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ABSTRACT

Strong interorganizational relationships play an essential role in business relationships. Soft skills associated with negotiation and communication are key to dealing with disagreements in these relationships. However, many companies do not invest in these aspects of their business relationships until conflicts arise. Dispute resolution provides helpful processes for managing these disputes, but companies can avoid conflict before it arises by investing in dispute prevention.

Dispute prevention represents a change in the existing paradigm, yet it poses numerous benefits. By implementing a dispute prevention mechanism, such as a Standing Neutral, companies can invest in strong interorganizational relationships and improve their ability to flexibly respond to changing circumstances, allowing them to save time and money while maintaining focus on their business purpose.

AUTHOR'S NOTE

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Professor Johnsen is on numerous dispute resolution panels including the arbitration and mediation panels of the American Arbitration Association, the International Center for Conflict Prevention and Resolution, and the Financial Industry Regulatory Authority. Professor Johnsen is a Fellow of the Chartered Institute of Arbitrators, is certified by the International Mediation Institute, and is accredited by the Centre for Effective Dispute Resolution. She is a past Chair of the ABA Section of Dispute Resolution, a member of the CPR Council, Executive Vice Chair of the International Bar Association Mediation Committee, and an academic board member of the Miami International Arbitration Society.

Professor Johnsen also is a leader in the emerging area of Dispute Prevention and is the 2023 recipient of the James P. Groton Award Outstanding Leadership in Dispute Prevention by the Conflict Prevention and Resolution Institute, which recognizes a person or organization who has contributed significantly to the development and/or practice of dispute prevention. She sends her sincere thanks to her research assistant Sela Dougherty and her colleague Christine Klein.

INTRODUCTION

Imagine that two bio pharma companies, Firm A and Firm B, have entered into a joint venture to share their R&D and develop a new vaccine on an expedited basis in order to address an immediate health crisis. This venture is time sensitive, and the research is highly confidential. The competition within bio pharma to be the first to market is fierce.

Imagine also that Firm A's CEO was surprised with a call from a reporter working on a story about the crisis. The CEO, during her conversation with this reporter, informally provided some background on the record about the joint venture and the exciting progress on addressing this pressing health crisis. The CEO views the resulting article as very favorable, benefitting both companies with positive goodwill and valuable free marketing.

Firm B's CEO has a different perspective. When Firm B's CEO learned of the article, he was furious. Firm B's CEO regards Firm A's failure to preclear this interview or even disclose it after the fact as a clear violation of the joint venturers' implicit understanding that all marketing—specifically including timing and content—would be handled jointly. Firm B's CEO also sincerely fears that information shared in the article provides competitors with valuable, otherwise unavailable, proprietary information. Firm B's CEO worries that this serious betrayal of confidentiality and trust suggests that Firm A is an untrustworthy partner. This has implications for this partnership going forward and their ability to openly share sensitive R&D and trade secrets. Firm A's CEO dismisses Firm B's position as yet another ridiculous, out of proportion overreaction.

Given the parties' shared interest in the ongoing relationship as a means of achieving this critically important and mutually beneficial objective, this disagreement may not torpedo the joint venture or rise to the level of litigation – at this point. This likely will, however, do some serious damage to the relationship and the trust between the two firms. For example, Firm B's scientists may be encouraged to be more guarded and more selective in sharing proprietary information. This may appear to Firm A's scientists as a lack of transparency and lead Firm A to question Firm B's motives and commitment to the joint venture. Diminished mutual trust could also make it more difficult for the two companies to navigate future conflicts. Going forward, each company may be quicker to impute bad intentions on the part of the other company. At some point, especially in an environment of mistrust, the

accumulation of friction and annoyance may ignite a full-blown conflagration or dispute. At that point, litigation may be inevitable.

As illustrated in this hypothetical, the mistrust developing between the two companies is the result of the mistrust between the individuals—here, the CEOs and the scientists. It would be easy to substitute general counsels, managers, or other agents. The ruptured individual relationships will likely damage the institutional relationships.[1]

In all cases, companies implement their actions and policies through individuals. And at all levels, companies ultimately rely on the skill of their delegees to manage the most critical relationships with customers, venders, joint venturers, and competitors.[2] In turn, customers, venders, joint venturers, and competitors make assumptions about the trustworthiness of organizations based on their perceptions of the individuals with whom they directly interact.

Many people intuitively recognize that interpersonal and emotional intelligence skills are key to managing our personal relationships. But not all companies appreciate the value of these relationship-oriented skills to their corporate relationships. As a result, many fail to invest appropriately in this "soft" aspect of their various inter-organizational relationships ("IORs").[3] Rather, companies rely to a large extent on systems and legal constructs to manage their IORs.[4] They draft contracts with rights and responsibilities and set in place formal grievance procedures.[5] While valuable, these systems are necessarily inflexible and may encourage rather than discourage personal recriminations.[6]

Soft skills associated with negotiation and communication are key to dealing with grievances and managing IORs. Companies should invest in equipping their personnel with these skills to understand and navigate personal interactions effectively. This paper posits that companies should also consider the value added by a third-party neutral

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[1] *See generally* Carolyn M. Wiethoff & Roy J. Lewicki, *Trust and Distrust in Work Relationships: A Grounded Approach* (Working Paper, June 5, 2005), https://ssrn.com/abstract=736273 [https://perma.cc/9FAT-QC72].

[2] Peter Smith Ring & Andrew H. van de Ven, *Developmental Processes of Cooperative Interorganizational Relationships*, 19 ACAD. OF MGMT. REV. 90, 95–96 (1994).

[3] *Id.* at 90.

[4] *Id.* at 108–11.

[5] *Id*.

[6] *Id*.

relationship facilitator, also called a Standing Neutral. It begins by highlighting how dispute resolution processes like mediation are a great fit for resolving disputes but not for preventing disputes by improving the quality of business relationships. Instead, dispute prevention techniques provide an important complement to dispute resolution processes. It details how Standing Neutrals manage delicate and all-important relationships using dispute prevention skills in order to maintain healthy corporate relationships and prevent expensive, disruptive lawsuits. It offers suggestions and techniques for strengthening the relationships of corporate entities through the interpersonal relationships of the individuals charged with maintaining them. Finally, it highlights successful examples of the dispute prevention model and the promise presented by adopting a dispute prevention model.

