequately satisfied by one-time monetary payments, such as payment plans, apologies, business opportunities, in-kind arrangements, and non-disclosure agreements.

In addition, bottom lines should reflect the intangible costs of the litigation process that parties often don't recognize or incorporate into their litigation decision-making. For example, litigation can add stress, distract parties from other activities, and harm relationships and reputations. Litigation stress can cause individuals to suffer anxiety, emotional and relationship difficulties, impaired memory, and neurosis.

Indeed, it can impair parties' ability to make litigation decisions and work effectively with their lawyers. Intangible impacts of litigation on businesses can dwarf the potential liability and tangible costs. For example, litigation can disrupt companies' internal dynamics, prevent them from pursuing some priorities, and harm their public image.

This book discusses intangible interests and costs in detail and provides appendices with model questions for lawyers and mediators to help parties make comprehensive assessments to aid decision-making in litigation, negotiation, and mediation. See John Lande, "Reality-Testing Questions for Real Life and Simulations—and Ideas for Stone Soup Assignments," *Indisputably.org* blog (Sept. 23, 2018) (available at https://bit.ly/3CzDmFN).

7. Early Mediation

In many civil cases, parties mediate late in the litigation.

Lawyers and courts often assume that mediation is not appropriate until lawyers have completed discovery and a trial date is looming. When lawyers are ordered to mediate early in a case, they may feel unable to settle because they don't have enough information to feel confident in settling. Of course, late mediation loses much of the value that parties get from early mediation. This section describes several variations of early mediation processes.

Preparation before parties convene in mediation is extremely important, especially before early mediation. The ABA Section of Dispute Resolution developed several pamphlets to help parties and lawyers prepare for mediation. Here is a general guide: https://bit.ly/3nMoC0b. And here are versions for family, at https://bit.ly/3mtchys, and complex civil cases, at https://bit.ly/3vXQ3rD.

A. Pre-Suit Mediation—Ideally, parties who want to mediate would do so before filing suit. Lawyer-neutral Conna Weiner

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described the benefits of pre-suit mediation in business disputes. John Lande, "Early Dispute Resolution Processes," *Indisputably.org* blog (April 8, 2020) (available at https://bit.ly/3jPGGVO). She writes, "Simply put, litigation can exacerbate conflict, take on a life of its own and make it that much harder to get back to the table to come up with a customized, sensible business solution within the parties' control."

She notes that one of the benefits of pre-suit mediation is reducing the risk of stimulating a series of counterclaims. Moreover, filing suit often ends the business discussion, shifting the conversation from business people to litigators.

Litigation is backward-looking, where parties dig up evidence of grievances, instead of forward-looking, where parties figure out how they can do business together profitably. Consideration of settlement is put on hold as the parties gear up for litigation. The mere filing of a lawsuit may cause major business disruption, including initiating document holds and preparing for discovery.

Weiner recommends that parties (1) consider where they are on the "future business relationship continuum," (2) switch from a litigation mindset to a pre-litigation business mindset, (3) hire mediators with strong transactional backgrounds and the ability to evaluate potential litigation, (4) prepare carefully before mediation, and (5) use procedures focused on promoting a deal rather than merely settling potential litigation.

B. Planned Early Two-Stage Mediation—In many practice settings, there is a strong norm of trying to settle civil cases in one mediation session if possible.

In cases following the one-session norm, parties sometimes endure marathon mediations lasting late into the evening. Parties and lawyers usually get new information and perspectives during mediation, however, and they may need time to digest it and possibly consult with others before making decisions.

When parties don't have enough information or aren't ready to make confident decisions, they may feel pressured to settle their cases. Even when mediators avoid intentionally exerting pressure, parties can feel pressed to settle if everyone assumes that mediation normally should involve only one session. This can cause "buyer's remorse," leading parties to renege on agreements, perform them inadequately, file suit to rescind them, or even sue neutrals or lawyers.

These problems generally can be avoided if everyone plans for two possible mediation sessions. People now sometimes have *unplanned* two-session mediations, where they unsuccessfully push to settle in one session and later re-convene. Although this may eventually produce good resolutions, it does not provide the benefits of a planned early two-session mediation—PETSM—process of being better organized and more humane. John Lande, "Planning for Good Quality Decision-Making in Mediation Using Two-Stage Mediation," *Indisputably.org* blog (May 9, 2019) (available at https://bit.ly/3EqMgG6).

In a PETSM process, the first session should occur soon after the parties have done some basic factfinding and legal research. In the first session, mediators can help identify critical uncertainties and potentially unrealistic assumptions, and then encourage people to check them out as "homework" to be completed before the second session.

In the first session, the parties may be ready to settle. If so, a second mediation session would not be needed. If parties plan for the possibility of a second session, they are less likely to feel pressured to settle.

To maximize the benefits of PETSM, participants need to change their expectations about how mediation would work. Mediators can post information on their websites explaining the process and provide materials to help people plan for particular mediations.

C. Planned Early Multi-Stage Mediation—In many practice communities, family mediations routinely consist of a series of sessions. In the early sessions, the parties define the issues. As the process continues, parties collect and share information, consult experts as needed, and eventually try to negotiate an agreement.

This process is much less common in (non-family) civil mediations. In the wake of the Covid-19 crisis, however, some civil mediators have offered planned early multi-stage mediation. John Lande, "The Evolution to Planned Early Multi-Stage Mediation," *Kluwer Mediation Blog* (Aug. 28, 2020) (available at https://bit.ly/3EqMRrk).

With video, lawyers and clients not only save travel time to attend mediations, but they also avoid the dead-time waiting while mediators caucus with the other side. It's possible to schedule several steps in a mediation that might unfold over a specified period, such as a week.

This also might address the recurring problem of a lack of engagement of actual decision-makers in large organizations. People with authority to settle, such as high-level executives, usually aren't willing to invest the time to travel to a mediation and endure a lengthy process in which their input isn't needed for most of the time.

As parties and lawyers become used to video communications, ultimate decision-makers could be engaged by video for the limited, critical times when their input is necessary.

D. Early Dispute Resolution Institute Process—Lawyer and neutral Peter Silverman founded the Early Dispute Resolution Institute to help resolve disputes within 30 days. See edrinstitute.org. The process involves parties making contractual commitments to participate in good faith and comply with the higher ethical standards required in the process.

After the defendant files an answer in a suit, the parties engage a specially-trained mediator to assess the procedural needs and recommend a process. Parties may be able to mediate right away or may need to exchange certain limited additional information so that they can make informed decisions. This may involve short interviews or depositions that would be conducted promptly.

When the parties are ready to mediate, they present their case valuations including specific numbers and explanations to the mediator and other parties about "(1) How much ... each side expect[s] to spend on fees and expenses to take the case through trial? (2) What would be the best and worst outcome for each side from trial? (3) What is the percentage likelihood of winning on each of the core claims in the suit? (4) If a party prevails on a claim, what's the low, middle and high range of damages, as well as the likelihood of winning at each level?" Finally, the mediator helps the parties try to resolve the dispute.

The EDRI website at edrinstitute.org provides detailed process protocols.

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E. Guided Mediation—Paul M. Lurie, a retired partner of Chicago's Schiff Hardin, established the Guided Choice mediation process in 2013. It is a collection of practices and tools, in current use, to increase mediation efficiency, get earlier settlements, reduce legal and consultants' fees, and minimize business disruption.

Now known as Guided Mediation, the program focuses on designing a mediation process best suited for efficient resolution by overcoming all reasons for impasse, including the psychology of decision makers and the sociology of organizations. It emphasizes training users (including litigators, in-house counsel, clients, and mediators) to understand the tools available to design an effective mediation process and allow the earliest possible settlement.

Key tools to maximize the benefits of Guided Mediation are:

- Early hiring of mediators to overcome lawyer resistance, establish a relationship with the parties, and build process trust. These mediators are referred to as Guiding Mediators.
- Using mediators as impasse diagnosticians based on confidential discussions to design the best settlement process for particular cases.
- Using a multi-phase mediation process including a pre-mediation phase that allows parties adequate time to understand why change of their settlement positions actually is in their best interests.
- Suggesting processes to overcome pre-existing impasses and those arising during mediation.
- Discouraging parties from making offers and demands (or even creating positions in their own minds) during pre-mediation until they get better insight into reasons for impasse.
- Collaboratively using experts or third-party neutrals on a binding or non-binding basis such as limited arbitration or "hot tubbing" parties' experts. See Anjelica Cappellino, "'Hot-Tubbing' Expert Witnesses: An Experimental Technique from Australia Makes a Splash in U.S. Courts," Expert Institute (Aug. 23, 2021) (available at https://bit.ly/3EoKxRM).
- Using separate mediation processes for certain parties within a larger mediation, e.g., insurers, governmental agencies, and subcontractors.

For more on Guided Mediation, see John Lande, "Paul M. Lurie on Guided Mediation," *Indisputably.org* blog (April 14, 2021) (available at https://bit.ly/3wa72Hi; see also gcdisputeresolution.com.).

8. Planned Early Dispute Resolution Systems

One might assume that sophisticated business executives would rarely use litigation because of the huge costs and uncertainties, which businesses generally loathe.

Litigation undermines many business interests such as efficiency, protection of reputations and relationships, control of business operations, and risk management, among others. Major businesses are repeat-player litigants that have large staffs of financial and legal experts that could develop proactive systems to avoid, minimize, and efficiently handle disputes.

Surprisingly, few businesses have such systems. To find out why some do and some don't, I conducted a study with lawyer and mediator Peter Benner. John Lande and Peter Benner, "Why and How Businesses Use Planned Early Dispute Resolution," 13 *Univ. of St. Thomas L.J.* 248 (2017) (available at https://bit.ly/2ZEtH2H). We interviewed inside counsel at major corporations using planned early dispute resolution (PEDR) systems to understand why these businesses adopted these systems, unlike many of their competitors. (See also the *Alternatives* version at Peter W. Benner & John Lande, "How Your Company Can Develop a Planned Early Dispute Resolution System," 34 *Alternatives* 67 (May 2016) (available at https://bit.ly/2ALumT1), and John Lande & Peter W. Benner, "How Businesses Use Planned Early Dispute Resolution," 34 *Alternatives* 53 (April 2016) (available at https://bit.ly/2Zh5ltb).)

PEDR is a general approach designed to enable businesses to resolve disputes favorably and efficiently as early as reasonably possible. It involves strategic planning for preventing conflict and handling disputes in the early stages of conflict, rather than dealing with disputes ad hoc as they arise.

There is no uniform PEDR model. Various companies' PEDR initiatives include some or all of the following elements:

- Building support for PEDR systems
- Changing the corporate disputing culture
- Dealing with resistance
- Designating PEDR counsel
- Using dispute prevention and resolution contract clauses
- Conducting early case assessments
- Determining appropriateness of cases for a PEDR process
- Systematically using dispute prevention and resolution processes
- Providing practice materials and training
- Using alternative fee arrangements
- Ensuring survival of PEDR systems

Especially important elements include designating individuals to manage the process, using early case assessments, building support, and changing the culture.

The study illuminated numerous reasons why many businesses don't use PEDR systems:

> This study illustrates that key stakeholders have their own interests, which often are satisfied by continuing with the status quo of LAU [litigation-as-usual] rather than switching to a PEDR system. The C-Suite often does not want to "get into the weeds" of managing litigation. Inside counsel and middle-level employees may feel that they currently handle disputes effectively, and they may resent efforts to reduce their autonomy. Outside counsel may worry about interference with their professional responsibility to produce the best legal results and their ability to generate substantial revenue that generally flows from LAU. Although general counsel have the formal authority to direct inside and outside counsel to use PEDR processes, the general counsel may not do so for various reasons such as their temperament, background, training, or reading of internal business priorities. Even if they implement a PEDR system, the system is unlikely to be as effective as possible if key stakeholders resist.

More generally, what may seem irrational to outside observers may seem quite rational to individual stakeholders. Although the status quo may not seem optimal to

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Prevention

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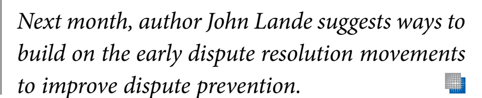
some stakeholders, doing something different may seem risky, possibly subjecting them to criticism if things do not work out well. Business people normally do not get involved in dispute resolution and they may not be interested in PEDR processes unless it "hits them personally." One lawyer said that the biggest barrier to adopting a PEDR system was simply agreeing to change. "People get set in their ways. Teaching an old dog new tricks is very tough. Change is upsetting the apple cart and people don't want to hear it." So, although adopting a PEDR system may seem like a no-brainer at first blush, proponents of this approach often face significant barriers that make it difficult to adopt and sustain this innovation. (Footnotes omitted.)

A recent book on corporate counsel's attitudes about cross-border commercial mediation in the European Union found that internal organizational culture plays a significant role in handling these disputes. John Lande, "Anna Howard's New Book Examines Why Businesses Don't Use Mediation—and Other Issues," *Indisputably.org* blog (March 11, 2021) (available at https://bit.ly/3w9g7Qv).

The Planned Early Dispute Resolution Task Force of the American Bar Association Section of Dispute Resolution produced a PEDR user guide and other materials to encourage businesses to develop PEDR systems. Information on the task force is available at https://bit.ly/3bxh7UY. New England energy provider Eversource Energy is an example of a company using a PEDR system. See John Lande, "Early Dispute Resolution Processes," *Indisputably.org* blog (April 8, 2020) (available at https://bit.ly/3jPGGVO).

* * *

Next month, author John Lande suggests ways to build on the early dispute resolution movements to improve dispute prevention.



International ADR

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The last time the Supreme Court addressed the scope of the provision was in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (available at https://bit.ly/3K9TDVq). There, the Court listed several factors that district courts must consider in ruling on a § 1782 request. But it declined—as Intel had asked in its briefing—to exercise its supervisory authority to adopt certain rules of procedure governing the application of § 1782. The Court reasoned that "[a]ny such endeavor at least should await further experience with § 1782(a) applications in the lower courts." Id. at 265.

Eighteen years of experience has made it clear that § 1782 must be narrowed.

Between 2005 and 2017, the annual number of § 1782 applications quadrupled. See Yanbai Andrea Wang, "Exporting American Discovery," 87 *U. Chi. L. Rev.* 2089, 2109 (2020) (available at https://bit.ly/3hx9XmQ). These applications impose tremendous burdens on companies that do business in the United States—especially international financial institutions, one of the most frequent discovery targets.

Respondents must retain outside litigation counsel—and often foreign-law experts—to respond to § 1782 applications. And they do so against the backdrop of a procedural regime that particularly unfairly favors applicants over discovery respondents.

Worse, foreign arbitrations—like domestic ones—are largely confidential. Respondents therefore generally lack the ability to obtain the arbitration record to evaluate the arguments made in the application or the propriety of the subpoena's scope. The respondent thus bears the burden of proof challenging a district court's grant of a § 1782 application, but has no access to the underlying evidence necessary to make its case.

