The Foundations of a Solid Dispute Prevention and Resolution Strategy
Introduction

We are witnessing a profound change when it comes to the public perception of so-called “alternative” dispute resolution (ADR) strategies, as well as what it really means to win. The business and legal communities are realizing that automatically following a default litigation model and attempting to destroy one’s opponent in court, whatever the cost, often ends up costing them a great more—in terms of money, time, relationships and business reputation.

Forward-thinking companies and their counsel now understand that, where ADR is appropriate, its more thoughtful and flexible approach can help to preserve important business relationships, and lead to results that are more finely nuanced and tailored to their needs than anything a judge (or jury) could provide.

But where does one start, in both thinking about and actually applying these concepts? When one has been operating with a pure litigation mindset for so long (as I had been, before my experiences as General Counsel at MasterCard), it can be difficult to change direction. This report aims to assist with that transition, by highlighting some of the foundational basics of dispute prevention and resolution, and then offering practical examples and viewpoints from a number of experienced stakeholders, including both in-house and outside counsel. Some questions it attempts to answer are:

• What trends are we seeing in the area of dispute resolution internationally?
• How can in-house counsel begin to “sell” and drive ADR effectively within their own organizations?
• How are other companies implementing dispute resolution techniques to positive results?
• Doesn’t arbitration ultimately cost just about as much as litigation?
• What kind of flexibility does arbitration offer me in terms of discovery, confidentiality and the opportunity to appeal?
• How can I ensure that my neutrals are unbiased, and experienced in the subject matter of my proceeding?
• Aren’t there some cases that are not suitable for arbitration and must always be litigated?
• I understand why a corporation would want to explore ADR, but what’s in it for law firms?
• How is online dispute resolution starting to change the landscape of ADR?

We welcome the opportunity to assist you with any aspect of building your own dispute resolution strategy. Contact us at marketing@cpradr.org.
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GETTING STARTED TIP#1: In deciding which process to use, parties should consider whether they want a binding (arbitration) or non-binding (mediation) process, or perhaps, some combination of both approaches. In addition, parties should take into account the amount of support necessary for the matter and how much they or their client is willing to spend on administrative elements of the case.
On the part of in-house counsel and law firm lawyer alike, when it comes to weighing the pros and cons of arbitration as opposed to litigation, myths and misconceptions abound. Some of these may have been based in fact, at one time, but have never been re-adjusted in light of several recent and somewhat radical developments in the field.

This article will attempt to set the record straight and report on the current realities of this powerful “alternative” option.

**MYTH #1: Arbitration costs a lot, and can last forever.**

**REALITY:** Just as with litigation, a badly managed arbitration can be costly. However, because of its inherent flexibility, arbitration provides more of an opportunity to manage costs. In fact, some provider organizations now offer rules that enable parties to use expedited proceedings to address issues in a more efficient manner, and to exercise additional control by providing only for those administrative functions needed. Parties today can also set the parameters for how long a proceeding can last. (By way of example, even when expedited proceedings are not specified, administered arbitrations from one provider of administered arbitrations, CPR (with which the author is affiliated), are designed to take no more than one year.)

**MYTH #2:** Arbitration does not allow parties the broad discovery options they may need. Many assume that—unlike litigation, with its liberal discovery rules—arbitration leaves parties with little to no opportunity for discovery, setting the stage for some potentially nasty surprises.

“On the part of in-house counsel and law firm lawyer alike, when it comes to weighing the pros and cons of arbitration as opposed to litigation, myths and misconceptions abound.”

**REALITY:** Arbitration is, for the most part, a contractual creation. The parties are free to decide for themselves processes to be utilized, including how much discovery they will allow, which will limit costs.
“Gone are the days, if they ever existed, when dispute resolution was some kind of new-fangled and ‘alternative’ litigation lifestyle. Smart companies and their in-house counsel long ago recognized the value of dispute resolution, and began incorporating it into their ‘tool kits’—at least as one possible option.”
REALITY: It is true that, traditionally, a neutral arbitrator’s decision has been very difficult to appeal (with limited exceptions, e.g., for fraud or stepping outside the agreed-upon arbitration scope) and parties often prefer the finality of arbitral decisions. However, there are some rules available now that expressly allow parties to provide for an appellate arbitral procedure.