I. DISPUTE RESOLUTION SHIFTS FOCUS FROM BUSINESS PURPOSE.

In the hypothetical above, assume that the parties continued with their joint venture and moved on from the dust-up with the newspaper article. If the parties never resolved or even addressed the relationship issues described above, specifically the diminishment of mutual trust and poor communication, they would likely struggle to address future inevitable conflicts or changes in circumstances.[7] Assume the joint venture fails to achieve an important milestone. In response, each side likely would assign blame to the other. As the perceived slights and mistrust build over time, the relationship would deteriorate. As each smaller conflict grows and trust erodes over time, it becomes more likely that some small friction could result in the termination of the joint venture at best and litigation at worst.

There is generally a consensus within the business community that companies are not in the business of litigation. Litigation is a source of uncertainty and risk, is expensive and disruptive, and distracts time and resources from business purpose.[8] For decades, corporations have

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[7] Wiethoff & Lewicki, *supra* note 1, at 5 ("trust functions much like the child's game 'Chutes and Ladders'[;] trust building is like ladder-climbing, slow and systematic; trust violations which produce distrust can be sudden, precipitous and resistant to efforts at trust rebuilding or repair.").

[8] *See generally* John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 CARDOZO L. REV. 187 (2018).

sought alternatives to litigation for resolving disputes.[9] Once the parties are disputing, whether they are engaging in litigation or are pre-filing, they are likely to resort to dispute resolution mechanisms or other formal systems for addressing disputes. To save time, money, and control over their dispute, the parties may engage a mediator.

Corporations have increasingly embraced mediation as a preferred method for resolving commercial disputes since mediation's "big bang" moment almost fifty years ago.[10] At the 1976 Pound Conference, formally titled the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," Chief Justice Burger convened lawyers, judges, and academics during the ABA National Conference in Minnesota to address increasing docket backloads and general frustration with the existing legal system.[11]

At this meeting, Harvard Professor Frank E.A. Sander proposed alternatives to the singular court system in his seminal address on "Varieties of Dispute Processing."[12] He envisioned a multi-door courthouse where only one of the options available to litigants was litigation before a judge and jury.[13] Professor Sander proposed a different sort of courthouse where disputants, with assistance from a screening clerk, could select among multiple options, including mediation or arbitration.[14] Among the criteria meriting consideration were the amount in dispute, the nature of the dispute, and whether the parties were in a long-term relationship.[15] He observed that, especially when preservation of a relationship was important, parties would benefit

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[9] *See generally* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133 (1998).

[10] Michael L. Moffit, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOTIATION J. 437, 437 (2006) ("Frank Sander's 1976 speech at the Pound Conference … is widely seen, particularly within the legal academy, as the 'big bang' moment in the history of alternative dispute resolution.").

[11] Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. OF CONFLICT RESOL. 677, 683–85 (2017).

[12] Frank E. A. Sander, Address at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *reprinted in* Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 120 (1976).

[13] Sander, *supra* note 12, at 131; Traum & Farkas, *supra* note 11, at 685-86.

[14] Sander, *supra* note 12, at 131.

[15] *Id*. Professor Sander described this process of selecting an appropriate process for resolving a dispute based on the particular needs of the case as "fitting the forum to the fuss." *See generally* Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 49 (1994).

from working out their differences in a facilitated process rather than adjudicating them.[16]

This represented a seismic shift in the litigation paradigm. As parties recognized the value of mediation over the intervening decades, its importance has grown significantly. Statistics demonstrate the extent to which mediation has transformed how disputes are resolved.[17] Mediation has been embraced by state and federal courts, administrative agencies, lawyers, and parties, including corporate ones.[18] In many states[19] and federal agencies,[20] mediation is a required step on the way to the courthouse, but mediation has moved beyond a court-ordered process. Today, corporate parties routinely include step or escalation clauses in their commercial contracts to mandate mediation before litigation even when the courts or arbitrators cannot.[21] Available statistics show the drastic decline in the number of cases that complete

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[16] Sander, *supra* note 12.

[17] *See generally* David B. Lipsky & Ronald L. Seeber, *The Use of ADR in U.S. Corporations: Executive Summary*, FOUND. FOR THE PREVENTION AND EARLY RESOL. OF CONFLICT (1997) (Joint Initiative of Cornell University and Price Waterhouse LLP) https://www.courts.state.md.us/sites/default/files/import/macro/pdfs/reports/cornellstudy1997execsummary.pdf [https://perma.cc/FU2F-GH2Y] (detailing the increased use of ADR in corporate America and its foreseeable growth in the future).

[18] *See generally* Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225 (2009).

[19] Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 373–77 (2001); *see, e.g.*, FLA. STAT. § 44.102 (2012) (requiring a court to refer any filed civil action for monetary damages to mediation upon request of one party); *and see generally* TEX. CIV. PRAC. & REM. CODE ANN. § 154 (West 2021) (outlining alternative dispute resolution procedures).

[20] Memorandum on Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking, 34 WKLY. COMP. PRES. DOC. 749, 749-750 (May 1, 1998), https://www.govinfo.gov/content/pkg/WCPD-1998-05-04/pdf/WCPD-1998-05-04-Pg749.pdf [https://perma.cc/XJJ8-DJS9] (presidential memorandum encouraging the use of ADR in federal agencies); 29 C.F.R. 1614.102 (2022) (requiring agencies to establish an ADR program "to promote equal opportunity and to identify and eliminate discriminatory practices and policies").

[21] Katie Shonk, *Mandated Mediation: What to Expect*, PROGRAM ON NEGOTIATION HARVARD LAW SCHOOL (July 8, 2019), https://www.pon.harvard.edu/daily/mediation/mandated-mediation-what-to-expect/ [https://perma.cc/8VN6-XKDQ]; GEN. MOTORS LLC., DISPUTE RESOLUTION PROCESS (2015) https://www.mwi.org/wp-content/uploads/2019/07/gm-process-2015.pdf [https://perma.cc/7W27-57JM].

the path through the entire trial process to verdict.[22] Today, a significant percentage of these non-judicial resolutions are attributable to settlements arrived at through mediation.[23]

Most mediators will assist these parties in reaching a resolution that is more favorable than their litigation alternative by focusing both sides on what would happen were the dispute to be litigated. They will seek a resolution to the dispute that is preferable to their "best alternative to a negotiated agreement" or "BATNA."[24] When the alternative to reaching an agreement is litigation, the approach is said to be bargaining "*in the shadow of the law*."[25] A mediator helps parties resolve disputes by listening to the concerns and needs of both sides. The mediator brings an objective perspective to the dispute and can educate the parties as to their conduct. The mediator coaches the parties in their negotiation, helping them fashion an agreement that will resolve their dispute short of litigation.