Discovery's Burden

The subject: The cases before the U.S. Supreme Court right now on including arbitration as a foreign tribunal under 28 U.S.C. 1782 for the purpose of providing discovery.

The position: The authors, who filed an amicus supporting a bank association, argue that the law already is subjecting institutions to unfair and costly international discovery, and will be made worse by adding arbitration.

The preferred path: The Court 'has the perfect opportunity to deploy 18 years of lower court experience and limit the scope of § 1782 to court proceedings, rather than international arbitrations.'

Finance's Heavy Burden

Financial institutions bear a particularly heavy burden responding to § 1782 applications.

Although no data specifies the percentage of § 1782 targets that are financial institutions, almost 40% of all § 1782 applications are filed in either New York's Southern U.S. District Court, the Southern District of Florida, or Florida's Middle District. Taken together, those three judicial districts represent the majority of places international financial institutions are subject to jurisdiction in the United States. See Wang, 87 *U. Chi. L. Rev.* at 2112 & n.116. And "the number of civil requests has grown rapidly, approximately quadrupling between 2005 (49 requests) and 2017 (208 requests)." Id. at 2111.

This number will likely only increase; several arbitration organizations have reported posting record-breaking numbers of proceedings filed in the past two years.

Responding to § 1782 applications is expensive. The Institute of International Bankers, a national association devoted to representing and advancing the interests of banking organizations headquartered outside the United States that operate in the United States, estimates that its members collectively spend mil-

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CPR News Special Edition

The New Corporate Counsel Guide for Arbitration in Brazil: Preparation, and the Role of the In-House Counsel

BY MONICA COSTA

An engaged in-house counsel is a key player on an arbitration team. Depending on the style, some may be more active and become directly involved in every step of the case. Others may prefer to work on strategic issues and leave the execution of tasks for external counsels. But in no circumstances should the in-house counsel be absent or distant from the arbitration proceeding and the external team.

The author, based in Tozzini Freire's São Paulo office, has more than 15 years of practice in the firm's Litigation and Arbitration practice groups. She has extensive experience in arbitration proceedings administered by domestic and international institutions and practices in commercial mediation, both ad hoc and institutional, representing clients during all phases of the proceedings. This article is adapted from the CPR Brazilian Advisory Board's new book, CPR Corporate Counsel Practical Guide for Arbitration in Brazil, available as a free download at bit.ly/3WCZkBZ.

In-house counsel should keep the arbitration proceeding on the company's agenda and seek the commitment from businesses to cooperate with the efforts. Cooperation encompasses providing information and evidence, indicating the company's ultimate goal for the arbitration proceeding, as well as determining the more sensitive legal discussions vis-à-vis the company strategy and the more favorable circumstances for settlement discussions.

This CPR Corporate Counsel Practical Guide for Arbitration in Brazil book excerpt aims to identify issues in-house counsel should have in mind

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Alternatives

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and steps to take during the preparation for an arbitration proceeding, after the decision to pursue arbitration and engagement of external counsel.

Serving as Liaison between business personnel and outside counsel: In-house counsel usually represents the common ground between the business and the external counsel and is the member of the team most acquainted with the company's culture and the manner in which its executives deal with disputes. In-house counsel is the most equipped person to anticipate possible bottlenecks.

In-house counsel must work together with the external counsel in identifying the legal and commercial key issues of the dispute, as well as the relevant persons in the company that must be involved in the arbitration proceeding.

Business personnel tend to be more focused on costs, resources required, and possible outcomes, but frequently are partial to the issues underlying the dispute and become biased.

For instance, if the dispute refers to products or services that are under an executive's supervision, he or she may have a different type of involvement with the case than if the dispute refers to the liability for a contingency after an M&A transaction.

The view and assessment of the case from the business personnel may be more or less partial depending on such factors. The in-house counsel is usually the person able to identify possible bias beforehand and seek advice from external counsel to (i) neutralize any possible bias on case narrative by business personnel; and (ii) use it to the advantage of the arbitration, in terms of engagement of the company.

In-house counsel must alert appropriate levels of management to the case details, which will enhance businesses' engagement.

In-house counsel should identify the teams and persons who will be required to participate and provide information and make them available for discussions with external counsel.

Questions that should be on an in-house checklist and revisited by the external team: (i) Who must and will be available? (ii) Who is key and who may contribute? or (iii) Who is the best person to present the case?

Corporate cases often become puzzles and may require discussions and contributions from different sources. Do not be timid in seeking different sources and involving a variety of people on fact finding.

Role in case developing and setting strategy: Familiarity with the business and closer contact with executives of the company place in-house counsel in a privileged position to walk through strategic issues with external counsel. In-house counsel may have more liberty to discuss weaknesses of the case and how to overcome difficulties. Legal background also facilitates and enhances discussions on possible approaches.

In developing case strategy, in-house must discuss and obtain from external counsel clear guidance on the case strengths and possible pitfalls, and clearly communicate these aspects to the business. To streamline case assessment, in-house counsel will need to quickly provide external counsel with all relevant documents, contracts, correspondence exchanged between the parties, existing reports on technical issues, etc.

Likewise, details on facts, the story of the background of the case and the perspective of a company in the dispute must be shared promptly with external counsel. In-house counsel must also identify and arrange meetings with the individuals that had a role in the project or transaction subject matter of the dispute.

Communication is of the essence when discussing strategy and drafting the roadmap to accomplish the company's goals. As noted, in-house counsel must alert the business to the details, and obtain the necessary approvals to move forward with the strategy.

Promoting meetings, presentations, and brainstorming sessions with the appropriate levels of management have the benefit of engaging the business in the case and encouraging people to contribute with facts, opinions, questions, as well as legitimatizing the strategy and actions to be taken.

The strategy set on the beginning of the case may require adjustments, particularly if facts previously unknown surface at some point. Strategy modifications must also be communicated and discussed with business personnel.

(continued on next page)

New Brazil Corporate Counsel Arbitration Guide

In late 2022, the International Institute for Conflict Prevention and Resolution's Brazilian Advisory Board (BAB) introduced its new CPR Corporate Counsel Practical Guide for Arbitration in Brazil, a companion to the CPR Corporate Counsel Manual for Cross Border Dispute Resolution.

The book, excerpted in the accompanying article, provides corporate counsel involved in Brazil-related transactions and disputes with resources to navigate the opportunities and challenges involved in Brazil arbitration proceedings. The BAB introduced the publication at a Nov. 7 São Paulo meeting, which also served as a launch event, hosted by Tozzini Freires, a law firm with offices in five cities in Brazil as well as New York City. The book's printing was sponsored by Freshfields, which, along with Tozzini and CPR, presented a Nov. 15 New York Arbitration Week program featuring the new guide.

The BAB is co-chaired by Rafael Alves, a partner in São Paulo's MAMG, as well as Brazil launch-event host Monica Costa of Tozzini Freires, who is author of the accompanying article, which is excerpted and adapted from Chapter 5.2 of the book. Alves and Costa were the book's co-editors.

The CPR Corporate Counsel Practical Guide for Arbitration in Brazil is available now as a free download at bit.ly/3WCZkBZ. Because the principles also have wide general application to arbitration practice, *Alternatives* presents this excerpt from the new book for readers' arbitration toolboxes.

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In-house counsel should also discuss with external counsel the timeline of the arbitration considering the time required to prepare the case properly. Planning must consider the amount of time required to gather evidence; obtaining technical evidence or expert opinions; review submissions; prepare for hearings, etc. Dates for hearings are critical and in-house counsel must have in mind the availability of witnesses for preparation and attending the hearing, particularly in view of the seniority of staff that will have to participate.

Finding opportunities to settle; identifying interests and zones of possible agreements, and designing a negotiation or mediation roadmap: The conflict is dynamic, and a settlement opportunity may rise after the arbitration proceeding commences. It could be as early as before the written submissions, prior to the hearing, or just before or after the award is issued.

Keeping an open mind and a sharp eye for amicable resolution opportunities may lead to a better solution than an adjudicated resolution.

New evidence produced, and the avoidance of exposure or a deeper deterioration of professional relations may enhance settlement opportunities. A change in commercial issues or even a change in business executives on either side may open windows for such conversations.

The case should be continually reassessed considering the arguments and evidence brought by the other side, as well any discrepancy in expected time and cost versus the actual pace of the proceeding.

In-house counsel, with the assistance of the external team, need to work on worst case/best case scenarios and the most likely outcome to evaluate settlement options. A list of the issues that should be addressed in the negotiation should be developed and updated—which ones are critical, and which could be easier to discuss, is always helpful. The team should also explore and try to anticipate the other side's critical and negotiable issues to determine where there may be a zone of possible agreement to end the dispute, or at least part of it.

Depending on the factors in and complexity of the dispute, in-house counsel may consider engaging a different team to work on settlement and keep the arbitration team focused on the proceeding. This will largely depend on the availability and capability of external counsel to pursue both routes, without compromising any facets of the case.

In any event, any negotiation will depend on empowerment of people engaged in the discussions. It may be that the businesspeople carry on the negotiation with the legal team's backup, or the legal team could start testing the waters before the engagement of the business executives.

Both options, and any other combination, are possible. In a fair negotiation, both sides must have a clear understanding of the authority of person leading the negotiation and the necessary approvals they would have to obtain to close a deal.

Parties could also resort to a mediator to assist them in finding a common ground and reaching an agreement. In Brazil, the persons serving as arbitrators cannot serve as the mediator(s) in the same dispute. Parties should search for a different professional.

It is important to agree on whether the arbitration proceeding will continue or be suspended during the negotiation or mediation, or if just some acts will not be practiced during this period. By default, the arbitration proceeding will be suspended if a mediation starts, unless parties agree otherwise.

Witness identification and preparation: Witnesses are key evidence in arbitration. Limitations on serving as witnesses in an arbitration are more lenient in comparison to judicial court proceedings.

In-house counsel should spend time as early as possible in identifying possible witnesses for the case, arranging meetings with external counsel to assess the witness's knowledge of facts, and determining how a witness can contribute to the case. The sooner the witnesses are asked to present the facts, the better, as the issue will be fresh in their memories.

In-house counsel, with the assistance of the external team, need to work on worst case/best case scenarios and the most likely outcome to evaluate settlement options.

It is also important to inform the potential witnesses about the documents he or she must preserve, including e-mails and other electronic documents. A witness spotted by the in-house counsel can also bring information on other witnesses that could be useful but had not been previously identified.

Depending on the applicable rules, fact witnesses may be required to submit written statements prior to the hearing. The opposing counsel may or may not request the witness examination during the hearing and the scope of examination may be limited to the content of the written statement.

Expert witnesses usually prepare reports or opinions that are presented to the arbitral tribunal together with the written submissions and should be properly prepared for cross examination by opposing counsel during the hearing.

Reviewing submissions: In-house counsel is expected to review, comment and suggest adjustments to written submissions of all kinds. Various rounds of review may be necessary depending on the complexity of the case and, particularly, on how extensive the factual or technical discussions develop.

In some cases, business or technical personnel will also be involved in submissions review. In-house counsel must work with the external

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CPR News Special Edition

team to anticipate the needs, and have a timeline that enables the necessary reviews prior to the proceeding's deadlines.

Budget and cash flow: Companies frequently demand external counsel submit a fee proposal for the case, with fixed fees, success fees, and caps, or at least estimates of attorneys fees.

Be sure that the fee arrangement is clear to everyone: the scope of work, the fees agreed, and the criteria for renegotiating fees if there is a change in the scope. It is also recommended to provide for payment in case of settlement or if, for any reason, the company decides to replace external counsel.

In addition to the attorneys fees, in-house counsel must have an estimate of costs with the arbitration proceeding: arbitrator's fees, costs and expenses with the arbitration institution administering the case, expected costs with experts, hearings, etc. It is also possible to estimate when the company will be expected to incur in such costs.

Arbitration costs are usually split between the two sides of the proceeding: claimant side and defendant side. If you are the claimant, bear in mind that, in case the defendant does not pay its share of the arbitration costs (arbitrator's fees and administrative fees), the claimant will be asked to advance such costs on the defendant's behalf, subject to the suspension of the proceeding.

The arbitral award allocates the arbitration costs pursuant to the provisions set forth in the arbitration clause, in the terms of reference, and in the rules of the institution administrating the proceeding. Usually, the defeated party should reimburse the prevailing party for the costs, considering the proportionality reasoning.

For instance, the party that prevailed the most in relation to relief sought will be reimbursed accordingly, not in full.

Reimbursement usually includes contractual attorney fees considered reasonable by the arbitral tribunal. Tribunal-awarded fees (*sucumbencia*) are less frequent but may be granted upon request by one of the parties.

Document production: Rules of document production rely a lot on the rules applicable to the arbitration proceeding, as agreed by the parties, and on the law governing the contract and the proceeding.

In Brazil, documents are usually presented as attachments of the written submissions. Upon conclusion of this submission phase, the arbitral tribunal frequently grants the parties the opportunity to request the production of further evidence.

Parties commonly request from the arbitral tribunal the production of certain documents in possession of the other side. To this end, arbitral tribunals usually resort to the so-called Redfern Schedule, a technique that comprises a table with columns (i) identifying the document requested by the party, (ii) the justification for the production of such document; (iii) the counterparty's comments to the request and (iv) the decision of the Arbitral Tribunal on whether such document will be produced. An example of the Redfern Schedule can be seen below.

The arbitration proceeding is not considered as rigid as a court proceeding, but all documents are expected to be presented according to the arbitration schedule. Witnesses should not be examined or questioned in relation to documents that have not been produced in a timely fashion.

In-house key questions and checklist in preparing for arbitration: To assist in preparing for an arbitration proceeding, the following is a set of questions in-house counsel should have in mind.

1. What are the key issues of the dispute?
   a. What are the strengths and weakness of the case?
   b. What will the legal discussions possibly be? Can we anticipate what this case will probably concern, from a legal standpoint?
   c. Can we anticipate the counterparties' arguments?
   d. What is the worst-case scenario of the dispute?
   e. What is the best-case scenario of this dispute?
   f. What is the most likely outcome of this dispute?
2. What teams of the company were involved in the project/transaction subject matter of the dispute?
   a. Who are the key persons for this case?
   b. Who can provide information and help on learning factual details?
   c. Who could serve as witness?
   d. Who can provide documents? Is a hold notice necessary to preserve documents/evidence?
   e. Is resorting to the company's IT team necessary to preserve data?