MYTH #4: There is no guarantee of confidentiality in arbitral proceedings.

REALITY: A small number of dispute resolution providers are now explicitly specifying in their rules that proceedings will remain confidential—with this obligation binding on both the parties and the arbitrators.

“Several years ago, CPR put into place a unique screened selection process, through which arbitrators are appointed without ever knowing which party selected them.”

MYTH #5: Neutrals can be inexperienced, and don’t have to follow the law.

REALITY: Parties have the option to select a neutral (in some cases, choosing from very narrowly focused provider subject matter panels) with a specific skill set and expertise that would enable more accurate and efficient decision-making. The basis for decision-making can also be expressly defined. Most provider organizations now offer rules that require arbitrators to apply the governing law and provide reasoned decisions.

MYTH #6: Because of the selection process, the arbitrator can be biased.

REALITY: Some parties may worry that, if a neutral is selected by one of the parties, that neutral may be biased in the selecting party’s favor. Several years ago, CPR put into place a unique screened selection process, through which arbitrators are appointed without ever knowing which party selected them.

MYTH #7: There are some kinds of cases that are not suitable for arbitration and must always be litigated.

REALITY: Some are of the opinion that certain categories of cases, e.g., intellectual property cases, can never be arbitrated. But there are no such clear-cut rules. Each case needs to be assessed thoughtfully with the parties asking such questions as: Do they want the decision to be public and precedent setting? Is jury unpredictability a concern? What are the parties’ scheduling and discovery needs? Is it important to the parties that they have control over the selection process? Does the case require a specialized understanding of the subject matter? Note: the answers to these questions should be given in the context of not only the case itself, but also the underlying—and possibly continuing—commercial relationship between the parties.

MYTH #8: The old “default clause” is fine.

REALITY: Yes and no. So,…maybe. Most transactional lawyers have probably done it—in a pinch, pulled the same old dusty clause from some ancient contract and thrown it in at the last minute, without much thought. When haggling over big dollars amounts and deliverables, the arbitration clause may to the uninitiated seem like one of the less important ones, comparatively speaking. Not so. While using a model clause can be a good way to go, especially for inexperienced arbitration counsel, it is important to make sure you’re using the one that most directly meets your needs (there are now several very different options available).

MYTH #9: Once arbitration starts, it can’t get settled.

REALITY: Some rules encourage mediation/settlement, so this definitely remains an option.

MYTH #10: Alternative Dispute Resolution is still “Alternative”

REALITY: Gone are the days, if they ever existed, when dispute resolution was some kind of new-fangled
and “alternative” litigation lifestyle. Smart companies and their in-house counsel long ago recognized the value of dispute resolution, and began incorporating it into their “tool kits”—at least as one possible option. In fact, this trend has also recently become particularly noticeable on the international front, as evidenced by this 2013 Queen Mary University of London, School of International Arbitration and PwC survey, *Corporate Choices in International Arbitration*, which found that businesses actually prefer to use arbitration over litigation for cross border disputes. A recent CPR, Pepperdine, Cornell survey, too, showed the mainstream use of mediation and the growing use of early case assessment and early neutral evaluation.

“It may be time to pen a new mythology, one in whose plot arbitration has officially arrived, carrying with it many exciting options and some new—and highly effective—rules with which to practically utilize it.”

In sum, it may be time to pen a new mythology, one in whose plot arbitration has officially arrived, carrying with it many exciting options and some new—and highly effective—rules with which to practically utilize it.

*This article originally appeared in InsideCounsel in March 2015.*
GETTING STARTED TIP #2: CPR has promulgated a user-friendly ADR Suitability Screen tool to assist lawyers and clients in determining whether a particular dispute is suitable for resolution through ADR, available to CPR members. Please contact info@cpradr.org if you would like a copy.
As recently summarized in this publication, in recent years so-called "alternative" dispute resolution has been evolving significantly, offering parties many new options to address old potential concerns.