While an effective technique for reaching resolution of a ripe dispute, this approach has its limitations for maintaining a relationship or a joint venture. First, disputing parties engaged in mediation rarely are willing to rely on one another's representations. Common sense and experience show that parties in litigation tend not to operate in an atmosphere of trust. Therefore, parties will still engage in discovery to support their theories of liability and damages. Invasive and often contentious discovery, however limited, further damages the weakened relationship and contributes to mistrust and imputed bad motives.

Second, by focusing the parties on their claims and defenses in the dispute, mediation focuses the parties on the dispute itself. Although mediators may try to steer parties away from assigning blame, focusing instead on litigation risk, mediators also must allow parties an opportunity to vent over perceived wrongs and resulting damage. This is yet another way in which the mediation focuses the parties on the

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[22] *See* Thomas Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. OF EMPIRICAL LEGAL STUD. 843, 844–48, 874 (2004).

[23] *Id.*

[24] ROGER FISHER ET. AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 99, 101–02 (3d ed. 2011).

[25] *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950, 997 (1979) (arguing that, in the context of divorce, the primary function of divorce law is to provide a framework within which divorcing couples can determine their rights and responsibilities outside of the courtroom).

wrongs and the wrongdoers. To arrive at an appropriate measure of dollars for resolving the dispute, the parties often analyze their costs, likely damages, or BATNA. Regardless of their side, plaintiff or defendant, the parties accept compromise in place of their perception of fairness or of being made whole. While mediators look for nonmonetary issues to add value, many commercial settlements are distributive negotiations, where the resolution largely is based on an exchange of money. This exchange of money, while often preferable to litigation, rarely addresses the harm to the corporate purpose done by the dispute itself. It also tends not to address any parties' perceptions of what is principled or fair.

Finally, regardless of when or how early it is conducted, the objective of a commercial mediation is the resolution of a dispute. Based on over thirty years of experience mediating commercial disputes, I have found that corporate parties usually do not want to pay for their mediators to focus on repairing relationships. Anecdotally, parties rarely, if ever, want to continue to work together, even if there are continuing benefits. Disputes destroy business relationships, and fractured business relationships precipitate disputes.

This is in no way intended as an indictment of mediation as a dispute resolution mechanism for commercial matters. On the contrary, mediation accomplishes its objective. It helps parties resolve their disputes on their own mutually agreed upon terms without the need for a verdict at trial. Mediation successfully saves parties time and money.[26] It allows parties to control their resolution with the flexibility to fashion outcomes unavailable in the courts.[27] It is far less adversarial and disruptive than full-blown court litigation.[28] Mediation has also helped to reduce court dockets.[29]

Though mediation is often less expensive and more efficient than litigation,[30] it is still dispute *resolution*. It is not dispute *prevention*. Because mediation resolves existing disputes, it may be too late in the life of the conflict to save a business collaboration or joint venture.

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[26] JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 256 (3d ed. 2016).

[27] DWIGHT GOLANN ET AL., MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 78 (3d ed. 2016).

[28] FOLBERG, *supra* note 26, at 259.

[29] Stipanowich, *supra* note 22, at 843–45, 847–48, 911.

[30] *See The Advantages of Mediation Cases Over Traditional Lawsuits*, FINDLAW (June 20, 2016), https://www.findlaw.com/adr/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html [https://perma.cc/JX7D-8GQ5].

Communication and trust may have broken down irreparably. In these cases, mediators are tasked with resolving the dispute and not with maintaining, or even repairing, the fractured business relationship. Regardless of whether mediation is utilized early in the life of a dispute or on the steps of the courthouse, the climate of acrimony and blame often make continued collaboration unfathomable and unworkable by the time there is a cognizable dispute.

Other dispute resolution processes, though innovative, present the same limitations as mediation for joint ventures seeking to promote their business purpose. Businesses have long identified the value of a "neutral observer."[31] In international arbitration, for example, arbitrators are known to call in their own neutral experts to assist with the battle of the party-engaged experts.[32] In construction projects, parties regularly engage dispute review boards comprised of neutral "elders" with engineering or other subject matter expertise. Dispute review boards, less commonly referred to as standing neutrals, can be given authority by their contracting parties, utilizing any or all of the available dispute resolution options. This can include binding opinions, advisory opinions, or facilitation to deal with issues that may arise during a construction project to keep it moving forward efficiently without need for litigation.[33]

The use of an organizational ombuds also has grown in popularity along with its demonstrated successes. The organizational ombuds sits outside of the human resources department and independent of any reporting chain.[34] Because the ombuds is not an agent of management, an employee can share concerns with confidence that the information will not be shared with management. The ombuds may or may not be charged with finding a result to the problem an employee points out. Even when the ombuds does not mediate the disagreement, the ombuds

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[31] See *In re* Antonio, 631 B.R. 499, 500 (Bankr. M.D. Fla. 2021), in which the Court appointed a "neutral observer" who represented neither party but instead acted as the Court's representative to maintain the integrity of the process and ensure proper conduct from all participants.

[32] *See IBA Rules on the Taking of Evidence in International Arbitration*, INT'L BAR ASS'N 17-20 (2020), https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b [https://perma.cc/4XM5-RH2A].

[33] Thomas J. Stipanowich, *Managing Construction Conflict: Unfinished Revolution, Continuing Evolution*, 34 THE CONSTR. LAW. 13, 17 (2014).

[34] CHUCK HOWARD, A PRACTICAL GUIDE TO ORGANIZATIONAL OMBUDS: HOW THEY HELP PEOPLE AND ORGANIZATIONS 4-6 (2022).

adds value by helping an employee find their own solutions to problems within the workplace.[35]

The concept of a Standing Neutral is in many ways a logical next step in managing conflict and preventing disputes. Professor Sander's forward thinking and willingness to change the then-existing paradigm launched the modern alternative dispute resolution movement.[36] Interestingly, in his paper, Professor Sanders also thought more attention should be paid to preventing disputes from occurring.[37] In their seminal book on negotiation, *Getting to Yes*, first published in 1981, Roger Fisher and William Ury also suggest there should be more focus on preventing disputes in the first place.[38] Fisher and Ury state:

> [T]he techniques . . . for dealing with problems of perception, emotion, and communication usually work well. However, the best time for handling people problems is before they become people problems. This means building a personal and organizational relationship with the other side that can cushion the people on each side against the knocks of negotiation … Knowing the other side personally really does help. It is much easier to attribute diabolical intentions to an unknown abstraction called the "other side" than to someone you know personally.[39]

As we continue the journey charted by these visionaries decades ago, a logical next step is adding dispute prevention to our existing tool kits.