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No.	Documents or Category of Documents Requested	Relevance to Requesting Party		Objections to Document Request	Reply to Objections to Doc. Request	Tribunal's Comments
		Ref. to Submissions	Comments			

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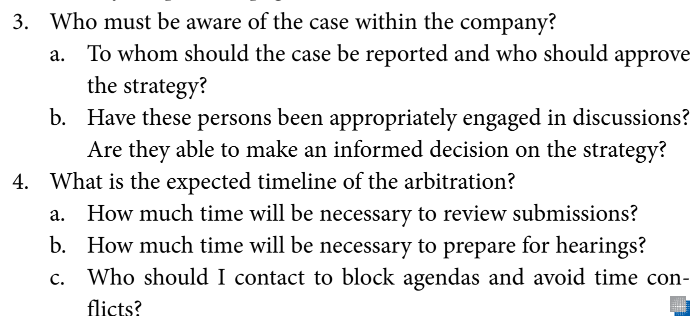

3. Who must be aware of the case within the company?
   a. To whom should the case be reported and who should approve the strategy?
   b. Have these persons been appropriately engaged in discussions? Are they able to make an informed decision on the strategy?
4. What is the expected timeline of the arbitration?
   a. How much time will be necessary to review submissions?
   b. How much time will be necessary to prepare for hearings?
   c. Who should I contact to block agendas and avoid time conflicts?

How Arbitrators Decide, and More, Set for Next Month's CPR Annual Meeting

Registration continues throughout February for the 2023 CPR Annual Meeting.

Signups for next month's meeting are now available at www.cprmeeting.org for CPR members, CPR neutrals, and nonmembers.

CPR's Annual Meeting returns to in-person form after two years of successful online programs. #CPRAM23 will be held Wednesday, March 1, to Friday, March 3. The return is scheduled for the Four Seasons Hotel in New Orleans (see www.fourseasons.com/neworleans).

#CPRAM23 will be CPR's first in-person Annual Meeting since St. Petersburg, Fla., in 2020, just before the pandemic closures. There were some discounted rooms for Annual Meeting attendees at the Four Seasons at press time, but CPR urges persons considering attending to act fast. Details and the discount code are available at bit.ly/3IE8Gcz.

The agenda is being posted as sessions are announced at cprmeeting.org, and is focusing on practical and innovative dispute management tools, techniques, and best practices for case management in corporations, law departments, and law firms.

As has become customary in the evolution of commercial conflict resolution, there will be a heavy emphasis on dispute prevention—how to avoid disputes from developing in the first place.

At press time, the agenda includes "The Next Frontiers in Energy," focusing on renewables and the disputes that arise in emerging electric and solar power innovations.

Also on the #CPRAM23 slate are sessions on the comparative best practices in U.S. domestic and international arbitration; the use of mock arbitrations; a discussion by veteran arbitrators analyzing their decision processes and the advocacy of parties and counsel before them; a session titled "Responding to, Litigating, and Mediating a Criminal Cyberbreach"; a review of the ethical considerations in addressing mixed-mode disputes, where multiple forms of ADR are deployed in concert, concurrently, or sequentially; a discussion on mitigating risk in life sciences licensing transactions; a look-forward to near-term expected disputes—such as supply chain disruptions, travel restrictions, climate change, and war—and how to prevent them; and a session titled "Bias Busters: Implicit Bias and Selection of Neutrals."

Keynoters can be found at cprmeeting.org. In addition, CPR's long-running Annual Meeting Corporate Counsel Roundtable will once again kick off the panel programs on March 1, and a third-day hot topics session will be included, too.

The meeting will include a banquet featuring the presentation of the annual CPR Awards and the latest list of ADR's Rising Stars. There also will be a meeting summary on the latest ADR support by CPR Dispute Resolution Services.

The CPR Annual Meeting is a networking and promotional opportunity for practitioners and business leaders interested in preventing disputes or resolving them early enough to avoid the cost, distraction, and ruined relationships that full-blown litigation brings. The New Orleans meeting next month will feature multiple meet-up sessions, including breakfasts, lunches, and receptions.

> CPR's 2023 Annual Meeting will feature ADR for emerging energy industry technologies; the use of mock arbitrations; ADR in cyberbreaches, and the ethics of mixed-mode/combined ADR processes.

CPR, a New York state-accredited CLE provider, expects to provide New York State continuing legal education credits for the 2023 CPR Annual Meeting.

CPR Senior Vice President Ellen Parker is organizing the Annual Meeting. The #CPRAM23 Steering Committee co-chairs are Laura Robertson, Deputy General Counsel at Houston-based ConocoPhillips Inc., and Mimi Lee, Chevron Inc.'s Managing Counsel, based in San Ramon, Calif. Robertson is vice chair of CPR's board; Lee is a member of CPR's Advisory Council.

Sponsorship opportunities are available. At press time, CPR's Global ADR Champion sponsors for #CPRAM23 include the law firms of Arnold & Porter, Debevoise & Plimpton, DLA Piper, King & Spalding, and Williams & Connolly. Microsoft Corp. is also a Global ADR Champion sponsor. Supporting ADR partners include the law firms of Baker & Hostetler, Fox Rothschild, Haynes Boone, and Kirkland & Ellis. The academic sponsor is the University of Florida Levin College of Law.

For more information on the sponsorship categories, see the meeting website above or contact Ellen Parker at eparker@cpradr.org.

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Alternatives
TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

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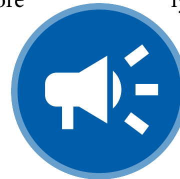
Commentary

An Optimistic ADR Look Forward: How We Can Make Commercial Arbitration Achieve Its Potential

BY JOHN D. FEERICK

The alternative dispute resolution field has emerged from the pandemic and now looks to the future.

Technology has been an invaluable tool for arbitrators, as well as mediators, in the pandemic period, in serving both the needs of the ADR community and the public interest. The future will provide even more tools for our field with the birth of artificial intelligence, which is on the agenda of conflict resolution organizations world-wide. A.I. will enable parties in ADR to have access to information and data never seen before technologically, and may be becoming a staple of legal education. See, e.g., Joseph Landau & Ron Lazebnik, "Law Schools Must Embrace A.I.," *Nat'l L. J.* (July 10) (available at https://bit.ly/3rwBWeK).



Despite optimism for the future, the ADR field is not without its challenges. The over-litigation of arbitration continues, as the numbers of users of this process grow. Indeed, the 2023 New York State of Judiciary Report indicates that in 2022, the court system had 8,000 arbitrations, and more than 12,000 mediations, with 58% of the mediations reaching a full or partial settlement. Anthony Cannataro & Tamiko Amaker, State of Our Judiciary 2023 (Feb. 28, 2023) (available at https://bit.ly/3JPNBeJ). The introductions of ADR and presumptive mediation earlier in the state's civil litigation process, as stated in the 2023 New York judiciary report, "often lessen conflict, decrease costs, produce satisfactory outcomes, and increase efficiencies in our dockets."

One of ADR's biggest benefits is its private nature; this feature, however, is raising questions. There is concern as to what happens in arbitration and doubt as to what criteria are used by arbitrators in making their decisions. Demands for greater transparency in consumer and employment arbitration continue. In addition, the cost of arbitration for those with limited means who are compelled to arbitrate under their consumer and employment contracts remains a serious issue.

This article provides commentary on these and related subjects. But first, it pays tribute to William Slate and James F. Henry, pioneers in the ADR field, who left us a year ago—Bill in June 2022, and Jim in October 2022. I knew them both quite well, having served on the search committee that led to Bill Slate's selection as American Arbitration Association president, and in responding affirmatively to Jim Henry's request as a practicing lawyer to his appeal to become involved in CPR.

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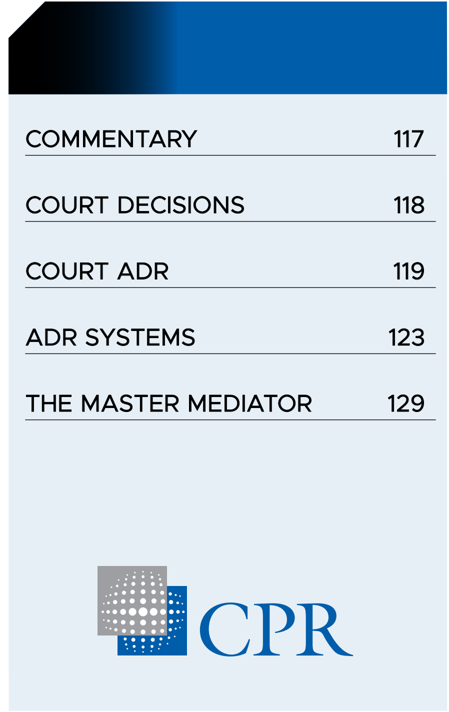
The author is Norris Professor of Law at Fordham University School of Law in New York, where he served as dean for 20 years. He is founder and senior counsel of the school's Feerick Center for Social Justice. He is author of "That Further Shore: A Memoir of Irish Roots and American Promise" (2020 Fordham Press) (available at https://bit.ly/3330X1t). This article is adapted and updated from a June 15 keynote at a New York State Bar Association program, "Arbitration and Mediation 2023: Fulfilling the Promise – Getting Matters Resolved in a Timely and Efficient Way in Today's World" (details available at https://bit.ly/3D6oTmJ). The author wishes to acknowledge his deep appreciation to Cara Mahon, '24, and Ilana Gucovschi, '23, of Fordham Law for research and drafting that made the speech and this article possible. He also appreciates comments received from Profs. Jacqueline Nolan Haley and Linda Gerstel, colleagues at Fordham Law School, and Charles Moxley, Esq.



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and disqualify candidates who grossly or repeatedly violate them.

8. Create "multi-door courthouses," as proposed by the late Prof. Frank E.A. Sander of Harvard Law School, and encourage informal problem-solving, facilitated negotiation, early neutral evaluation, summary jury trial, mediation, and arbitration before, during, and after litigation.
9. Draft generic language requiring parties to use mediation or other alternative dispute resolution processes before litigation, and include it as standard language in all treaties, legislation, executive orders, contracts, and agreements at every level of government.
10. Fund the education of all students from kindergarten through college in conflict resolution, with special courses to train aspiring political candidates, as well as public sector employees, managers, and supervisors in mediative practices *before* they run for office or begin work, and periodically improve their skills.

While none of these proposals addresses the serious substantive, structural, and systemic issues that divide us—and much more is obviously needed—these measures, and many like them, will be quicker, easier to implement, and better able to convince hostile opponents that democracy need not be scrapped simply because we lack the skills required to turn political animosity in the direction of social problem-solving.

Committing to Change

James Baldwin was clearly right when he wrote that, "Not everything that is faced can be changed; but nothing can be changed until it is faced." We can add: not everything can be changed immediately, but without a sense of immediacy and commitment nothing can change.

Today, we face circumstances that require us to rapidly figure out how to solve a growing number of complex, divisive, life-threatening, global issues. Chief among these is our inability to solve them *together,* because we lack the skills and capacities, processes and relationships, systems and structures needed to turn hyper-polarized political conflicts into collaborative social problem-solving. Yet these skills and capacities are now well within our grasp.

Even a *grossly* insufficient, dreadfully underfunded, half-hearted effort to implement a *fraction* of these proposals could have a dramatic, transformational effect, and point us in the right direction. All we need to begin is an interest-based orientation, a diverse set of skills and processes that can be scaled-up, and a willingness to draw people into dialogue, collaborative problem-solving, negotiation, and teamwork.

Will we succeed, and will we be able to do so in time? No one knows. But we do know that there will be little hope of succeeding if we don't try, and we know, as writer Rebecca Solnit reminds us, that hope resides in all of us:

> The grounds for hope are in the shadows, in the people who are inventing the world while no one looks, who themselves don't know yet whether they will have any effect, in the people you have not yet heard of.

Legendary management consultant and mediation founder Mary Parker Follett wrote that we have not yet experienced *real* democracy, nor a genuine "government of the people, by the people, for the people" that Lincoln hoped would not perish from the earth. We couldn't, and can't, until we develop the skills we need to make it work. We are now building those skills, and it is time to put them to work.

Commentary

(continued from front page)

The mission and visions of Jim and Bill influence my words and thoughts today, namely, the importance of acquiring ADR-related data, increasing transparency using such data in selecting a process and neutral, and having a mindset of an ADR "think tank" so essential to ADR's growth, as I see it.

When I entered law practice in the 1960s, many advocates were searching for ways to resolve conflicts without litigation. In 1976, U.S. Supreme Court Chief Justice Warren E. Burger questioned this predicament, stating that we can do "better." Prof. Frank E.A. Sander of Harvard Law School posited the varieties of options that could exist in a "multi-door courthouse."

After this questioning of the state of litigation, ADR emerged in the 1980s with more than 600 corporations adopting CPR's Pledge, the Corporate Policy Statement on Alternatives to Litigation. (See www.cpradr.org/corporate-policy-statement.) Soon after this innovation, companies began to use ADR as a private justice system. Todd B. Carver & Albert A. Vondra, "Alternative Dispute Resolution: Why It Doesn't Work and Why It Does," *Harvard Business Review* (May-June 1994) (available at https://bit.ly/3rlunra).

Pioneering and Launching

Turning to these two trailblazers:

Bill Slate: Upon being chosen as president of the American Arbitration Association in 1994, Slate said in his first column in the association's *Dispute Resolution Journal*: "The AAA is poised to take on new leadership challenges as we further develop and refine ADR techniques and applications, to meet the discrete need of a growing number of users in different fields."

Bill prioritized diversity-inclusion and innovation. To enhance diversity in the ADR field, he established the A. Leon Higginbotham Jr. Fellows Program at the AAA (available at www.adr.org/higginbothamfellowsprogram) to provide training and mentorship programs to diverse professionals who historically have not been included in a meaningful way in the ADR field.

He pioneered at the same time the launch of an e-commerce initiative which led to the development of the AAA's online case management system and the association's leadership in this area, including the establishment of its International Centre for Dispute Resolution. See www.icdr.org. Bill also established a dispute resolution research center and then, with his wife, an organization for dispute resolution data. The use of the Internet and data in ADR were among his major accomplishments.

When asked by his mentor, businessman Pete Scotese, what he wanted his legacy to be, Bill said, "data in arbitration and mediation globally." Bill's wife, Debi, continues his legacy

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Commentary

A Vision for the Future of ADR

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and shared with me a few words about this subject: "Data," she said, "is the foundation of the future, whether it is used in analytics, smart contracts or to inform future ADR-focused A.I. initiatives." Bill considered data, technology, and diversity of immeasurable importance to the future of ADR.

Jim Henry: James F. Henry revolutionized the ADR field as well, through his visionary approach. I met him when he was a young lawyer at the firm then known as Breed Abbott. He envisioned a way for companies and people to resolve disputes by avoiding them entirely.

Strengthening and maintaining genuine business relationships before disputes occur was at the core of his philosophy. The father and founder of the Center for Public Resources, and later the International Institute for Conflict Prevention and Resolution-CPR, Jim served as president until his retirement in 2000. CPR introduced the concept of a "think tank" for advancing ADR. It promoted the value of flourishing business relationships by means of international dispute resolution and conflict mitigation.