One of the most interesting domestic trends is the increasing—and increasingly flexible—use, by cutting edge companies, of innovative alternatives, including preventative methods, in the arena of employment relations.

Beyond mere mediation or arbitration, employers now are utilizing strategically a wide array of tools—such as integrated conflict management systems, online collaboration tools, employee hotlines, peer review, ombuds (whether subscribing to the Ombuds Standards of Practice or not), and coaching—all towards the end of preventing workplace disputes that might otherwise lead to lengthy, and costly, litigation.

In late 2013, following broader 1997 and 2011 studies, the International Institute for Conflict Prevention and Resolution (CPR) working through its Employment Compendium Subcommittee, and Cornell University's Scheinman Institute surveyed companies (pulled from the 2011 Fortune 1000 survey and CPR’s corporate membership list) that had implemented particularly innovative and varied employee dispute resolution policies and practices. They reached out to attorneys and managers — not necessarily GC’s—who had principal design and oversight responsibility for employer-employee disputes. Fifty-one companies ultimately provided complete survey responses.

“Almost 50 percent of large U.S. corporations are now using alternative dispute resolution as their main vehicle for resolving workplace disputes.”

Of these respondents, 26 were in the corporate legal department, 13 in HR and 12 were ombuds or headed autonomous or semi-autonomous offices that managed the company’s ADR program. Ninety-nine companies were identified and 57 were interviewed. Other survey criteria included identifying companies that: used both interest-based and rights-based options—not only arbitration and mediation, but a whole range of techniques; used an ombudsman, or an autonomous or semiautonomous office to coordinate their policies; and used some form of a conflict management system, either integrated or less comprehensive.
“Cutting edge companies are not necessarily limiting themselves to ‘best practices’ as some authorities or textbooks might define them. Instead, they are shaping their programs’ scope and methods to meet their own needs and objectives.”
Cornell's Scheinman Institute Director, David B. Lipsky, provided the history from prior surveys and summarized the 2013 Survey results in Cutting Edge Advances in Resolving Workplace Disputes (CPR 2014), drawing various conclusions about trends in the resolution of employer-employee (and other) disputes, while other authors provide enhanced detail about various innovations.

In-house counsel seeking effective solutions to workplace disputes within their own companies may glean some ideas and/or inspiration from the following observed trends and conclusions, in some cases pulled contextually from all three surveys:

- While there seems to be a divide, with nearly 40% of companies reporting avoiding the use of "alternative" dispute resolution methods, almost 50 percent of large U.S. corporations are now using alternative dispute resolution as their main vehicle for resolving workplace disputes.

“Contrary to the assumption that companies prefer mandatory, rights-based methods of resolving employee complaints, all three surveys revealed that a majority of large US companies actually prefer voluntary, interest-based dispute resolution procedures.”

- In fact, the 2013 survey revealed that within the prior three years, 77 percent of companies had used employment arbitration to resolve at least one dispute. In the 2011 survey, that number was only 36 percent, a marked increase. However, of the companies using arbitration, only 23% were using mandatory pre-dispute arbitration agreements, indicating a shift toward voluntary programs.

- Nearly 60 percent of the 2013 companies reported that all of their employees, from managers to line employees, were covered by dispute resolution policies.

- Cutting edge companies are not necessarily limiting themselves to “best practices” as some authorities or textbooks might define them. Instead, they are shaping their programs’ scope and methods to meet their own needs and objectives. For example, one company reported using ADR policies to cover hourly employees in non-union facilities, but not in unionized facilities where presumably they were covered by collective bargaining agreements.

- Contrary to the assumption that companies prefer mandatory, rights-based methods of resolving employee complaints, all three surveys revealed that a majority of large US companies actually prefer voluntary, interest-based dispute resolution procedures.

- In the 2013 survey, 45 percent of companies reported using voluntary procedures, with only 19 percent using entirely mandatory procedures.