II. DISPUTE PREVENTION PROVIDES A BETTER ALTERNATIVE.

A. The Role of the Standing Neutral in Dispute Prevention.

Just as mediation was an improvement over costly and protracted litigation, prevention is an improvement over mediation to manage common business disputes. Rather than just minimizing the cost and disruption of a dispute, businesses can anticipate, manage, and de-escalate conflicts and prevent them from becoming disputes with

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[35] *Id.* at 5.

[36] *See generally* Deborah Thompson Eisenberg, *Frank Sander: Father of Court-based Dispute Resolution*, *in* DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES 337 (Art Hinshaw et. al. eds., 2021).

[37] Sander, *supra* note 12, at 120.

[38] FISHER ET. AL., *supra* note 24, at 39–41.

[39] *Id*. at 39.

dispute prevention tools.[40] Most importantly, preventing disputes also prevents the destruction of relationships. Parties using prevention tools can maintain trust, transparency, effective communication channels, and productive business relationships.

Unlike dispute resolution, dispute prevention utilizes a series of small, real-time interventions throughout the life of a business relationship to address common areas of disagreement. Such dispute prevention interventions include governance devices such as notice and cure agreements, covenants of good faith and fair dealing, step negotiation clauses, incentives for cooperation, and risk allocation.[41] A third-party neutral will be best positioned to deal with this type of interpersonal friction by helping both sides air their grievances in a neutral yet appropriate way, coaching them towards identifying an interest-based solution, and refocusing both parties on their larger objective.

A particularly effective prevention tool is the Standing Neutral, who is engaged by both parties for the clear purpose of helping them maintain their essential relationships.[42] A Standing Neutral is an individual who is respected and trusted by both sides with allegiance to neither one, only to the goals of the business venture.[43] In contrast to a mediator, the Standing Neutral's objective is to help the parties maintain a good relationship and keep the joint venture strong. The Standing Neutral will use the full range of negotiation skills to provide this support, as well as familiarity with the subject matter and the parties' long-range objectives.

In dispute prevention, the third-party neutral brings many of the same skills and perspective as the mediator. Like the mediator, the Standing Neutral coaches the parties as they navigate their relationship throughout their deal and helps them communicate and uncover their needs and their constraints in order to negotiate more effectively.[44] Unlike a mediator, a Standing Neutral manages the parties' disagreements over changes in circumstances, miscommunication, or

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[40] *See* JAMES P. GROTON ET AL., THE NEGOTIATOR'S DESK REFERENCE 265, 267–70 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017).

[41] *Id*. at 267–72.

[42] *Id*. at 273–75.

[43] *CPR Term Sheet for Dispute Prevention and Resolution*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (CPR), https://static.cpradr.org/docs/Model%20Provision%20Term%20Sheet-11.2022.pdf [https://perma.cc/H2F4-789N] (last visited Apr. 14, 2024).

[44] FOLBERG ET AL., *supra* note 26, at 29.

other disagreements in real time. The Standing Neutral uses the full range of negotiation skills drawn from the social sciences, including economics, statistics, psychology, game theory, sociology, accounting, predictive models, and other disciplines.[45] This negotiation skill set is malleable and effective. In addition to subject matter expertise, the Standing Neutral possesses a full range of problem-solving skills and brings this emotional intelligence to the business venture's dealings.

Standing Neutrals prevent disputes by valuing and elevating the parties' relationship and the dynamics of the people who interact with each other to achieve the joint venture's business purpose. As observed by the authors of *Getting to Yes*, problems between corporations are essentially problems between people.[46] The Standing Neutral, in conjunction with other more formulaic and systemic prevention techniques such as expressions of good faith and step negotiation procedures, focuses on the human aspect of the relationship. By recognizing that conflict is inevitable, anticipating possible sources of conflict in each business relationship, and establishing workable processes in advance, a Standing Neutral provides value by treating the relationships as an important asset of the business. This includes helping parties plan for common sources of conflict in a business venture, such as changes in circumstances or missed benchmarks.

Moreover, parties may utilize technology to identify, based on experience, those areas where conflict is most likely to arise and develop mechanisms for addressing those problems. Parties to a joint venture or other joint relationship can include processes for addressing changes in circumstances, missed benchmarks, or other likely sources of conflict that can be anticipated or even some that cannot. These common-sense structural approaches require recognizing that conflict is inevitable, anticipating possible sources of conflict in each business relationship, and establishing workable processes in advance. Structural prevention

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[45] Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV 905, 911, 915–18 (2000).

[46] The authors note:

> A basic fact about negotiation, easy to forget in corporate and international transactions, is that you are dealing not with abstract representatives of the 'other side,' but with human beings. They have emotions, deeply held values, and different backgrounds and viewpoints; and they are unpredictable. They are prone to cognitive biases, partisan perceptions, blind spots, and leaps of illogic. So are we.

FISHER ET AL., *supra* note 24, at 20-21.

tools provide processes and incentives for managing and preventing some disputes.

Imagine that the parties in the introductory hypothetical included a clause providing for Standing Neutral in their original joint venture agreement.[47] In the hypothetical, the information disclosed by Firm A's CEO to a reporter on a phone call is insignificant—it causes no actual, direct financial harm. However, remember that Firm B did not view the article the reporter wrote as favorable, while Firm A considered it favorable. Firm B really is reacting to Firm A's act of disclosing and the lack of coordination. Although it is possible to frame this conflict as a disclosure of trade secrets and a violation of legal rights, doing so elevates a dust-up into something more dangerous.