[Henry also founded *Alternatives to the High Cost of Litigation* for CPR, and served as publisher from its first issue in January 1983, until his 2000 retirement. *Alternatives* is published by CPR and John Wiley & Sons.]

His forward-thinking idea for conflict prevention manifested itself in the Pledge concept. It embodied a promise to be amicable in the face of disputes and to be open to exploring alternative paths to litigation. It encouraged companies to embed mechanisms within their bylaws to lessen the chances of a dispute. For more, see www.cpradr.org/adr-pledges.

He considered the term "ADR" as standing for "appropriate dispute resolution," as opposed to "alternative dispute resolution." He opined that it is a critical notion to remember when faced with conflicts to ask what is the appropriate dispute resolution mechanism where we as lawyers and neutrals can offer our area of expertise.

Jim's legacy will forever remain apparent in the mission of CPR to learn, listen, and build toward a place "with less conflict and more purpose."

The organization Bill Slate helped create, Dispute Resolution Data LLC, developed, at least upon its founding, "the first and only global database pertaining to commercial arbitration and mediation dispositions." See www.disputeresolutiondata.com. The organization's mission is to enhance the practice of arbitration and mediation through the collection and analysis of case data. The ADR field, forward-looking, will benefit enormously from Debi Slate's commitment and dedication to the work Bill and she began.

In speaking of data, I take note of Micronomics, an economic research firm, which has provided objective differences between litigation and arbitration. In 2017, it concluded that on average, litigation through trial and appeal took 12-21 months longer than AAA arbitration. Roy Weinstein, Cullen Edes, Joe Hale & Nels Pearsall, Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings, Micronomics (March 2017) (available at https://bit.ly/44dKt4I). Micronomics also discovered that direct expenses attributed to trial time ranged from $10.9 billion to $13.6 billion, as compared to the AAA arbitration matters studied, between 2011 and 2015.

Human Element of ADR v. A.I.—Impact of the Digital World: In stride with the increase in data collection technology, artificial intelligence is beginning to enter the world of lawyers and judges, and ADR as well. In recent months, however, there has been controversy over A.I.

In a recent matter, *Mata v. Avianca Inc.*, No. 22-cv-1461 (PKC), 2023 U.S. Dist. LEXIS 94323 (S.D.N.Y. May 4, 2023) (orders available at https://bit.ly/3sdYPUv), plaintiff Roberto Mata's lawyers objected to their client's case being tossed out by submitting a 10-page brief relying on numerous opinions. But neither the opposing counsel nor presiding U.S. District Court Judge P. Kevin Castel, in New York, could find the decisions or case quotations featured in the brief.

This was because Mata's attorneys relied on ChatGPT to create the brief, and ChatGPT used nonexistent cases to back up its arguments. In a June 22 sanctions order (at the link above), Judge Castel issued a $5,000 sanction against the attorneys and ordered them to contact each of the judges to whom they had attributed the fake citations in the ChatGPT-generated legal submission.

A. *Benefits of A.I. in ADR.* Moving beyond the skepticism surrounding A.I. in the legal and ADR fields, the evidence is strong that it is in fact being used, with advocates citing the benefits of A.I. as including efficiency, speed, consistency, accessibility, cost-effectiveness, and data analysis. In terms of efficiency and speed, A.I. can process massive amounts of data quickly, significantly reducing the time it takes to analyze documents or extract relevant information.

In terms of consistency, A.I. models can apply rules uniformly, avoiding inconsistencies that can arise from human interpretation.

In terms of accessibility and cost-effectiveness, the use of A.I. can help lower the cost of legal services making ADR more accessible to parties with limited resources.

In terms of data analysis, A.I. can more efficiently analyze past cases and decisions to identify trends and patterns faster and more efficiently than ever before.

B. *Negatives of A.I. in ADR.* With A.I.'s positive features comes significant downsides. These negatives include potentially incorrect analysis, lack of the human element, ethical and privacy concerns, legal liability, over-dependence, and misuse.

The lack of the human element is in direct contrast to ADR as fundamentally it is a human-centric process requiring an understanding of human emotions.

The biases embedded in A.I. algorithms, it is said, can lead to unfair outcomes. Luke Taylor, "Colombian Judge Says He Used ChatGPT in Ruling," *The Guardian* (Feb. 2, 2023) (available at https://bit.ly/3XFJk3o); see also Matthew Stepka, "Law Bots: How A.I. Is Reshaping the Legal Profession," *Business Law Today* (ABA Feb. 21, 2022) (available at https://bit.ly/44fZqmK). Also, the use of A.I. requires the collection and processing of potentially sensitive data. Once information is entered into A.I. platforms, such as ChatGPT, it becomes public information, compromising the client's privacy.

The liability question of who is responsible when A.I. makes a mistake during a dispute resolution process is still largely unanswered. In addition, over-reliance on A.I. could lead to misuse and manipulation of the system to the detriment of justice.

As we move forward, it will be critical to balance A.I.'s benefits with the need to maintain the human touch, fairness, and privacy inherent in ADR processes. Leaders in the field should simultaneously maintain a healthy degree of skepticism as well as listen openly to the opportunities these innovations can offer to the ever-changing field of ADR.

Campaign for Greener Arbitrations: Another movement taking place now is the adoption of technology to lessen the impact of our work on the environment.

The Campaign for Greener Arbitrations is an initiative started by Lucy Greenwood, of Alresford, U.K.'s Greenwood Arbitration, to advocate for environmental awareness in arbitration. See www.greenerarbitrations.com.

Greenwood launched the Campaign with the vision of spreading a shared responsibility for the high carbon footprint caused by the legal profession. The "Green Pledge," as they call it, lists a set of commitments that signatories agree to follow to promote a "greener" practice of law. See "About the Campaign," at www.greenerarbitrations.com/about.

This movement, in congruence with the post-pandemic cultural shift, has allowed for a more seamless evolution into virtual proceedings that could have never been imagined before. The AAA, CPR, JAMS Inc., and other ADR providers are giving strong support to the green initiative, providing education to users of their services. And while it's a real learning curve, we must use these tools to ensure a transition to more sustainable practices for the benefit of future generations.

Diversity & Inclusion Efforts

Ray Corollary Initiative: Another pressing issue in today's world is the continued lack of diversity in the legal profession. Diversity initiatives are more critical than ever. The Ray Corollary Initiative, or RCI, is an organization focused on increasing diversity and inclusion among ADR neutrals. RCI promotes a detailed plan of action to increase the number of persons of color and women selected as arbitrators and mediators. See "About Us," Ray Corollary Initiative at www.raycorollaryinitiative.org/about-us. The plan entails that "RCI Pledge" signatories will commit to the "furtherance of diversity, equity, and inclusion." See "The RCI Pledge," at www.raycorollaryinitiative.org/the-pledge.

Already in 2023, ADR provider JAMS Inc. and the AAA have signed up for the RCI Pledge. This follows the leadership of CPR, which made such a commitment in 2020. Additionally, large corporations and law firm signatories to CPR's Diversity Commitment agree with the initiative on diversity and will track RCI's impact. See the 2022 CPR Diversity Commitment at www.cpradr.org/diversity-commitment.

Encourage ADR Use among Minority Populations & Poorer Communities: In a similar vein, as I have noted in presentations, low-income communities can benefit from using ADR rather than having to go through the court system.

Empirically, people in low-income communities are less likely to seek remedies in court, due to limited access, rigid procedural systems, and low likelihood of recovery. ADR would benefit these communities and encourage the filing of warranted arbitration claims and resort to mediation as a resolution process.

And let me add with praise for the commitment of the Office of Dispute Resolution of New York's Unified Court system (at https://bit.ly/3NJ4xVr), which has developed its own dispute resolution programs as part of the court system giving access to all people—including providing a mediator or problem solver. Many lawyers are participating in the community work of the Unified Court system and are being given training in doing so, and they also are serving as neutrals in the civil litigation system and for "Presumptive ADR."

One observation I need to include: Although ADR can offer many benefits, third-party neutrals must proceed with care in disputes involving low-income individuals. When such individuals are involved, the parties often are not on an equal footing. Mediators and arbitrators may need to consider excusing themselves from a dispute if they believe there is a power imbalance preventing a fair resolution of the matter.

The larger picture—Affirmative action and ADR: The methods of providing equal opportunity to address discrimination in our society—a constant, evolving, and contentious subject of public debate—have been elevated once again this summer in the wake of the U.S. Supreme Court decision, *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, No. 20-1199 (June 29) (available at https://bit.ly/3XGoxMS).

The decision prohibits the application of affirmative action processes in private and public universities as a basis for admission, as they have been developed, adapted and used for decades. But in the case, Chief Justice John G. Roberts Jr., writing for the 6-3 majority, noted how applicants can still discuss "how race affected his or her life, be it through discrimination, inspiration, or otherwise" in their personal essays. This was mentioned multiple times throughout the majority and dissent.

Therefore, if applicants are judged by their character traits in so far as they relate to their racial identity, universities don't need to act colorblind, and will not absolutely forbid the mention of race in admission applications.

Examples of the manners the Court believes race will be included is in essays where applicants would be able to write about overcoming racial discrimination if it is tied to that student's courage and determination, or where a student has benefited from their heritage and has been motivated to assume a leadership role or attain a particular goal.

These examples where an applicant's race could be considered would still need to be "tied to that student's unique ability to contribute to the university." Id. at 39. Also, the opinion specifically mentions a carveout of this ruling as it does not apply to military academies because they have different national security interests that are "distinct" from universities. Id. at 22, n. 4.

The ADR community, as well as and in its function as part of the general business community, is only beginning to examine the effects of *Students for Fair Admissions* on conflict resolution practice, and on the ADR field's practice reforms to encourage diversity. But the RCI in July issued a statement that it

> reaffirms the importance of taking positive steps to overcome barriers to ensure that all the talent available is deployed in service of ADR. Although the RCI is not directly affected by the U.S. Supreme Court's decision to significantly narrow how race can be considered in university admissions and not in other contexts, we are disheartened, but not demoralized, by

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Commentary

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the Court's ruling. While many in the ADR community acknowledge the benefits of diversity in the field, the fact is that, despite decades of effort, the neutrals who serve in cases are overwhelmingly white males. We believe that this is because there have been a variety of obstacles, implicit biases concerning minorities amongst them, that have made diversifying the roster of ADR neutrals more difficult.

The RCI's full statement is available at https://bit.ly/3qth1ZA.

Conflict Prevention and the Divided Community Project

Conflict Prevention: A continuing issue for our society is the focus on fixing what is broken instead of prevention, especially at a time of greater division and polarization.

When differences arise, there is a looming potential for a serious conflict, making it important to have available forums for discussion, understanding, and collaboration in order to alleviate underlying fears and instill confidence in a fair and equitable outcome. Facilitation and other ADR skills have vast potential to be used as a conflict prevention tool before larger conflicts develop by helping parties engage in communications that lead toward resolution. See, e.g., "Facilitation," Australian Disputes Centre, https://disputescentre.com.au/facilitation. See also CPR's dispute prevention library, resources, and Dispute Prevention Pledge for Business Relationships, at www.cpradr.org/dispute-prevention.

Divided Community Project: The Divided Community Project's Bridge Initiative at Moritz, a project based at the Ohio State University Moritz College of Law, in Columbus, Ohio, is working on using alternative dispute resolution systems to develop processes that not only keep initial protests safe but also offer a path toward engaging the entire community in more systematic reform.

The project is designed to provide facilitators, mediators, and other individuals with problem-solving experiences with opportunities to resolve, mitigate, or temper situations of civil unrest—helping, for example, to deal with conflicts between the community and law enforcement, training local community members on effective strategies to keep protests safe, and offering technical assistance to build a sustainable infrastructure for inclusive engagement. The Bridge Initiative at Moritz, "Offering Communities Rapid Consultation on Processes for Addressing Community Conflict" (available at https://bit.ly/43j0ncF).

The process used by the DCP is always personalized based on the conflict at hand. It is important that community members feel they have a voice to assist them that will be fair, supportive, and transparent.

With the help of a significant grant from the AAA Foundation, the DCP is expanding its project to California and New York. Stanford Law School, in Stanford, Calif., and Fordham School of Law, in New York, have agreed to develop as a pilot project, an academy to train individuals in ways of helping communities: In the summer of 2024, the project contemplates the creation of an academy where people from designated communities will be trained in problem-solving skills. They will include active citizens, law enforcement, and community leaders. The use of personalized ADR processes and professionals in conflict resolution may well be able to help mitigate deep-rooted issues permeating, if not growing, in various communities across the country.

The project was at the heart of two recent CPR Awards for outstanding ADR achievement. See, e.g., CPR News, 41 *Alternatives* 70 (May 2023) (available at https://bit.ly/3NLfqWI) (includes link to related 2021 award).

* * *

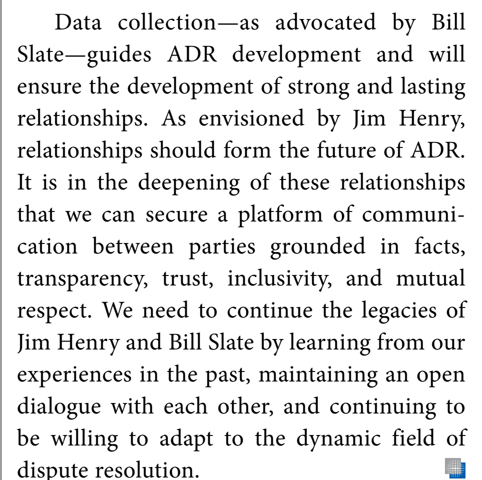
While the foundation of ADR must remain intact, the field needs to be dynamic and adapt to our changing needs and times. What I have suggested are areas in need of growth and refinement: (1) data and technology, to afford greater expansion and transparency for ADR; (2) recruiting, selection, and training of diverse neutrals; (3) exploring how minority communities can gain from expanded ADR use; and (4) greater roles for conflict prevention instead of waiting.

In order to create an effective, adaptable, and modern ADR system, I offer the following specifics:

1. Precautions and regulations should be instilled regarding A.I. and the legal profession to prevent errors, privacy invasions, and ethical violations.
2. Firms and organizations should consider using data to determine if their diversity and inclusion practices have been effective (such as the Ray Corollary Pledge), and if they have not been effective, to expand their diversity practices.
3. Institutions should sign variations of the Green Pledge to reduce their carbon footprint by capitalizing on the expansion of technology.
4. ADR professionals should consider introducing conflict prevention tools and practices to communities that battle with racism, poverty, homophobia, or issues of civil unrest. We can mend small rifts before detrimental eruptions occur by using a Divided Community Project that might already exist or can be developed.
5. Successful ADR professionals should consider taking on pro bono ADR matters for low-income clients who do not have the means to use the courts. ADR professionals should also continue to reach out to poorer communities about court-annexed mediation and arbitration options.