- 25 percent reported using a mix—for example the approach described by one company, using voluntary procedures unless the employee elects to use arbitration, in which case the process becomes mandatory for the employer.

- Most companies using an integrated or less comprehensive conflict management system used voluntary arbitration as their last step. In some cases the result is no arbitrations as disputes are resolved at the latest at the mediation step.

- The 2013 survey aimed to identify those individuals within a corporation most typically responsible for designing a company’s dispute resolution policies and procedures; how the company communicated those policies to its workforce; and whether the company conducted formal assessments of its dispute resolution policies.

- Design of the policies is primarily managed by top managers. In the 2013 survey, nearly three-quarters of companies reported that corporate counsel fulfilled this role.

- In terms of communication, nearly three-quarters of
2013 survey respondents reported including ADR policies and procedures in their HR handbooks. More than 70 percent said they used face-to-face communications to inform their employees about these options, while nearly 90% used a website or intranet. Reflecting its increasingly important role in societal interactions, social media made an appearance at 7%.

24 percent of 2013 survey respondents reported conducting formal assessments of their ADR policies within the prior three years.

“The ultimate goal for companies is not dispute resolution, per se, but conflict management such that traditional dispute resolution methods are no longer required.”

As Prof. Lipsky summarized in Cutting Edge Advances in Resolving Workplace Disputes, "[T]he evolution of ADR policies and practices in U.S. corporations has not been a story of convergence around a common set of techniques and systems. Instead it has been a story of experimentation, variation and attempts by companies to tailor the ADR policies they use to their perceptions of the needs and interests of their organizations." The ultimate goal for companies is not dispute resolution, per se, but conflict management such that traditional dispute resolution methods are no longer required. While inside counsel have a role in conflict management, these new and innovative programs recognize that HR and autonomous offices, as well as non-decision-making third parties such as mediators, coaches and ombuds, have an equally important place in achieving a litigation-free workplace.

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WHAT IS MEDIATION? Mediation is a flexible non-binding dispute resolution process that uses a neutral third party—the mediator—to facilitate negotiation and resolution between parties. A mediator has no power to impose a solution on the parties but rather provides a framework within which parties can resolve their dispute.
Business is global. Dispute resolution is global. Trends that originate in one jurisdiction can, and often do, have an impact around the world. To succeed, businesses and their counsel must stay abreast—and hopefully get ahead—of those trends. Three current trends present important opportunities and challenges to the in-house counsel community and merit close attention.

Development of a Framework for Expedited Enforcement of Conciliation/Mediation Settlement Agreements

It is widely agreed that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (“New York Convention”) has played a critical role in the growth of arbitration over the last half a century. As of January 2015, over 150 State parties have adopted the New York Convention which, by providing a multilateral framework recognizing the validity of commercial arbitration agreements and enabling expedited enforcement of arbitral awards in convention States has made arbitration the leading form of dispute resolution for cross-border disputes.

Despite the fact that most companies consider conciliation/mediation to be the most efficient and cost-effective form of dispute resolution, its growth on the international front has been inhibited by concerns that, if a party reneges on an agreement, the time and resources invested in the process are lost due to a lack of a global and streamlined enforcement mechanism.

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With the goal of encouraging conciliation/mediation of cross-border disputes in the same way that the New York Convention has facilitated the growth of arbitration, at the June 2014 Session of the United Nations Commission on International Trade Law (UNCI-TRAL), the U.S. delegation proposed¹ that Working Group II of the Commission develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation/mediation.

¹ http://bit.ly/1RRsruL
“Business is global. Dispute resolution is global. Trends that originate in one jurisdiction can, and often do, have an impact around the world. To succeed, businesses and their counsel must stay abreast—and hopefully get ahead—of those trends.”
The Commission requested² that the Working Group consider the issue and report on the feasibility and possible approach of such work.

“With the objective of encouraging global investment and trade, investment treaty arbitration provides foreign investors with a predictable rule of law and potential relief if they experience business difficulties in a host State that arise out of acts or omissions of that State.”