When the newspaper article appears, Firm B's CEO first calls the Standing Neutral. In confidence, Firm B's CEO shares the company's concerns. The Standing Neutral serves as an effective sounding board, confidant, and coach. As a neutral relationship manager, the Standing Neutral is uniquely positioned to help both sides navigate this situation. The neutral's objectivity allows her to see and understand both perspectives. Her understanding of the relationship dynamics and business purpose, and above all her skill in managing interpersonal conflict and process design, enables her to help the parties constructively work through this threat to a trusting relationship and productive joint venture.

The Standing Neutral can meet with the appropriate representatives privately or, as appropriate, with both sides together to identify underlying interests and motivations and to facilitate productive exchanges. In this hypothetical, the Standing Neutral assists the two companies to examine their respective conduct and intentions without blame or recrimination. She might help the two companies focus on communication as well as their motivations, which in this case is furthering their shared goal and business purpose. The outcome of this process need not be based on legal rights by negotiating "in the shadow of the law."[48] Rather, the way forward can address each side's interests: Firm B's desire for coordination and confidentiality and Firm A's interest in public good will and recognition. The resolution could be

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[47] *CPR Term Sheet*, *supra* note 43 ("The Relationship Facilitator is an impartial neutral who is engaged by the parties to assist them with managing their business relationship and/or resolving disputes. Parties an choose to deploy the Relationship Facilitator in a variety of ways, including asking the Relationship Facilitator to simply standby until needed.").

[48] Mnookin & Kornhauser, *supra* note 25.

clearer protocols going forward and better communication. The Standing Neutral in this scenario helps the parties maintain trust, place the situation in its proper context, preserve the valuable relationship, and refocus both companies on furthering their shared business purpose.

The intervention in this hypothetical is successful because the parties selected a Standing Neutral knowledgeable about biopharma, joint ventures, corporate governance, and industry-specific risk management. Most importantly, this Standing Neutral is also a skilled facilitator and negotiator. Her emotional intelligence and expertise in negotiation, communication, and interpersonal dynamics helped repair the relationship damage and refocused the parties on their shared business purpose.

B. Dispute Prevention Responds to Changing Circumstances.

Parties enter long term business relationships with the expectation that the relationship will benefit all. Recognizing that the unanticipated happens, companies draft lengthy contracts designed to anticipate and develop dispute resolution processes to deal with uncertainties, changed circumstances, or other sources of disputes that may arise during their business relationship. Contracting parties may utilize step negotiation clauses, contractual promises to act in good faith, or methodologies and formulas for the allocation of identified risk.[49]

These contract-based mechanisms for managing uncertainty have their benefits, especially since corporations are generally more adept at developing concrete solutions compared to the abstract skills required to manage relationships.[50] Rights-based solutions can come at the expense of the relationship, though. Contractual processes identify and establish legal rights and responsibilities, and they can provide a way forward for dealing with changed circumstances. However, legal rights are subject to the application of the facts, which are often subject to the interpretation of the parties. Dealing with rights-based conflict with formal conflict resolution processes often fails to consider the human element of the conflict.[51] Lawyers especially tend to utilize an

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[49] *How Can a Step Clause Help Parties Manage Future Disputes?*, ADR SYS. (Sept. 28, 2023), https://www.adrsystems.com/news/how-can-a-step-clause-help-parties-manage-future-disputes/ [https://perma.cc/28NM-GHBF]. *See* TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 4, 19, 52 (2014).

[50] Smith Ring & van de Ven, *supra* note 2, at 96.

[51] *Id*. at 108–09 (explaining that "excessive formalization and monitoring of the terms of interorganizational relationships lead to conflict and distrust among parties"

adversarial model with an emphasis on winning rather than solving problems.[52]

Businesses enter cooperative IORs (interorganizational relationships) where there are mutually beneficial circumstances and objectives that are better accomplished together.[53] Despite the value to both companies in forming a joint venture, a large percentage of joint ventures, as high as 50%, fail.[54] Given the objective mutuality of purpose, the likely explanation is the human aspect. These sorts of cooperative IORs rely on human dynamics and interpersonal understanding and trust to succeed.[55] Even when there are shared benefits and goals for all parties, joint ventures often struggle to find success.

In the hypothetical, Firms A and B formed a joint venture because they shared a goal that was better accomplished together than individually. The pooling of intellectual property, financial resources, networks, and talent would produce a product in less time that was superior to anything either company could produce on its own. Implementation and success in achieving these shared objectives requires the parties to manage their relationship. The Standing Neutral helps these parties to nurture the human aspect of this valuable business collaboration through all the unanticipated bumps in the road along the way to achieving that objective.

Recognizing that the unexpected is inevitable in long-term business relationships, parties benefit by creating processes to intentionally deal with the human element of the conflict before resorting to legal or contractual processes.[56] Often, the very human aspects of

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and "[parties'] identities and unique domains may gradually shift from being complementary to being undistinguished").

[52] *See* Carrie Menkel-Meadow, *The Origins of Problem Solving Negotiation and Its Use in the Present, in* DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES 68 (Art Hinshaw et. al. eds., 2021).

[53] Smith Ring & van de Ven, *supra* note 2, at 90.

[54] Joshua Kwicinski et al., *Why Joint Ventures Fail, and How to Prevent It*, THE JOINT VENTURE ALCHEMIST (Apr. 2016) https://jvalchemist.ankura.com/governance-and-restructuring/why-joint-ventures-fail-and-how-to-prevent-it/ [https://perma.cc/TL28-TFDW].

[55] Smith Ring & van de Ven, *supra* note 2, at 92–93 (noting that inherent in these long-term deals or ventures are uncertainties relating to mutual trust especially at the beginning of a corporate relationship).

[56] Smith Ring & van de Ven, *supra* note 2, at 93 (citing GEORGE HOMANS, SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS (1961)).

miscommunication, misunderstanding, misalignment of values and beliefs, and mistrust are not properly and skillfully addressed.[57] In addition to utilizing contractual and risk shifting provisions, businesses should consider adopting a formalized dispute prevention mechanism, specifically a Standing Neutral, to manage the interpersonal aspect of these valuable business collaborations. The source of the problems may vary, but a skilled Standing Neutral helps parties address changing circumstances. The Standing Neutral's expertise is in understanding the specific human dynamics at play and how to leverage those dynamics in a positive way to address the issue at hand. Companies would be well served by increasing their focus on maintaining the qualities of trust and good will "which [are] produced through interpersonal interactions that lead to social-psychological bonds of mutual norms sentiments, and friendships."[58]

At its core, dispute prevention solves small human problems before they become larger, deal-killing disputes. Focusing on the personal relationship with skill and intentionality can help sustain the parties' IOR, not just resolve the immediate conflict. Engaging a skilled Standing Neutral to assist in navigating these human issues can help the parties navigate unexpected changes in circumstances, even when those circumstances are difficult, while maintaining the quality of their relationship. The Standing Neutral allows parties to look beyond rights-based solutions in order to recognize and creatively satisfy their actual interests. A Standing Neutral with mastery of these negotiation and communication skills can assist the companies with resolving the unanticipated conflict while preserving both the human and the corporate relationship. In this way, a Standing Neutral can be a simple yet valuable tool in a deal's risk management arsenal.