As the title of this adapted speech states, I am optimistic about ADR's future because of the hard work that has already been done nationally by ADR providers, bar associations, law schools, and law firms, as well as public entities like the New York State Unified Court System's Office of Court Administration and the judiciary, which has established a solid foundation for ADR in New York State.

Data collection—as advocated by Bill Slate—guides ADR development and will ensure the development of strong and lasting relationships. As envisioned by Jim Henry, relationships should form the future of ADR. It is in the deepening of these relationships that we can secure a platform of communication between parties grounded in facts, transparency, trust, inclusivity, and mutual respect. We need to continue the legacies of Jim Henry and Bill Slate by learning from our experiences in the past, maintaining an open dialogue with each other, and continuing to be willing to adapt to the dynamic field of dispute resolution.



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ADR Systems / Part 2 of 2

How Your Company Can Develop a Planned Early Dispute Resolution System

BY PETER W. BENNER AND JOHN LANDE

This is the second part of a two-part article summarizing the results of a study about why and how some businesses use "planned early dispute resolution" systems.

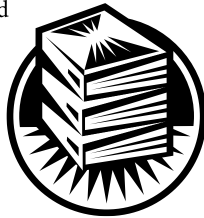
Last month's article identified elements of the "PEDR" systems and processes. See John Lande and Peter W. Benner, "How Businesses Use Planned Early Dispute Resolution," 34 *Alternatives* 49 (April 2016). This month's Part 2 offers recommendations for businesses—and especially their inside counsel—for developing robust and sustainable PEDR systems in their companies.

The study will be published in 13 *Univ. of St. Thomas Law Journal* (2017) (for more information, see http://ir.stthomas.edu/ustlj/), and is now available at bit.ly/1Qu9H0o.

In undertaking our study, we wanted to find out why some companies use PEDR systems when most companies apparently do not. This study was designed to help companies learn from this experience and develop PEDR systems tailored to their own needs.

These days, lawyers and business executives have access to a wealth of information and resources about ADR, and they frequently use mediation and arbitration. Most companies do so on a case-by-case basis, however, often at a late stage of a dispute, rather than as a systematic strategy to achieve their business objectives.

Peter W. Benner is a mediator, arbitrator, resolution adviser, and adjunct professor of dispute resolution at the Quinnipiac University School of Law in Hamden, Conn.; he was a partner for 28 years in Hartford, Conn.'s Shipman & Goodwin LLP. John Lande is Isidor Loeb Professor Emeritus and Senior Fellow of the Center for the Study of Dispute Resolution at the University of Missouri School of Law in Columbia, Mo.



Many PEDR systems feature early case assessment processes, individuals charged with overseeing the system, policies about using particular ADR processes, and training of stakeholders. As described in Part 1 last month, there can be no uniform model of PEDR systems because each company's system is a function of its line(s) of business, history of disputing, resources, business philosophy and culture, and the interests and actions of key stakeholders, among other factors.

As obvious as it may seem that PEDR systems offer great value, our study shows that developing such systems often is quite challenging. Proponents face persistent professional, organizational, and cultural barriers that impede changes.

OVERCOMING BARRIERS

We wondered why the concept of innovation seems so attractive in technology and business strategy, but not as much in conflict management.

We found that disputes usually are left to legal departments where often there are minimal incentives to change as long as the departments operate within budget, try to control outside legal costs, and avoid bad results. In that environment, innovation commonly is not rewarded and does not flourish.

Many stakeholders are comfortable with the status quo and are reluctant to change, especially if they perceive some risk to their professional standing. Top executives generally have other priorities and are reluctant to interfere with the operation of legal departments. General counsel may have little or no litigation background, may be satisfied with litigation as usual, and may not be well-versed in alternative approaches.

Litigators, both within companies and law firms, can be rooted in the status quo as the best option to protect their companies from aggressive opponents and to gain advantage for their clients. Transactional lawyers can be reluctant to negotiate tailored dispute resolution clauses because it may raise red flags for the other side about one's motives if the deal breaks down.

Even when companies develop PEDR systems, these systems may be discontinued after the departure of their initial champions.

Pursuing innovation means considering something outside of the usual paradigm. For those interviewed in our study, PEDR usually was initiated as an innovation within the legal department, followed by reaching outside of the department to build support of key stakeholders.

When the general counsel were "on board," they sought buy-in from the top executives. Those companies also gained the support of rank-and-file inside counsel, especially the litigators, and routinely insisted that outside counsel not over-litigate.

Our study suggests that for PEDR systems to take hold and endure, organizational cultures must shift from instinctive consideration of conflict as a threat, to that of a potential business opportunity. The companies that adopted PEDR systems most effectively did so by making them part of a cultural shift in the way they handle disputes.

That can be a big leap for many stakeholders, which may require incentives for business leaders to take that leap. They also must be assured that they are not subjecting their companies to risks that could have adverse personal and organizational consequences.

Such innovation is hard, requiring sig-

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ADR Systems

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nificant time and commitment. In the dispute resolution context, innovators assess problems such as inefficiency and damage to relationships. They formulate strategies to transform disputes into potential business opportunities rather than burdens to be handled, risks to be minimized, or cases to win.

Resourceful lawyers guide the legal department to function symbiotically with the business of the organization. They demonstrate to business managers that the legal department is not to be avoided for fear of essentially taking over their jobs. Rather, "legal" is a resource to collaborate with managers in their efforts to advance the companies' objectives.

Based on these findings of the study, we developed the following recommendations to overcome barriers preventing innovation in dispute management. In the words of the old Apple Computers commercial, innovation requires people to "think different." Our recommendations require lawyers and executives to think different than the traditional way of handling business disputes.

Because this can be a challenging conceptual hurdle, PEDR systems should include processes addressing the needs of the companies and their stakeholders, incentives to encourage stakeholders to take the leap, and support for change in the culture of disputing.

* * *

Develop Technical Assistance Resources: The CPR Institute, by itself or together with other ADR organizations, could establish a distinct working group to provide technical assistance for business lawyers and executives to develop PEDR systems in their companies. [The CPR Institute publishes *Alternatives* with John Wiley & Sons.]

For example, consultants could help companies adapt CPR's Early Case Assessment Toolkit (available at bit.ly/1LEv0eF) to fit their particular needs. Some retired lawyers who have worked with PEDR systems may have the time, expertise, and interest to be part of such an effort. This assistance could focus on addressing stakeholders' concerns in particular companies.

Such a group might publish guides and toolkits for designing and implementing PEDR systems. In particular, these materials should include success stories as models, as well as suggestions about developing company-specific metrics to demonstrate the benefits of a PEDR system. Development of training modules and conducting trainings would provide that necessary resource without companies having to design and conduct their own training programs.

'Think Different'

The innovation: Planned early dispute resolution.

The challenge: Change itself. What incentives do companies' departments need to address disputes earlier and more effectively?

The suggestions: Build resources, establish a clear concept, and provide leadership with program support from top management for inside development as well as for outside counsel.

Encourage Law Firms And Neutrals To Advise Clients About PEDR: A PEDR technical assistance committee could not help all the companies that might develop a PEDR system, so outside counsel and neutral dispute resolution professionals may be needed to fill the gap.

For lawyers in private firms, providing such assistance could be a great opportunity to deepen relationships with clients and encourage continuing business.

Some companies could retain neutrals to help set up a PEDR system. Many dispute resolution professionals have extensive experience designing and managing processes in particular types of cases and thus may provide substantial value in helping design PEDR systems.

Develop a Clear, Flexible Concept of PEDR: Our study suggests that PEDR experts consider several elements to be essential to successful systems, particularly use of early case assessments and training of relevant personnel.

Although there cannot be a uniform model of PEDR considering the particular circumstances of each company, experts (such as a technical assistance committee described above) could develop a set of general principles and elements of PEDR systems as "best practices" that could be adapted by individual companies based on their particular needs.

Use Methods of Dispute System Design: Development of PEDR systems fundamentally is a matter of dispute system design. "DSD" involves (1) collecting data about the company's dispute resolution experience, (2) eliciting views of stakeholders in the company about their interests, objectives, and values, (3) designing the system to satisfy stakeholders' interests, (4) developing materials and providing training for stakeholders, (5) regularly analyzing the operation of the system, and (6) proposing any refinements needed to improve the system and address any problems.

This process should be devised to facilitate achievement of business goals. Stakeholders identify what they find most troublesome about the way disputes currently are handled, and the system is designed to address those concerns.

The User Guide of the ABA's Planned Early Dispute Resolution Task Force outlines a DSD process for developing business PEDR systems. (Download available at bit.ly/1VPkc2M.)

Designate PEDR Counsel To Coordinate the Systems: Our study confirmed the importance of having an individual responsible for overseeing the planning and operation of a PEDR system, who might be called a "PEDR counsel."

> To have the greatest enduring impact, planned early dispute resolution systems should become an intrinsic part of companies' business strategy, mindset and culture, and not merely a set of procedures for handling disputes.

Typically, the PEDR counsel is an inside counsel with litigation oversight responsibility who manages the DSD process described above. In a PEDR system, this individual's responsibilities extend beyond simply managing the use of ADR. PEDR counsel also are responsible for overseeing the design and implementation of the overall system as well as integration of the system in the companies' business operations.

Create Incentives To Use PEDR: Since organizations and individuals typically respond to incentives, PEDR system designers should consider what incentives their businesses might include in the system. Incentives can operate at both the organizational and individual level.

At the organizational level, top executives could be encouraged to buy into PEDR systems that satisfy their particular interests. Virtually all companies welcome reduction of the time and cost of disputing, which can harm company performance. The companies' interests can be addressed by regular measurement of these variables to demonstrate the value of a PEDR system.

Businesses typically are concerned about their relationships with a wide range of stakeholders including customers, suppliers, competitors, regulators, and employees. Companies can adapt innovations like Monsanto Co.'s "relationship model" to handle problems at the earliest possible stage.

Business leaders may have other interests beyond cost reduction and achieving better outcomes in disputes, such as protection of privacy, protection of reputations, greater control of disputes, reduction of risk, improvement in relationships between inside litigators and business leaders in their company, and improvement in coordination between companies and their outside counsel (with companies generally now exercising increased control over the outside counsel). Monitoring these variables can reinforce the continuing use of PEDR systems by demonstrating that they contribute to achievement of key business goals.

Annual reports can discuss the PEDR efforts, as well as explain the program itself. Once quantified and publicized, positive results can help build support for the program within the company ranks by creating enthusiasm among shareholders. Details in an annual report could help enhance the company's general public perception and enhance the company's market value.

Companies can create incentives for individuals to follow the letter and spirit of PEDR policies. For example, companies can consider advancement of PEDR-related policies in performance reviews and setting compensation of inside counsel. Companies also can give awards or other recognition to inside lawyers who are particularly effective in advancing their companies' goals through the use of their PEDR systems.

Companies can create incentives for outside law firms to adhere to PEDR policies in several ways. One company requires its law firms to perform an early case assessment for a fixed fee, which is based on the amount at stake and other factors. Some companies use alternative fee arrangements designed to achieve the companies' goals with monitoring that protects against sacrificing the quality of work. Firms that regularly achieve PEDR goals can be rewarded with engagement to handle additional matters in the future. Law firms that do not follow the PEDR program may get fewer assignments.

Plan for PEDR To Survive the Departure of Initial Champions: Since PEDR systems often depend on the leadership of a particular general counsel or other champion within a company, it is vital to plan collaboratively within an evolving culture for the continuation of the program after the departure of key champions.

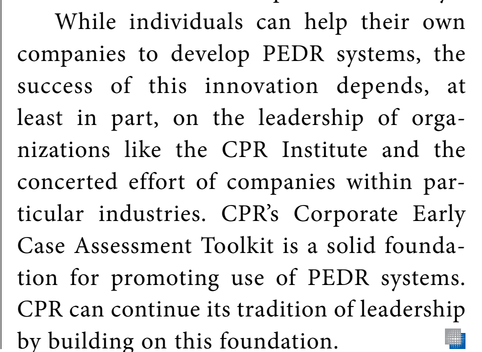
Make PEDR a Valued Part of the Business Culture: To have the greatest enduring impact, PEDR systems should become an intrinsic part of companies' business strategy, mindset and culture and not merely a set of procedures for handling disputes. When PEDR is part of companies' culture, people can deal more successfully with problems to advance their companies' interests. As one lawyer put it, his company's PEDR system simply is "a better way to do business."

Cultures within businesses affect companies' receptivity to innovation in their dispute management system. Companies that are open to innovation and whose leaders are not tied to a traditional "default to litigation" approach will be more receptive to adopting PEDR systems. Those companies are more likely to invest the time and effort needed to make the systems successful.

* * *

Our study suggests that companies can gain great benefits from adopting PEDR systems instead of a traditional zero-sum, high-cost approach to disputes and litigation.

Although this sounds simple in theory, we found that in practice, often there are significant hurdles to overcome. It is hard to "think different." Innovative lawyers and executives need to persevere in dealing with barriers inhibiting development of the best approach for their companies. Our study suggests that businesses that do so can accrue significant gains that are well worth the investment. By studying companies that have done so, we have identified strategies that make successful adoption more likely.



While individuals can help their own companies to develop PEDR systems, the success of this innovation depends, at least in part, on the leadership of organizations like the CPR Institute and the concerted effort of companies within particular industries. CPR's Corporate Early Case Assessment Toolkit is a solid foundation for promoting use of PEDR systems. CPR can continue its tradition of leadership by building on this foundation.

#CPRAM22: Corporate Counsel Roundtable–Leveraging Technology to Prevent Disputes

APRIL 7, 2022
By Janice L. Sperow

Unlike many other alternative dispute providers that focus exclusively on conflict resolution outside the courtroom, the International Institute for Conflict Prevention & Resolution (CPR) (http://www.cpradr.org) also places a high premium on dispute prevention.

That's right–curtailing an emerging issue before it becomes a full-blown legal dispute in the first place. CPR has challenged the corporate world to commit to dispute prevention by signing CPR's Dispute Prevention Pledge for Business Relationships (https://www.cpradr.org/resource-center/adr-pledges/dispute-prevention-pledge-for-business-relationships).

Business disputes impose enormous costs in loss of mission, business, focus, revenue, and relationships. Consequently, today's savvy leaders understand the need to use every tool possible to prevent them–including increasingly available, sophisticated technology.

Four corporate leaders shared how they leverage technology to prevent business disputes at this year's CPR Annual Meeting (https://www.cprmeeting.org/). Corporate counsel in-house thought-leaders joined this article's author, CPR neutral Janice Sperow (http://sperowadr.com/about-janice-sperow-arbitration/), La Mesa, Calif.'s Sperow ADR Services (http://sperowadr.com/). who moderated a March 2 #CPRAM22 discussion on the role of technology in preventing disputes.