During its February 2015 Session, Working Group II devoted two days to discussion of the topic, addressing a broad range of issues identified in the U.S. proposal, as well as in the Note prepared by the UNCITRAL Secretariat. In its Report, the Working Group recommended to the Commission that it be given the mandate to work on the topic of enforcement of settlement agreements, and to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also suggested that a mandate be broad enough to take into account the various approaches and concerns. This decision presents an enormous opportunity for businesses engaged in global trade to enhance their ability to engage in more effective and efficient dispute resolution.

The Emergence of Codes of Conduct and Ethics in International Arbitration

As the use of arbitration has grown, concerns about how parties and counsel conduct themselves in international arbitration have grown as well. Party representatives from a wide range of jurisdictions are subject to widely varying domestic codes of conduct. Conflict between those domestic codes can easily lead to inequality in arbitral processes. Compounding matters, some say domestic codes of conduct do not apply in international arbitration. Perceptions that international arbitration lacks a consistent ethical framework are resulting in growing concerns that, if the arbitration community does not effectively regulate itself, regulation will be imposed. Responses to this challenge have been varied and include guidelines on party representation³ promulgated by the International Bar Association, proposals in Switzerland for a global ethics tribunal and in Singapore for a global regulatory framework, incorporation of guidelines for the conduct of parties in certain arbitration rules, and general admonitions to behave more responsibly. At the same time, there is vocal opposition to doing anything at all. One thing is for certain, in-house counsel at companies relying on international arbitration need to engage in the debate. Whatever the ultimate outcome, they will be impacted.

Rising Resistance to Investor-State Arbitration

In contrast to commercial arbitration, in which the authority of an arbitral tribunal is based on agreement among the parties, authority for investor-state arbitration is derived from an investment treaty—either bilateral investment treaties (BITs), multilateral agreements, or regional free trade agreements (e.g., NAFTA)—that set out the terms and conditions for investment in one country (the host State) by private companies and individuals of another country. With the objective of encouraging global investment and trade, investment treaty arbitration provides foreign investors with a predictable rule of law and potential relief if they experience business difficulties in a host State that arise out of acts or omissions of that State (including the executive, the courts, the legislature, administrative, and regulatory officials).

Over the last couple of decades, as BITs, multilateral agreements and regional free trade agreements have grown in number, investor-state arbitration has

² http://bit.ly/1RRsFBO
³ http://bit.ly/1RRsIhw
become a widespread system of adjudication.

As that system has grown, so too have grown concerns that decisions by arbitral tribunals can limit State sovereignty. Such concerns have resulted in strenuous objections from some quarters to inclusion of investor-state arbitration in the ongoing negotiations for the Transatlantic Trade and Investment Partnership (TTIP), a proposed free trade agreement between the European Union and the United States, and the Trans-Pacific Partnership (TPP), a proposed regional regulatory and investment treaty among the United States.

Opponents to including arbitration chapters in the TTIP and the TPP assert that national courts can provide sufficient remedies. Such objections overlook the fundamental fact that the growth of investor-state arbitration (and, more generally, international commercial arbitration) is due in significant part to practical obstacles to resorting to courts (lack of jurisdiction and lack of a multilateral framework for enforcement of foreign judgments to name only two) and concerns that local politics may impact judicial decision-making. Absent a stable rule of law and a functional global process for dispute resolution, global investment, trade and economic growth will likely suffer.

“The fate of investor-state arbitration depends, in part, on those who rely upon it to protect their investments and global trade.”