C. Dispute Prevention Provides a Flexible Approach.

The International Institute for Conflict Prevention and Resolution (CPR) provides a suggested structure for implementing the Standing or Standby Neutral mechanism.[59] The model clause sets forth best practices and important considerations, but the process used by a Standing Neutral is flexible. It can adapt to the needs of the parties and the particulars of their deal and their relationship. Not all deals are the

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[57] Smith Ring & van de Ven, *supra* note 2, at 93.

[58] *Id*. (citing GEORGE HOMANS, SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS (1961)).

[59] *CPR Term Sheet*, *supra* note 43.

same, and there are many ways to adapt the Standing Neutral process based on the needs of a specific transaction.

Corporations using a Standing Neutral designate someone to coordinate with the Standing Neutral as well as with the other side's designee. These corporate representatives should hold sufficient power and possess actual authority to make and implement important decisions on behalf of their respective companies. They should also be accountable for oversight of their company's responsibilities and for direct interaction with their counterparty and with the Standing Neutral.

The Standing Neutral can play an adjudicative, advisory, or facilitative role. Flexibility is a key part of the dispute prevention process and the Standing Neutral's role. Companies can continue to refine the Standing Neutral's role throughout their tenure, granting them more or less power depending on the nature of the issue at hand.

Using an adjudicative process, the Standing Neutral may be empowered to resolve a conflict between the parties by rendering a decision. This is the most efficient method of resolving conflicts. In advance, the parties could agree on the scope of power given to the neutral, whether any evaluation will be binding or advisory, and the basis and standard to be applied in rendering their assessment. Although the adjudicatory model is efficient, it also is likely to focus on the parties' relative legal rights, which do not address the parties' relationship. Parties also may lose a chance to feel empowered and build trust by resolving their own issue. Finally, the Standing Neutral may lose the trust of the losing side, who may perceive the Standing Neutral as favoring the winning side. When using an adjudicatory model, a Standing Neutral should consider rendering their decision in conjunction with other dispute prevention work focused on maintaining the relationship.

The Standing Neutral may also render a nonbinding advisory opinion, which provides an evaluation of the relative merits of the parties' disagreement. Parties can utilize a nonbinding advisory opinion as an objective standard to guide their subsequent negotiations. Parties should decide in advance if any advisory opinion from the Standing Neutral would be admissible if the parties later chose to litigate the conflict, and they should consult legal counsel to take the proper steps to implement this decision. As with the binding adjudicatory model, a Standing Neutral could compromise their effectiveness as a facilitator going forward if they are perceived as non-neutral.

The Standing Neutral may be limited to a facilitative role in dispute prevention. As a relationship facilitator, the neutral would not have

power to impose a result or perhaps even to issue an opinion. Instead, the neutral would rely on negotiation and interdisciplinary dispute prevention skills to aid the parties in fashioning their own interest-based solutions. The obvious disadvantage of a purely facilitative Standing Neutral lies in their lack of power to dictate solutions or influence the outcome with their own opinion on the matter. This could result in less efficient outcomes. However, this model presents several advantages for maintaining and improving parties' relationship. A facilitative Standing Neutral maintains their neutrality, which can build trust with parties. By helping parties negotiate and communicate more effectively for themselves, the facilitative Standing Neutral empowers parties and pushes them to own their solutions and their own processes. This invests in the parties' skill development and long-term relationship.

The Standing Neutral may combine these techniques with prior approval by the parties. This could include an arbitration-mediation model, an adjudicative approach for smaller or more time-sensitive matters, and a more facilitative approach to address issues arising from relationship-driven miscommunication such as that in the hypothetical. The allocation of costs for the Standing Neutral may depend on the relative size and ability of the two parties to pay. As long as the Standing Neutral is clearly independent, it is possible to adopt a cost-sharing model for a larger party to absorb all of the cost and expense of the Standing Neutral. There may even be an allocation of the costs and expenses based on the relative size or ability to pay of the parties.

While this paper focuses on the Standing Neutral role as a dispute prevention mechanism, other variations can provide similar benefits. Because the dispute prevention process is flexible, parties in the joint venture can tailor the role to meet their specific needs. One important variation is the Stand*by* Neutral. A Standing Neutral is involved in the parties' relationship on an ongoing basis. They participate regularly in governance meetings and receive updates on developments in real time. The Standby Neutral serves in a similar capacity, but they are brought in by the parties on an as-needed basis. Each role provides different benefits. A Standing Neutral can proactively identify and resolve areas of potential conflict, provide guidance and coaching to both sides in real time, and serve as a reminder of the importance of maintaining a high-quality IOR. The Standby Neutral will have less day-to-day information and involvement but will be more cost effective.

The Standing Neutral also functions similarly to a dispute review board. Dispute review boards have been implemented with great success in the construction industry. In construction, "project neutrals" or panels

of experts are used when a conflict arises.[60] The project neutral helps parties manage communication, approach problem solving collaboratively, and negotiate and resolve conflicts in real time.[61] Panels of experts are sometimes called upon to provide advisory opinions or can be empowered with decision making authority, as is often the case with dispute review boards.[62] The nature of construction is that it is prone to changes in circumstances and in disputes.[63] Dispute review boards prevent, manage, and resolve dispute in real time and have been very successful in managing conflict in this industry.[64]

Several bio-pharma firms, including Bayer, have implemented an "Alliance Manager" or "Relationship Management" approach.[65] With this approach, an internal businessperson is charged specifically with managing the interpersonal relationship.[66] The parties could also choose any combination of these approaches, or they can, by mutual agreement, modify the neutral's authority. They might begin with a facilitative model and empower the neutral to give a binding or advisory option if appropriate.