The panel explored data transformation's accelerating role in avoiding litigation, securing compliance, and minimizing risk across a wide range of industries, sectors, and markets. From "big data," software development, and retail sales, to aerospace and defense, these experts explained how they navigate the benefits and challenges of today's technology and tomorrow's automation.

* * *

The corporate counsel panelists included leaders in their fields: Amy Yeung, General Counsel and Chief Privacy Officer for Lotame Solutions Inc., a Columbia, Md., data collection and management consulting firm; Nick Barnaby, Staff Vice President and Associate General Counsel at aerospace defense contractor General Dynamics Corp. in Reston, Va.; Chris Nelson, head of the Data & Operations Team for Microsoft Corp.'s Compliance & Ethics organization in Redmond, Wash., and Kenneth Oh, Vice President of Privacy for Bath & Body Works, headquartered in Reynoldsburg, Ohio..

Before Lotame, **Amy Yeung (https://www.lotame.com/about-lotame/team/)** started her career the conventional way, in law firm practice. She soon went in-house, joining Zenimax Media Inc., a Rockville, Md.-based global video game publisher, as Associate General Counsel. She then moved to New York-based artificial intelligence platform Dataminr. Continuing to build on her successes, she became Deputy General Counsel at Comscore Inc., in Reston, Va., where she was integral in evolving the company to compliance with new and prospective privacy regulations, in addition to launching Comscore products.

Like Amy, **Chris Nelson** is no stranger to big data. His Microsoft position has primary responsibility for workplace- and business-conduct. The Data & Operations Team (DOT), brings together data analysts, program managers, and legal professionals to design and operate solutions that increase the effectiveness of investigations, translate learnings into data-driven insights, and build predictive models and analytics that help the company mitigate emerging compliance risks. Chris is also a core member of Microsoft's Anti-Corruption Technology & Solutions program, a 10-year effort to "bend the curve" of corruption by delivering expertise and anticorruption technology to governments. Chris worked as Microsoft corporate counsel before taking over DOT.

Protecting new technology, **Kenneth Oh** is a privacy and intellectual property attorney with more than 25 years of experience. He is a former Trademark Examiner with the U.S. Patent and Trademark Office and was of counsel with Washington, D.C.'s Baker & Hostetler, where he advised clients on intellectual property issues, litigated cases, and appeared before the USPTO's Trademark Trial and Appeal Board. He served as Associate General Counsel at Bentonville, Ark.'s Walmart Inc., and Assistant

Vice President, Privacy and IP Corporate Counsel with Miami-based TracFone Wireless Inc. before becoming the Assistant Vice President, Privacy at Bath & Body Works Inc.

Handling large government and other contracts, **Nick Barnaby** is General Dynamics' Staff Vice President and Associate General Counsel, where he advises on many of the company's most significant litigation and disputes. Nick works on identifying and avoiding potential risks and disputes. Prior to joining General Dynamics, Nick was a partner at Jenner & Block, focusing on internal investigations and commercial litigation.

Moderator **Janice Sperow** is a full-time neutral, CPR arbitrator and mediator, hearing officer, special master, and Judge Pro Tem who serves on several arbitration panels, including emerging technology, complex commercial, and employment disputes. Formerly a litigator with Morrison & Foerster and then Managing Partner and Head of Litigation & ADR at Ruiz & Sperow, Janice has served as an arbitrator for more than 35 years, overseen more than 450 arbitrations as an arbitrator, and conducted more than 1,000 arbitrations as counsel. Like CPR, she also focuses on dispute prevention.

Despite their differences, the panelists shared one key innovation: they are on the cutting edge in using technology to prevent disputes and mitigate risk.

* * *

The Format: The moderator used a series of questions to launch the dialogue. Here is what the panelists shared with CPR at its annual meeting.

Question: Share with us how your company currently uses technology to prevent disputes and avoid risks.

Chris: Microsoft aggressively uses technology inside the company to fuel its compliance programs and to drive a culture of accountability and business ownership of risk. One of the critical avenues Microsoft uses focuses on increasing the use of data and data fluency on the legal compliance side so that managers and risk owners can translate historically subjective descriptions of risk into objective quantifiable indicators of why a particular risk is trending high or low as compared to the rest of the world–all in the business language they understand and work with daily. It also paints a big picture of how the risk looks over time, its scope, magnitude, and current probability.

Amy: Lotame pulls together a lot of big data sets for commercial advertising purposes, but many companies also use these same data sets to address risk. For example, insurance and financial companies use them to round out their own data for benchmarking, context, and discrimination avoidance. Prior companies, such as Dataminr, capture social media content for

immediate use on the ground, such as in the Ukraine conflict, to protect employees and personnel at risk by feeding them real-time data. Other companies use the data for anticipatory prevention such as crafting policies or developing training to address predicted risks.

Kenneth: Bath & Body Works focuses on technology use to protect privacy. In today's world, it would frankly not be possible to practice privacy law without technology, AI, and third-party vendor software that track data, systems, and populates necessary information fields. Technology reduces the risk of human error as the AI manipulates the data.

Nick: General Dynamics likes to use technology to address the root causes of disputes. Most disputes trace back to three sources or drivers: poor business partners, poor assumptions, or poor contractual terms. For example, technology-assisted due diligence of potential suppliers or partners can uncover more information quicker than a manual review. It may reveal information that can permit the parties to structure a deal which addresses that information directly before a problem arises, or even information that permits a company to choose not to partner with a particular entity.

Question: Dispute prevention looks both backward and forward. We hope to learn from past disputes and avoid repeating them. We also hope to use data to predict potential future problems and avoid them. How has your company used technology both to prevent repeat problems and to avoid future risks?

Chris: Microsoft has been on a multi-year journey to learn how to capture lessons from disputes, workplace investigations, and corruption cases to then try to hone them into a compass that can help point in the direction of likely problems in other places to ideally avoid them, since most risks are serial in nature. Microsoft then feeds those lessons back to the management teams to implement and thereby can avoid a whistleblower case, for example, before it happens. While Microsoft understands that reactive capabilities are critical and therefore it has hotlines, complaint, and ethical issue avenues for problems requiring immediate redress, its focus also includes a proactive approach, for if we do not proactively apply what we learned, then we have as a society have learned nothing. Reactive posturing is a long-term losing proposition.

Amy: Post-mortems are critical on all levels: individual, enterprise, strategic. Plus, the data sets can serve as an independent check to confirm that the company is on the right track. The data become a movable white board to hold us all accountable and to avoid repeating mistakes because we all share in the lessons learned based upon the data.

Question: What are some of the most underused technologies in the corporate world today? Technology that could really help prevent disputes and risk but that we are simply not taking full advantage of?

Nick: Data currently used for business purposes could often be leveraged to mitigate risk if seen through that lens. For example, a budding contract dispute in a long-term contract can often mask a bigger underlying issue, such as a failure to meet a contractual obligation. If we used the information we collect in the aggregate for business purposes for prevention purposes, we could often address concerns before they ripen into full-blown disputes. General Dynamics, and likely many other companies, could use the information they already capture for business uses and repurpose it for risk-management purposes and to escalate the issue more quickly to higher-level decisionmakers before it blossoms into litigation.

Ken: Technology tools work exceptionally well for version- and document control. [Version control tracks systemic changes in software engineering.] We actually have many tools right now that we do not fully understand and use to their maximum capabilities.

Chris: The type of tool most needed and underused depends on the type of risk. For example, for financial risks, data architecture and structure are key. At the executive level, if the company is deciding where to deploy personnel to manage risk, then visualization and constant monitoring are essential.

Question: Greater technology use certainly achieves greater benefits. But it also comes with its own challenges. What are some of the issues you have faced with increased reliance on technology and how have you navigated them?

Amy: The greater the footprint grows, the more resources the company needs to devote to it. For example, most companies adopted email without pre-planning or thought. Now, emails frequently represent litigation fodder. Well, many companies are not currently thinking of today's email equivalent–the data and technology we are using or adopting today and how it will be used in disputes down the road. Thus, one of the key challenges both at the enterprise and commercial level is the thoughtful planned and integrated structure for technology use at your company. Earlier architecture and ongoing monitoring of data uses can create a much more seamless integration of technology and avoid some types of risk before they occur.

Nick: General Dynamics very deeply values transparency and trust. So, one of the challenges we face in any adoption of new technology is managing the culture around its implementation, requiring us to focus on alignment and trust so employees understand the purpose, need, and benefit of the technology. General Dynamics empowers employees to use and adopt the technology themselves rather than imposing it on them.

Question: How does data ethics fit in?

Amy: Awareness and enactment of data privacy regulations has definitely increased dramatically. Consumers are also becoming more conscious of the varying uses of their data. We data professionals are really looking at the ethics involved in data use and taking responsibility. We do a gut check: Are our assumptions correct? Did we start with the right questions to begin with? Is this the right thing to do?

Question: What has really been worth it in terms of return on investment? If you had to choose one technology that has most impacted your company's bottom line in terms of dispute and risk cost savings, what would it be?

Kenneth: Privacy software. Frankly, it would subject the company to statutory liability and damages not to properly monitor the use and privacy of customer data with available technology.

Chris: Microsoft uses its own really deep stack of technological tools. In addition, Microsoft spends on securing rich, valuable data sources, especially when working with governments. We also spend on data fluency, making sure we have the personnel who can bridge the risk managers to the backend data.

Nick: Technology limiting and eliminating the environmental impact of our operations. Investing in remedial technology beyond legal requirements to reduce any lingering liability from past environmental issues that occurred before people understood the environmental impact of the chemicals and materials used.

Question: How has data automation affected your own department? Has it helped prevent disputes and minimize risk?

Ken: Access to data quickly has allowed us to prevent disputes.

Chris: Data transformed the de-escalation of the energy after an investigation or dispute. After a dispute, the stakeholders meet and determine the critical failure points. At the end of the meeting, they are energized to avoid the same problems in the future. But a manual audit approach does not have a good return on investment and tends to deenergize the good intentions and follow up. Data has transformed that phenomenon. Now, people have data and a model showing where to look next for the problem to surface and to avoid it, rather than anecdotal memories. Vertically integrating the process to avoid waiting to get answers and analytics in the middle of the process has really helped as well.

Nick: Technology has helped us diagnose legal spend and determine patterns with data analysis rather than an old-school subjective review of legal bills.

Question: Predictions–Experts predict that we will see more technological advances in the next decade than we did in the past century. Given our world's accelerated data transformation, what

area do you predict will see the greatest advancements in dispute prevention over the next five years?

Kenneth: AI.

Nick: A more-hope-than-a-prediction that conscientious folks will use technology for good purposes, such as preventing disputes, and not just to gain an advantage.

Amy: Consolidation and integration of technology uses and functions.

Chris: Natural language processing.

Moderator: Personalized and genetics-based healthcare.

* * *

Key Themes & Takeaways:

- With greater technological advancement, comes greater responsibility.
- Use technology in a language business managers understand to achieve common goals.
- Real-time data allow on-the-ground, in-the-moment decision-making to mitigate immediate risks, such as supply-chain blockage due to extreme weather or civil unrest.
- Keeping knowledgeable and current on developing technology allows companies and individuals to pivot nearly instantaneously to new business opportunities.
- Technology-assisted due diligence can more easily permit companies to partner and align themselves with others that share their goals and values.
- Capturing data over time illustrates the serial risks companies face, their pattern, and where they are likely to surface next.
- Technology allows society to turn its past lessons more easily into future remedies.
- Repurpose and leverage data already captured and monetized for business uses to prevent disputes.
- Understand and use all the features of your technology.
- The nature of the risk will often dictate the best technological tool to prevent it.
- Data ethics must be a conscious part of all technology use.
- Ultimately, technology is only as good as the uses to which we, as humans, put it.

* * *

Take the Pledge:

If you agree that dispute prevention should play a vital role in our economy and society but are not sure where to begin, start by taking the CPR Dispute Prevention Pledge for Business Relationships (https://www.cpradr.org/resource-center/adr-pledges/dispute-prevention-pledge-for-business-relationships). If

you would like to become more active in dispute prevention, join CPR's Dispute Prevention Committee (https://www.cpradr.org/programs/committees/transactional-dispute-prevention-solutions-committee), or if the intersection with technology sparks your interest, join CPR's Technology Advisory Committee (https://www.cpradr.org/programs/committees/technology-advisory-committee). Contact CPR Senior Vice-President Ellen Parker (https://www.cpradr.org/about/staff/ellen-parker) at eparker@cpradr.org (mailto:eparker@cpradr.org). For other questions or information about this article or the roundtable, contact Janice Sperow at janicesperow@sperowadr.com (mailto:janicesperow@sperowadr.com).

CPR members can access the roundtable video and other #CPRAM2022 sessions after signing in here (https://www.cpradr.org/events-classes/annual/past/2022).

* * *

Author Janice Sperow is a full-time neutral, arbitrator, mediator, dispute prevention facilitator, and Hearing Officer specializing in mass claims, healthcare, technology, employment, and all commercial matters. She works on domestic and international matters at her La Mesa, Calif., firm, Sperow ADR Services. Her previous *CPR Speaks* article was "Increased Mobile Health Triggers Increased FTC Enforcement, and Points to a Need for Dispute Prevention Efforts," CPR Speaks (Nov. 4, 2021) (available here (https://blog.cpradr.org/2021/11/04/increasing-mobile-health-triggers-increased-ftc-enforcement-and-points-to-a-need-for-dispute-prevention-efforts/)).

[END]

Committee Q&A, Committees, CPR Events

AMY YEUNG, **CHRIS NELSON**, **CPR DISPUTE PREVENTION PLEDGE**, **DISPUTE PREVENTION**, **JANICE SPEROW**, **KENNETH OH**, **NICK BARNABY**, **TECHNOLOGY**, **TECHNOLOGY ADR**

BLOG AT WORDPRESS.COM.

#CPRAM22 Highlights: Why Do I.T. Outsourcing Projects Fail? How to Keep Them Going with Dispute Resolution Boards and Standing Neutrals

MARCH 9, 2022MARCH 9, 2022
By Katerina Karamousalidou

A second-day CPR (https://www.cpradr.org/) 2022 Annual Meeting (https://www.cprmeeting.org/agenda) panel last week analyzed why information technology outsourcing projects fail, and highlighted ways to keep them going with dispute resolution boards and standing neutrals.

The panel included moderator Zachary Hill (https://www.morganlewis.com/bios/zacharyhill), a partner in Morgan Lewis's San Francisco office; Cherrie Fisher (https://www.linkedin.com/in/cherriefisher/), a civil engineer and ADR neutral and consultant in the Dallas-Fort Worth area; David Frydlinger (https://cirio.se/people/david-frydlinger), managing partner at the Stockholm, Sweden law firm of Cirio Advokatbyra AB, and Kate Vitasek (https://haslam.utk.edu/experts/kate-vitasek), an adjunct faculty member at the Halsam College of Business, University of Tennessee in Knoxville, Tenn.