A Word to the Wise Inside Counsel

Each of the above trends has potentially huge impact to global businesses. Opportunities such as a convention that would enhance acceptance of conciliation/mediation around the world may not bear fruit if in-house counsel do not speak up in support. The fate of investor-state arbitration depends, in part, on those who rely upon it to protect their investments and global trade.
WHY MEDIATE? The overwhelming majority of commercial disputes settle. Voluntary mediation enables parties to achieve a better settlement earlier and, thereby, to reduce costs and disruption to your business. It also gives parties the valuable opportunity to speak directly to each other with the assistance of a neutral third party.
Incentives for Outside Counsel to Embrace Dispute Resolution Options

Jennifer Glasser
Senior Associate, White & Case LLP

Corporate clients rely on a diverse toolkit of techniques and options beyond litigation—ranging from negotiation, mediation and arbitration to expert determination and dispute resolution boards—to resolve their disputes. The three incentives below might help convince your outside counsel to get out of the courtroom and join you in exploring Alternative Dispute Resolution (ADR) techniques if they have not yet done so.

1. Clients Prioritize ADR and Global Dispute Management

The role of corporate law departments has transformed significantly in recent decades. Gone is the notion that in-house counsel manage disputes by overseeing litigation after the eruption of a dispute. The first wave of change began with a movement by companies to embrace ADR before turning to litigation in recognition of the business advantages of ADR, including:

- ADR allows companies to tailor dispute resolution to their issues and disputes.
- In many cases, it provides a cheaper and quicker alternative to litigation that better preserves long-term business relationships.
- ADR can often be deployed in the resolution of cross-border disputes more effectively than domestic litigation which has little value if the foreign counterparty does not have assets in the jurisdiction where domestic litigation is being pursued.

“Proactive dispute resolution management is the next frontier. Rather than handling disputes on an ad hoc basis each time a new one arises, companies are adopting processes for global, systemic dispute management that allow for early detection and resolution of disputes in order to further reduce the costs, time, and risks of dispute resolution.”

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management that allow for early detection and resolution of disputes in order to further reduce the costs, time, and risks of dispute resolution.

These trends have changed not only the way companies manage disputes within the organization, but also how they select outside counsel. For example, a 2013 survey on Best Corporate Practices in Conflict Management from France published by the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR) and French law firm Fidal showed that dispute-savvy French companies no longer outsource individual cases to outside counsel on an ad hoc basis, but instead partner with law firms to develop a dispute resolution approach that is tailored to the dispute and the underlying issues.

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By adapting their skill set and philosophy to align with their client’s dispute management objectives and strategies, outside counsel can develop broad, long-term relationships with their clients based on a shared culture of dispute resolution.

2. Outside Counsel Can Work Side by Side with Clients to Tailor ADR Processes

The ADR landscape has a built-in feature that can respond to users’ needs and drive change: the institutions that administer arbitrations and other ADR processes.

Recent initiatives to reduce costs and improve efficiency in arbitration are one example of how the ADR community has taken action to address user complaints. In addition to protocols and guidelines that establish best practices for efficient and cost-effective dispute resolution, most of the major arbitral institutions have amended their arbitration rules within the last two years to further these objectives. Some of the changes include new provisions that allow for emergency arbitration as well as joinder of additional parties and consolidation of multiple arbitrations, expedited procedures that apply to lower value disputes, and amendments that encourage mediation. While each institution follows its own process for amending its rules and preparing guidelines, the process typically includes consultation with in-house counsel, outside counsel, and arbitrators who sit together on task forces and committees.

A few lessons can be gleaned from these recent initiatives.

First, ADR offers a unique opportunity for outside counsel to play a role in the organizations and institutions that drive the ADR processes to advocate for changes that are in their clients’ interests.

Second, outside counsel can work alongside in-house counsel on committees and task forces, opening the door for outside counsel to build new client relationships.