D. Dispute Prevention Can Save Time and Money.

Litigation, whether in court or in arbitration, has become more expensive, protracted, and unpredictable. Corporations unsatisfied with current dispute resolution options appear more receptive to exploring alternatives, but those considering dispute prevention look for evidence of its success. One challenge is the difficulty inherent in developing metrics and measuring return on investment for disputes which never materialize. It is impossible to show something which never happened otherwise would have happened without dispute prevention mechanisms; in fact, it is impossible to know what disputes may have

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[60] Stipanowich, *supra* note 33, at 13.

[61] *Id*.

[62] *Id*. at 13–14.

[63] *Id.*

[64] *Id*. at 16.

[65] *What is an alliance manager?*, BIOTECH CONNECTIONS (Sept. 11, 2020) https://www.biotechconnection-sg.org/what-is-an-alliance-manager/ [https://perma.cc/N3LM-9NDC].

[66] Michael Kennedy & Bill Dodero, *Relationship Management: An Introduction on How to Successfully Work with Eternal Partners*, BAYER 1, 2 (Feb. 23, 2022), https://assets-002.noviams.com/novi-file-uploads/cpr/pdfs-and-documents/Relationship-and-Alliance-Management-20220223.pdf [https://perma.cc/HGK6-78A4].

occurred but for a corporation's investment in a Standing Neutral. Therefore, it is difficult to quantify the specific value provided by a Standing Neutral or any other dispute prevention mechanism.

Luckily, we can look at examples where experience would teach us that litigation is likely and where, with the implementation of dispute prevention techniques and approaches, there is an absence of litigation. The CPR website lists examples where litigation was substantially reduced or eliminated with the support of dispute prevention.[67] One illustrative example concerns several power companies who repeatedly found themselves litigating power distribution rights.[68] Recognizing the cost and disruptive impact of these inefficient approaches to determining their respective rights, they instead selected expert negotiators called "Advisors" to design a process to resolve these recurring disputes.[69] What the power companies discovered was that the mere presence of the process and the Advisors deterred litigation.[70] The presence of the Advisors incentivized the companies to directly resolve their disagreements without the need for either litigation or the dispute resolution Advisors.[71] This is consistent with research suggesting that the very presence of a neutral party and a neutral mechanism incentivizes parties to engage in the direct negotiation and tends to reduce the need for utilizing the neutral mechanism.[72]

Another successful example involved Intel, which completed over $18 billion in construction projects with only one small dispute.[73] Intel implemented a Third Party Neutral program where Intel required all

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[67] *See Dispute Prevention Library of Resources: Case Studies*, INT'L. INST. FOR CONFLICT PREVENTION & RESOL. (last updated July 1, 2022), https://www.cpradr.org/resource-center/dispute-prevention [https://perma.cc/M2Y9-JTQ2].

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] L.G. Zucker, *Production of Trust: Institutional Sources of Economic Structure, 1840–1920* 10-13 (Univ. of Cal. Dep't of Sociology, Working Paper No. 82, 1985) https://oac.cdlib.org/ark:/28722/bk0003t9k8m/?brand=oac4 [https://perma.cc/SE7S-92SB] (discussing how formal mechanisms produce trust, even when they are not utilized, by explicitly stating background expectations and reducing opportunities for differing expectations).

[73] Jan Bouckaert, *Speaking with Howard Carsman from Intel about innovation in dispute resolution*, ADVICE FOR INT'L TENDERS AND CONTRACTS (Apr. 3, 2019) https://afitac.com/2019/04/03/innovation-in-dispute-resolution/ [https://perma.cc/EDY5-Z2PD].

general contractors to agree to a provision implementing this program in their contracts.[74] Although Intel had superior bargaining leverage, the program itself was administered with neutrality, with Intel and the contractors mutually selecting the Standing Neutral.[75] The program did not contractually prevent parties from litigating. Parties did not litigate because the process worked efficiently and effectively to address conflicts at an early stage and resolve them. In addition to various nonmonetary benefits, the cost savings of avoiding litigation is likely in the tens of millions of dollars. As recognized by Howard Carsman, Global Construction Claims Manager, "It is difficult to quantify exactly the money saved, the disruption avoided, and the relationships saved from litigation that did not occur. But an almost total absence of litigation on over 18 billion dollars and six years of construction is a striking statistic." [76] Given the scope of the dispute prevention mechanism at Intel and its resounding success, this provides strong support for the valuable return on investment provided by a Standing Neutral.

Furthermore, Intel's success is particularly impressive because construction is recognized as an area where disputes are frequent and the value of those disputes significant. Among the sources of disputes are poorly drafted contracts, misunderstandings, and miscommunication.[77] Additionally, there was a significant impact in the

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[74] *Id.*

[75] Telephone Interview with Howard Carsman, Global Construction Claims Manager, Intel Corp. (Jan. 2023)

[76] From the Carsman interview:

> By the end of 2021, Intel had executed about $18 billion in construction work under the Third Party Neutral ("TPN") program. This was multiple major projects carried out in Oregon, Arizona, and Ireland by five large general contractors. With the sole exception of a small subcontractor pass-through claim, all other disputes and claims were resolved by project executives during or immediately after the project. With the one noted exception, Intel did not require the services of outside counsel for any of the disputes or claims. The program has a significant dispute prevention element to it, but that part defies data. There is no way to track disputes or claims that are prevented.

Id.

[77] *2022 Global Construction Disputes Report: Successfully Navigating Through Difficult Times*, ARCADIS 11 (2022), https://www.arcadis.com/en-us/knowledge-hub/perspectives/global/global-construction-disputes-report [https://perma.cc/QJN5-G8DX].

construction industry due to COVID-19 and supply chain impacts, according to the 2022 Global Construction Disputes Report, and participants in this survey expressed a desire to resolve disputes early.[78] It is not surprising, then, that the construction industry has been a leader in dispute prevention, regularly utilizing early intervention techniques including dispute review boards, Standing Neutrals, and early mediation.[79]

These case studies offer promising indications of dispute prevention's value to an organization. In fact, the United Nations Commission on International Trade Law's ("UNCITRAL") Working Group III on Investor State Dispute Settlement Reform has been exploring dispute prevention and has prepared a comprehensive draft compilation on best practices on its website.[80] UNCITRAL focuses on the benefits of dispute prevention in the area of preventing investor state disputes.[81] Although in some respects the nature of the relationship is different from a business-to-business transaction, due to the power of the State relative to that of the private investor as well as the political considerations and the regulatory environment, in many ways it is simply another application of the same concept and same set of skills. And as with business-to-business relationships, the parties to an Investor-State deal are incentivized to successfully complete their projects and avoid the expense, disruption, and failure of the deal associated with litigation. Especially when the State is a developing nation, the failure of an investment project may pose a particularly high risk to both sides of the transaction because the need to attract, expand, and retain foreign investment may be particularly critical.[82] Several

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[78] *Id*. at 8.