After the panelists' introduction, the March 3 discussion started with addressing common IT outsourcing projects, how they sometimes fail, the consequences of such failure, and then evolving to the use of a standard neutral from an academic and practical perspective to help resolve problems.

Zachary Hill, who represents clients in the technology, energy, and pharmaceutical industries, with a focus on contract disputes involving business software, addressed the issue of IT outsourcing in the software implementation context. More specifically, he explained how even large organizations lack the necessary in-house expertise to handle that type of implementation and, therefore, hire hundreds of consultants and programmers to ensure that the software components function properly.

But given the complexity of such software, projects can often fail at multiple points. Considering the potential risks of software implementation and the failures and high litigation costs associated with such disputes, using a standing neutral is usually useful.

The standing neutral is "a trusted neutral expert selected by the parties at the beginning of their contracting relationship to be readily available throughout the life of the relationship to assist in the prompt resolution of any disputes." James P. Groton, "The Standing Neutral: A 'Real Time' Resolution Procedure that also Can Prevent Disputes," 27 *Alternatives* 177 (December 2009) (available at https://bit.ly/3hSWoy4 (https://bit.ly/3hSWoy4)). See also, Kate Vitasek, James P. Groton, and Dan Bumblausakas, "Unpacking the Standing Neutral: A Cost Effective and Common-Sense Approach for Preventing Conflict," (University of Tennessee Haslam College of Business Fall 2019) (available at https://bit.ly/3pSD1d4 (https://bit.ly/3pSD1d4)).

The standing neutral originated in construction projects.

Panelist Kate Vitasek, who works on global supply chain issues, focused on the importance of preventing conflict, rather than resolving it. For this reason, pre-selecting and appointing a standing neutral as part of the governance team, who will assist the parties in resolving misunderstandings before they escalate, communicate effectively, and engage in constructive dialogue is extremely useful.

The construction industry began to use dispute review boards to prevent conflict; adding standing neutrals can be effective in every type of industry. The parties can decide upon the expertise they need from their standing neutral–from being a lawyer, or a mediator, to being an industry expert, or an engineer.

Panelist Cherrie Fisher, who acts as a standing neutral herself, emphasized the importance of dispute avoidance from the beginning of a construction project, because most problems arise early, such as a scheduling delay, or a differing site condition.

Then, she focused on analyzing the importance of both construction partnering facilitation and dispute resolution boards working simultaneously to assist parties in dispute prevention.

Panelist David Frydlinger, an attorney focusing on complex customer and supplier contracts, explained that standing neutrals are continuously involved during the project in advising parties and providing them with their neutral perspective.

Videos from #CPRAM22 will be posted; watch www.cpradr.org (http://www.cpradr.org/) for updates.

* * *

The author, an LLM student focusing on international commercial arbitration at Pepperdine University School of Law's Straus Institute for Dispute Resolution in Malibu, Calif., is a Spring 2022 CPR Intern.

[END]

CPR Events, Practice Tips

#CPRAM22, **CHERRIE FISHER**, **DAVID FRYDLINGER**, **DISPUTE RESOLUTION BOARDS**, **INFORMATION TECHNOLOGY**, **KATE VITASEK**, **STANDING NEUTRALS**, **ZACHARY HILL**

BLOG AT WORDPRESS.COM.

Rules For Administered Dispute Prevention and Management Boards for Commercial Transactions

Effective October 2023

CPR DISPUTE RESOLUTION SERVICES LLC
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DRS.CPRADR.ORG

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INTRODUCTORY NOTE:

The International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Dispute Prevention and Management Boards for Commercial Transactions ("DP&M Board Rules") are intended for parties that desire an accelerated, streamlined early dispute avoidance and mitigation process designed to result in consensual resolution of unanticipated issues and disputes, and, if unsuccessful, then the delivery of a decision within a short, specified period during the progress of a long term commercial Endeavor.[1] These DP&M Board Rules are provided as guidance to the parties to incorporate into their commercial Endeavor Agreement ("Agreement"). They do not supersede legal norms, governmental rules and regulations, or judicial precedent. The parties to the Agreement are free to modify these DP&M Board Rules to reflect their intentions and circumstances. Parties should seek legal guidance before incorporating these DP&M Board Rules in the Agreement.

The DP&M Board Rules were designed to be suitable for Endeavors regardless of their complexity or the amount in dispute.

Guidance

Interspersed in these DP&M Board Rules, CPR has prepared non-binding Guidance that should be consulted when applying these DP&M Board Rules.

[1] As used in these DP&M Board Rules, "Endeavor" shall be understood to encompass the entire scope of the venture, enterprise, project, or transaction under the Agreement; the intent is to encompass as broadly as possible the realization of the objective of the commercial transaction or the relationship of the parties under the Agreement. See Rule 1.4 below.

CPR Rules for Administered Dispute Prevention and Management Boards (2023)

Rule 1: Scope of Application

1.1 Where the parties to a contract have provided for a board under CPR's DP&M Board Rules (the "Board"), they shall be deemed to have made these DP&M Board Rules a part of their agreement, except to the extent they have agreed in writing to modify these DP&M Board Rules.

1.2 The parties shall be presumed to have agreed to the version of these DP&M Board Rules in effect at the time of the commencement of the Agreement.

1.3 By agreeing to these DP&M Board Rules, a party commits to cooperate with the Board and the other party to conduct the Board proceedings in an efficient manner. The parties agree that the Board shall take the parties' compliance with this obligation into account when apportioning costs under these DP&M Board Rules.

1.4 As used in these DP&M Board Rules, "Endeavor" shall be understood to encompass the entire scope of the venture, enterprise, project, or transaction under the Agreement; the intent is to encompass as broadly as possible the realization of the objective of the commercial transaction or the relationship of the parties under the Agreement.

1.5 The Board shall interpret and apply the DP&M Board Rules insofar as they relate to the Board's powers and duties. When there is more than one member on the Board and a difference arises among them concerning the meaning or application of the DP&M Board Rules, that difference shall be decided by a majority vote. All other DP&M Board Rules shall be interpreted by CPR Dispute Resolution Services LLC.

Rule 2: Purpose and Operations of Board - Dispute Avoidance

2.1 The purpose of this dispute management process is primarily to assist in the prevention and mitigation of disruptions to the Endeavor as a result of disputes (i) arising between the parties to the Agreement, or (ii) stemming from external events that affect the relationship between the parties, or that affect the timely completion of the Endeavor, and secondarily to assist in the expeditious resolution of disputes and claims between the parties arising out of the Agreement. As used in this Section, the term "Agreement" is understood to mean the agreement between the parties establishing the rights and responsibilities of each party to jointly participate in a commercial transaction which commits the parties to participate in an Endeavor. The intent of the establishment of the Board is to facilitate contemporaneous agreement as to the responses and responsibilities of the parties regarding issues arising during the progress of the work on the Endeavor by providing recommendations (see Rule 5.1) to the parties, and if agreement cannot be quickly reached upon such recommendations, then to fairly and impartially consider disputes placed before it and to provide binding written recommendations (see Rule 5.2) for resolution of these disputes to disputing parties.

Unless the parties agree otherwise in writing, all recommendations of the Board with respect to disputes before them are provisionally binding on the parties during the term of the Agreement; provided, however, that if one party gives timely written notice of its objection as provided in Rule 5, the written recommendation shall become non-binding on the parties at the termination of the Agreement and shall be subject to binding arbitration under the appropriate CPR Administered Arbitration Rules then in effect ("the CPR Arbitration Rules"). To the extent no timely written notice of objection is made to the written recommendations of the Board, such recommendation shall be final and binding only during the term of the Endeavor, and cannot be challenged in arbitration after the proceeding. Any issue of noncompliance with a recommendation may be referred to arbitration as provided below. If the parties so desire, a written recommendation may be embodied in a Consent Award through the Arbitration process, provided that a sole arbitrator will be selected. For the avoidance of doubt, submission of a disputed matter to the Board by a party for discussion at a regular meeting of the Board over the course of the Agreement is a condition precedent to that party filing suit or to filing a demand for arbitration with regard to that specific disputed matter. Should a party wish to seek a binding determination by arbitration, they can initiate an arbitral proceeding by consulting the CPR Arbitration Rules.

__Guidance:__ The parties may instead agree that the recommendations of the Board will be binding. Alternatively, the parties may agree that recommendations of the Board involving disputes that have a value less than a specified threshold amount will be binding and may be embodied in a Consent Award pursuant to the arbitral process herein, provided that a sole arbitrator shall be selected.

__Guidance:__ If the parties are wary of the impact a binding recommendation may entail to the Agreement, they may opt for non-binding recommendations only, understanding that such recommendations do not have contractual binding effect on the parties.

2.2 After appointment of the Board members, the Board and the parties will formulate applicable procedures for operation consistent with these DP&M Board Rules, which will be kept flexible to adapt to changing situations. At a minimum, the procedures will encourage a) the parties to keep the Board informed of ongoing activities and progress under this Agreement by submitting to the Board relevant or requested data; and b) the Board to convene in person or virtually at regular intervals with representatives of the parties, and at times of critical events. The meetings of the Board will be deemed to be confidential settlement negotiations without prejudice to the parties' positions. From time to time, a party may invite a third-party to attend these meetings; absent objection by a party, the third party may attend subject to executing an appropriate confidentiality agreement.

__Guidance:__ In some instances the parties may find that it is helpful to invite a non-party to the Board meetings, subject to their confirmation of the confidentiality requirements of the proceeding and the consent of all parties. By way of example, the non-party invitee could be a lender, a tenant, a significant customer, an indemnitor, or a stakeholder in the Endeavor who will be impacted by the matters to be discussed in the Board meeting, but who is not a direct party to the Agreement.

2.3 Coordination and Logistics; Board Expenses

The parties will coordinate the operations of the Board. The parties will determine their respective responsibility for the logistics and expenses of Board operations, including the fees and expenses of the Board members and other expenses of the Board. In the absence of any agreement otherwise, the parties will share the fees and expenses of Board operations equally, and if a party fails to pay its share of the Board expenses, the other party or parties may advance the expenses of the Board, request that CPR appoint an arbitrator to allocate costs by way of an arbitral award or disband the Board. Absent full payment of the Board expenses, the Board may terminate its operations.

2.4 Time for Beginning and Completion

Subject to timely payment of its expenses, the Board is to be in operation from the commencement of work on the Endeavor under the Agreement by any party ("Commencement Date") until all Requests for Review submitted prior to the termination or expiration of the Agreement are determined by the Board.

__Guidance:__ The Agreement may provide that the Board is to be in operation upon the selection of fewer than all Board members.

Rule 3: Number and Selection of Board Members

3.1 As soon as practicable after being contacted by a party, CPR shall jointly convene the parties by video conference, telephone, or other means of communication for a pre-selection conference to discuss the selection of the Board member(s) and other administrative matters.

3.2 The number of Board members shall be in accordance with the agreement of the parties. Absent the parties' agreement on the number of Board members, the Board shall consist of three members, unless otherwise determined by CPR. The factors that may be taken into consideration by CPR include (i) the legal or factual complexity of the transaction; (ii) the total amount at issue in the Agreement; and (iii) differences in nationalities of the parties.

3.3 **Procedures for the Selection of a Sole Board Member.** Where the Board is to consist of a sole member, also known as the Dispute Management Advisor, the parties shall attempt jointly to agree on and designate the member within 15 days of the Commencement Date of the Board/Endeavor.

3.4 If the parties have not jointly designated a Board member within 15 days of the Commencement Date, CPR shall appoint a Board member in accordance with the List Selection Procedure provided in the CPR Arbitration Rules (Selection Through CPR List Procedure).

3.5 **Procedures for Selection of a Three-Member Board.** Where a Board is to consist of three members, CPR shall appoint the members in accordance with the Screened Selection Procedure provided in the CPR Arbitration Rules (Screened Selection By the Parties). All Board members will be independent, impartial, and neutral in all Board matters. Unless the parties agree otherwise, each member shall have significant experience in the subject matter of the Agreement. Training and experience in mediation, arbitration, dispute board procedures and other dispute resolution and dispute prevention methods are also preferred qualifications for prospective Board members. The members of the Board shall be selected no later than 30 days after the parties have held a conference call with CPR for the selection of the Board members.

> ***Guidance:***
> *1. The rules provide for a board consisting of one or three members. The parties may agree that the Board comprise a different number of members, provided that they agree on a selection method or that the members are jointly selected. Differing experience among the Board members may help expedite discussions of various Endeavor issues that are anticipated to arise and may bring value to the Board process.*
>
> *2. The parties may agree that they prefer an attorney with expertise in dispute management or adjudication to serve as the Chair.*
>
> *3. The parties may agree to jointly select all members of the Board.*

3.6 **Availability.** The Board member(s) designated by the parties or appointed by CPR shall affirm in writing their availability and their willingness and ability to manage the proceedings efficiently.

3.7 **Independence and Disclosure of Relationships.** The Board members designated by the parties or appointed by CPR shall affirm in writing their independence, impartiality and neutrality and shall disclose all professional relationships with the parties that exist at the time of their appointment, existed in the past 5 years, or that arise during the time of their appointment to the Board. Within 10 days of the filing of a disclosure, a party may file an objection to the appointment of a Board member with CPR on the basis of the Board member's lack of independence, impartiality or neutrality. CPR shall determine the objection in accordance with the CPR Challenge Protocol.

Rule 4: Meetings

4.1 Initial and Subsequent Meetings. Within 5 days of its constitution or as soon thereafter as practicable, the Board shall schedule an initial meeting. Subsequent meetings will be regularly held virtually or in-person as set forth below. Each meeting will consist of an informal round table discussion and, if useful, an inspection of the work where applicable. The goal of the roundtable discussion is to identify matters early that might become issues or disputes and find cooperative ways to eliminate or mitigate them. The round table discussion will be attended by party designated representatives and is intended to provide a forum for the parties to resolve current or anticipated issues with the assistance of the Board. If the parties agree, other participants or stakeholders in the Endeavor who are not direct parties to the Agreement may be invited to attend Board meetings; in such instances, the invited participants will be held to the same confidentiality requirements as the parties (including but not limited to those set forth in Rule 2.2) and will be required to comply with the protocols and procedures of the Board.

> ***Guidance: Site Visits:*** *If a site of the work that is the subject of the Agreement exists, the Board members may find it helpful to visit the site of the work that is the subject of the Agreement on a regular basis to keep abreast of ongoing activities and to develop a familiarity of the work in progress. The frequency, exact time, and duration of these visits shall be as mutually agreed between the parties and the Board. Regarding matters before the Board, it may be advantageous but not necessary for the Board to personally view the site and any relevant conditions. If viewing by the Board would cause delay to the ongoing work of the Agreement, video, photographs, and descriptions of these conditions collected by either or both parties could suffice.*

4.2 Frequency of Meetings: Subject to agreement otherwise by the parties in the Agreement, in order for the Board to become familiar with the Endeavor circumstances, it will meet at least once per month. If conditions warrant, the Chair, in consultation with other Board members and the parties, may vary the time between meetings to better serve the parties. The parties may invite the Board to attend regular business meetings attended by executives or managers.