[79] *Id*. at 14.

[80] U.N. COMM'N ON INT'L TRADE L., WORKING GROUP III: INVESTOR-STATE DISPUTE SETTLEMENT REFORM, 48th Session, Apr. 1-5, 2024, https://uncitral.un.org/en/working_groups/3/investor-state [https://perma.cc/3D93-AKGH] (last visited Apr. 14, 2024) (containing reports with information and recommendations from dispute prevention programs around the world).

[81] *See generally* U.N. COMM'N ON INT'L TRADE LAW, WORKING GROUP III: INVESTOR-STATE DISPUTE SETTLEMENT REFORM, Investment Mediation and Dispute Prevention Working Documents, https://uncitral.un.org/en/investmentmediationanddisputeprevention [https://perma.cc/4565-2A9V] (last visited Apr. 14, 2024) (containing reports proposing processes and guidelines for dispute prevention).

[82] Presentation by Priyanka Kher, *Dispute Prevention: Rationale and Tools*, at the Forum on Dispute Prevention: 56th Session of UNCITRAL (July 7, 2023), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/for

States have successfully implemented Dispute Prevention Programs.[83] These programs will likely provide metrics and opportunities to identify best practices in the future.

Experts in business, law, and dispute resolution recognize the need for dispute prevention. The International Mediation Institute, with the support of other major ADR providers and associations, convened a series of 29 events in 22 countries beginning in London in 2014 and continuing around the world concluding in 2017.[84] At each event attendees were asked a series of questions regarding their satisfaction with ADR–focused largely on mediation and arbitration. Participants, while preferring mediation to arbitration, still were not entirely satisfied with the options available to them. Another takeaway was that over three quarters of the participants in all stakeholder groups parties favored intervention as early as possible.[85]

The London Chamber of Arbitration and Mediation also uses the terminology Facilitated Contract Renegotiation (FCR) for the process of responding to unanticipated changes in circumstances without resorting to litigation or arbitration.[86] In its Centenary Declaration of March 27, 2023, the International Chamber of Commerce included prevention among its priorities for the next century.[87] In yet another variation on dispute prevention, practitioner Kate Vitesek has successfully implemented a program to teach procurement professionals

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um_on_dispute_prevention_56th_uncitral_session_wbg_slides_07072023.pdf. [https://perma.cc/AMT9-RLCN]

[83] *Possible Reform of Investor-State Dispute Settlement*, U.N. COMM'N ON INT'L L. WORKING GROUP III: INVESTOR-STATE DISPUTE SETTLEMENT REFORM (Nov. 20, 2023) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2322784e_-_advance_copy.pdf [https://perma.cc/WQM7-B6QA].

[84] *About the 2016–2017 Global Pound Conference*, INT'L MEDIATION INST. https://imimediation.org/research/gpc/gpc-about/ [https://perma.cc/RF7Q-R9KN] (last visited Apr. 14, 2024).

[85] *Id.*; Michael Leathes & Deborah Masucci, *The Urgent Need for Data: Are the Needs of Users and the Dispute Resolution Market Misaligned?*, MEDIATE.COM (Nov. 7, 2014), https://mediate.com/the-urgent-need-for-data-are-the-needs-of-users-and-the-dispute-resolution-market-misaligned/ [https://perma.cc/PY4M-WX7Z].

[86] *How to approach a Facilitated Contract Renegotiation (FCR)*, LONDON CHAMBER OF ARB. & MEDIATION (Nov. 16, 2020), https://lcam.org.uk/how-to-approach-a-facilitated-contract-renegotiation/ [https://perma.cc/J5MC-NQUT].

[87] *See ICC Centenary Declaration on Dispute Prevention and Resolution*, INT'L CHAMBER OF COM. (Mar. 27, 2023), https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-centenary-declaration-on-dispute-prevention-and-resolution/ [https://perma.cc/6SQW-BF6D].

techniques and protocols for managing long term relationships.[88] Her program in "Deal Architecture" helps parties manage expectations, build trust, and anticipate changes in circumstances as a means of avoiding disputes.[89]

III. CONCLUSION

Although conflict is inevitable, conflicts distract from a corporation's business purpose. Conflicts are a source of risk and uncertainty. This has been especially true during the past several years of the global pandemic, which disturbed contractual relationships with business disruption, unanticipated changes in circumstances, and conflict. Dispute prevention, while intuitive, represents a change in the existing paradigm. This is an appropriate time to progress to the next step in reducing the cost and disruption of lawsuits. By focusing on the basic and powerful skills of communication and negotiation, which are essential to maintaining trust and preserving relationships, many disputes may be prevented, which would avoid the need to resolve them.

Despite the promise of dispute prevention, changing a paradigm is difficult. Almost fifty years after Professor Sander highlighted the many benefits of mediation and sparked a wider acceptance of alternative dispute resolution, resulting in disputing parties saving time and money, we still have not seen mediation fully integrated in all corners of legal practice. Dispute prevention faces the same barriers to widespread adoption.

It is expected that this seismic change to a longstanding paradigm will take time. Perhaps a litigator's identity may shift somewhat from litigator to problem solver. However, I remain optimistic for the same reason I am optimistic about the likelihood of resolving a difficult matter when I mediate. Cases settle because it is usually in the interest of all parties to settle their disputes rather than litigate. Prevention will eventually change the existing paradigm because it is in the interest of all parties to improve their relationships and maintain their deals rather than for their deals to fail and for there to be more litigation. At the end of the day, less litigation means more business purpose. Prevention can provide an avenue to that new paradigm.

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[88] *Meet Kate*, KATE VITESEK, https://katevitasek.com/meet-kate/ [https://perma.cc/Z6EE-KQNE] (last visited Apr. 14, 2024).

[89] *Id.* (describing her development of University of Tennessee's Certified Deal Architect Program).