> ***Guidance:*** *Factors to be considered when setting the time between meetings include work progress, occurrence of unusual events and the number and complexity of ongoing or potential issues.*

4.3 Record of Meetings. While the Board may take notes or keep other records during the consideration of a Notice of Disagreement (see Rule 5.1), it is not necessary for the Board to keep a formal record. If possible, it is desirable to keep the meetings and hearings completely informal. The proceedings of the Board shall be considered confidential settlement communications.

> ***Guidance:*** *However, formal records of the Hearings with respect to Notices of Disagreements may be transcribed by a court reporter if requested by one party. The party requesting the court reporter shall be responsible for any costs. Audio and/or video recording of the meeting should be prohibited without prior written agreement by the Board and the parties.*

4.4 Ex parte Communications are Prohibited. Board members shall not discuss or communicate with any party without the other party being present or copied on the communication. Each party is expressly prohibited from seeking any Board member's advice or consultation, unless done in the open at a Board meeting and in the presence of all parties.

Rule 5: Disputed Matters

5.1 Procedure for Scheduling Review of Matters Before the Board: Any party can request the Board to issue a written recommendation concerning a disputed matter, by submitting to the Board a Notice of Disagreement for Recommendation. In response to a party request, the Board may consider and make non-written and written recommendations concerning any matter or circumstance that may affect or impact the objective of the commercial transaction that is the purpose of the Agreement. The parties should attempt to resolve potential disputes without resorting to use of the Board, and, except in urgent circumstances, the disputed matter should be discussed informally at a regular meeting before a party requests that the Board provide a written recommendation regarding the dispute. Written Recommendations of the Board will be binding to the extent provided in the Agreement, as agreed in writing by the parties, or as provided in these Board Rules.

5.2 Request for Hearing. Upon receipt of a Notice of Disagreement for Recommendation, the Chair will schedule the matter for a hearing by the Board for a written recommendation, in person or virtually, within 30 days unless the parties agree on a different schedule.

> ***Guidance:*** *The parties in the Agreement, or the Board at the outset should have agreed upon the Board's authorities and power, notice, supporting submissions, and other procedures for organization and conduct of the Hearing for Recommendation.*

5.3 All material furnished to the Board members shall also be furnished to the other party [parties] concurrently.

5.4 Disputing parties may offer information relating to the dispute to the Board. The Board members may ask questions, request clarification, or request for additional information. It is not contemplated that an individual presenting information be required to be sworn, or that they be subject to direct questions from the opposing party.

5.5 Attorneys are generally discouraged from attending the Board meetings but are allowed to participate in the hearings on the following limited basis: Any participation in a hearing by legal counsel or technical experts will be for the sole purpose of facilitating a party's presentation. Legal counsel may not examine directly or by cross-examination any presenter, may not object to questions asked or factual statements made during the presentations, nor may it make or argue legal motions.

5.6 Time for Written Recommendation. All of the Board's written recommendations for resolution of disputes will be given to both parties, within 15 days of receiving all offered information, subject to additional time agreed upon by all parties for the Board to formulate its recommendations. The Board may elect to address contractual entitlement in an initial, written recommendation to allow the parties an opportunity to resolve issues of monetary damages.

> ***Guidance:*** *The parties in the Agreement, or the Board at the outset should have agreed upon the Board's authorities, power and procedures regarding correction and interpretation of a Recommendation.*

5.7 No provisions associated with the Board or these DP&M Board Rules shall in any way abrogate a party's responsibility for preserving a claim under the parties' agreement or applicable law.

5.8 Unless the Agreement stipulates otherwise, the parties are obligated to comply with the Board's written recommendations until the expiration of the Agreement. **Failure to comply with a written recommendation of the Board during the term of the Endeavor is a breach of contract.**

5.9 Objection to Recommendation. In the event that a party is not in agreement with a written recommendation of the Board, the party may file its written objection with the Board within 15 days of receipt of the written recommendation to preserve its rights to challenge the written recommendation after the termination of the Agreement, and shall nonetheless comply with the recommendations of the Board during the duration of the Agreement, with appropriate reservations of rights to pursue its claim, if properly preserved, at the termination or expiration of the Agreement. Absent a timely objection, the binding recommendation of the Board will become final as between the parties.

5.10 By agreement of the parties and the Board, the steps listed under this section may be modified in order to expedite resolution.

5.11 Recommendations of the Board. All written recommendations of the Board shall be signed by all Board members and supported by at least a majority of the Board members. Written recommendations of the Board will be admissible in any subsequent arbitration or litigation proceedings as provided in the Agreement or as subsequently agreed by the parties in writing.

> ***Guidance:*** *Written recommendations will be based on the pertinent provisions of the Agreement and the facts and circumstances involved in the dispute.*

5.12 Limitation on Scope of Authority of the Board. The Board shall not have the power to compel any party to comply with its recommendations or to remedy a breach of contract.

5.13 Condition Precedent. Submission of a disputed matter to the Board for a written recommendation as to resolution, and timely filing of an objection to a recommendation, shall be conditions precedent to pursuit of any claim in arbitration or litigation under the Agreement.

Rule 6: Termination and Substitution

6.1 Termination of Board. Upon mutual written agreement of all parties, this dispute management process may be terminated. The Board may also be terminated pursuant to Rule 2.3.

6.2 Replacement of a Board Member. Board members may withdraw from the Board by providing 30 days (or a longer notice period set forth in the Agreement or otherwise agreed upon by all parties and the Board) written notice to all other parties. Should the need arise to appoint a replacement Board member, the replacement Board member shall be selected in the same fashion as was the departing Board member. The selection of a replacement Board member shall begin promptly upon notification of the necessity for a replacement.

6.3 Termination of a Board Member. A party desiring to terminate a Board member for cause will notify the other party and CPR and shall provide an explanation for the requested termination. If the other party does not agree that cause exists, CPR shall decide whether cause exists, and such decision shall be effectuated. CPR may refer the matter to a CPR Challenge Review Committee.

6.4 Immunity of Board Members. Each Board member, in the performance of his or her duties on the Board shall act in the capacity of an independent contractor and not as an employee of any party or CPR. CPR and each Board member shall have the same immunity to the fullest extent provided by applicable law for mediators, arbitrators, adjudicators, or other dispute resolution professionals.

Model Clauses for CPR Rules for Administered Dispute Prevention and Management Boards for Commercial Transactions.

CPR's Rules for Administered Dispute Prevention and Management Boards for Commercial Transactions may be adopted by the parties by using the following provisions:

A: Pre-Dispute Clause for Administered Dispute Prevention and Management Boards for Commercial Transactions

CPR Rules for Administered Dispute Prevention and Management Boards for Commercial Transactions Adopted. The parties hereby adopt the CPR Rules for Administered Dispute Prevention and Management Boards ("DP&M Board Rules"). The purpose of this Dispute Prevention and Management Board for Commercial Transactions ("Board") process is primarily to assist in the prevention and mitigation of disruption as a result of events arising between the parties to this Agreement or stemming from external events that affect the relationship between the parties or that affect the timely completion of the Endeavor. Endeavor shall be understood to encompass the entire scope of the venture, enterprise, project, or transaction under the Agreement; the intent is to encompass as broadly as possible the realization of the objective of the commercial transaction or the relationship of the parties under the Agreement. As used in this Section, the term "Agreement" is understood to mean the agreement between the parties establishing the rights and responsibilities of each party to jointly participate in this commercial Endeavor. The intent of the establishment of the Board is to facilitate contemporaneous agreement as to the resolution of unanticipated issues occurring during the progress of the work over the course of this Agreement by providing recommendations to the parties, and if resolution cannot be quickly reached, then to fairly and impartially consider disputes placed before it and to provide written recommendations for resolution of these disputes to both parties.

Unless the parties agree otherwise in writing, all written recommendations of the Board are provisionally binding on the parties during the term of the Agreement; provided, however, that if one party gives timely (within 21 days of receiving the written recommendation) written notice of its objection to the recommendation it shall become non-binding on the parties at the termination of the Agreement, and shall be subject to binding arbitration at the termination of the Agreement under the appropriate CPR Administered Arbitration Rules then in effect. To the extent no timely written notice of objection is made to the recommendations of the Board, the recommendation shall be deemed mutually accepted by the parties and become final and binding during the term of the Endeavor and may not be challenged in arbitration thereafter. Any issue of noncompliance with mutually accepted written recommendations by the parties may be referred to arbitration as provided below. If the parties so desire, a recommendation may be embodied in a Consent Award through the Arbitration process, provided that a sole arbitrator will be selected. Submission of a disputed matter to the Board by a party for discussion at a regular meeting of the Board over the course of the Agreement, is a condition precedent to that party filing suit or to filing a demand for arbitration at any point in time with regard to that specific disputed matter.

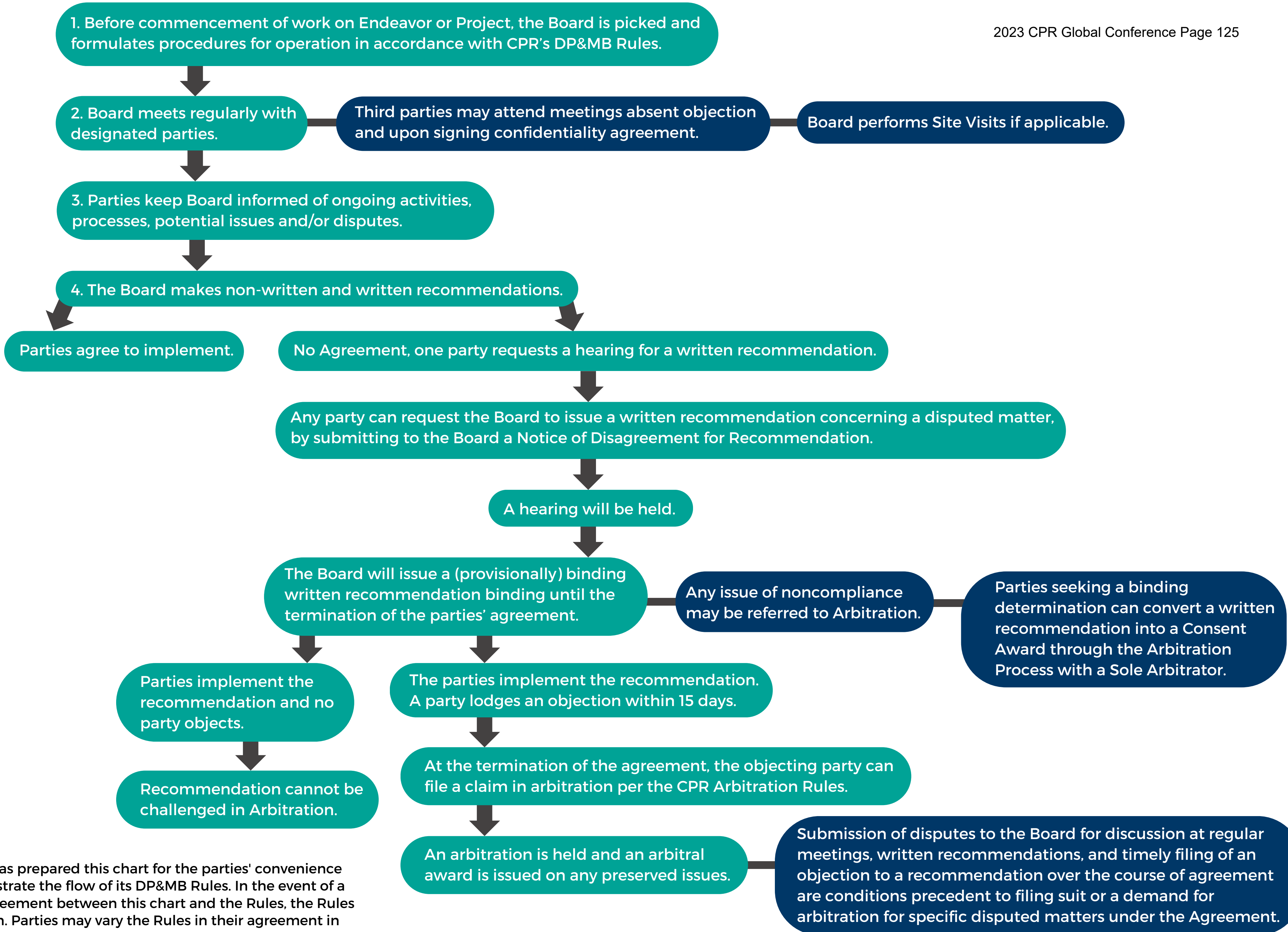
CPR Arbitration Rules Adopted. The CPR Rules for [Administered Arbitration][Administered Arbitration of International Disputes], are hereby adopted and incorporated by reference into the Agreement.

Any dispute arising out of or relating to the Agreement, including the breach, termination or validity thereof, not finally resolved by the DP&M Board Rules, shall be finally resolved by arbitration in accordance with the [CPR Rules for Administered Arbitration][as supplemented and modified by the CPR Fast Track Rules for Administered Arbitration] [CPR Rules for Administered Arbitration of International Disputes] [as supplemented and modified by the CPR Fast Track Rules for Administered Arbitration of International Disputes] (the "Arbitration Rules") by [a sole arbitrator] [three arbitrators] ("Tribunal"). The arbitral Tribunal, and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitral Tribunal. [Subject to any extension granted under the Fast Track Rules, the arbitration shall be conducted in accordance with a procedural timetable providing for the delivery of an award [within _____ days after the constitution of the Tribunal] [as provided in the Arbitration Rules]]. Judgment upon the award rendered by the Tribunal may be entered by any court having jurisdiction thereof. The seat of the arbitration shall be (city, country)."

B. Optional Clause (to be used with above clause) Limiting Application of Fast Track Arbitration Rules To Claims Below a Financial Threshold

"Provided, however, that where the stated amount of the claim or counterclaim does not exceed [specify amount] exclusive of interest or costs under Rule 19 of the Administered Rules, the [CPR Fast Track Rules][CPR Fast Track Rules for Administered Arbitration of International Disputes] shall apply to supplement and modify the CPR Arbitration Rules. Furthermore, subject to any extension granted under Rule 4.5 of the Fast Track Rules, the arbitration shall be conducted in accordance with a procedural timetable providing for the delivery of an award [within ___ days after the constitution of the Tribunal] [as provided in the Fast Track Rules]."

DISPUTE PREVENTION AND MANAGEMENT BOARD OVERVIEW



CPR has prepared this chart for the parties' convenience to illustrate the flow of its DP&MB Rules. In the event of a disagreement between this chart and the Rules, the Rules govern. Parties may vary the Rules in their agreement in which case the parties' agreement will control.