Third, if these initiatives are successful, more in-house counsel will likely turn to arbitration to resolve their disputes. In a 2013 survey on Corporate Attitudes in International Arbitration prepared by Queen Mary University of London’s School of International Arbitration and PricewaterhouseCoopers, 52% of respondents considered arbitration as the preferred method of dispute resolution for cross-border disputes, while 73% indicated that arbitration is suited to the resolution of their disputes. For those respondents who stated that arbitration was not well suited to their industry, the most common complaint was cost, followed by delay, rather than any industry-specific factors, suggesting the potential for arbitration to grow if the community can rectify cost and delay issues. Outside counsel can position themselves to handle these new matters by expanding their dispute resolution toolkits to include arbitration.
3. ADR Raises Cutting-Edge Policy Issues

As an alternative to dispute resolution before national courts, ADR gives outside counsel an opportunity to participate in a dialogue on cutting-edge policy issues. The current debate on whether the U.S. should sign the Trans-Pacific Partnership (TPP) in light of its investor-State dispute settlement (ISDS) chapter is a case in point. The ISDS provisions would allow nationals of one State to bring an arbitration against another State for violating certain minimum standards of treatment with respect to investments made in that State. ISDS provisions are common in trade agreements and bilateral investment treaties. They provide a forum for investors to bring claims against host countries where none existed previously outside of domestic legal systems that are often partial to State interests (or are perceived to be by foreign investors) and international diplomacy. Opponents of ISDS in the TPP have criticized it, among other reasons, as an infringement on State sovereignty that would have a chilling effect on State regulation in the public interest.

“As an alternative to dispute resolution before national courts, ADR gives outside counsel an opportunity to participate in a dialogue on cutting-edge policy issues.”

Conclusion

As clients look to settle their disputes with techniques other than litigation, the pool of litigation work for outside counsel will shrink. However, by embracing dispute resolution options other than litigation, and working with ADR institutions and organizations to drive change, outside counsel can position themselves optimally as a long-term partner of their clients in building a dispute management strategy. An added bonus is an opportunity to work on the frontline of cutting-edge policy issues.

If made aware of its importance to their clients, most outside counsel would willingly educate themselves about ADR and begin a dialogue about using ADR to further the client’s business objectives, keeping in mind that dispute resolution is not one size fits all.

This article originally appeared in InsideCounsel in June 2015.
WHAT IS ARBITRATION? Arbitration is a binding dispute resolution process in which an independent, impartial and neutral third party (an arbitrator or arbitral panel) considers arguments and evidence from disputing parties, then renders a decision or award. Generally, arbitration decisions are subject to only very limited forms of appeal.
Inside counsel’s strongest contributions to dispute resolution flow directly from being positioned as the intermediary between inside business objectives and outside legal forces.

To exploit being thus situated to greatest effect, recognize and take advantage of your strongest tools:

**You are Known and Trusted**

You are a business-oriented lawyer with industry knowledge and open access to a business unit that knows and trusts you. You understand the enterprise—not just the importance of the current challenge, but also your firm’s history and long-term objectives as it constantly reshapes itself. Because you are a leveraged resource, your clients know that they can freely call you without additional expense, a concern that can inhibit contact with the private law firm. They know that you are “bilingual,” and can be counted on to translate business talk to legalese and back. In an unspoken way, they may even expect you diplomatically to buffer outside disruptions to company politics.

**You Keep Up the Drumbeat of Serving Commercial Goals**

Achieving business objectives often may be different from merely “winning the case.” As you advocate for ADR as a business risk mitigation engine, for the sake of all, you should begin every client contact by revisiting this question: “What are our business goals in this matter?” You can then forearm your outside counsel with the wisdom necessary to achieve an acceptable outcome; an understanding of the client’s true underlying interests. Serving those interests optimally (despite the pressures of fact and law) is victory, even if the result of the legal maneuvering superficially may resemble a controlled crash landing.

**“You understand the enterprise—not just the importance of the current challenge, but also your firm’s history and long-term objectives as it constantly reshapes itself.”**

You Bring Critical Institutional Knowledge

Savvy outside counsel recognize that your access to the company and experience resolving prior controversies
“To prevent mishaps from ADR clauses, a legal department does well to promote the idea that just as every business arrangement is different, so should there be a different dispute procedure, fashioned by someone who a) understands the deal underway and b) is expert in ADR.”
for the firm can increase their own effectiveness. While outside counsel should be granted early and thorough direct interchange with the business team, as well as continuing visits, successful collaboration between the two of you depends on your superior power to fetch concepts, data and true goals from inside.

**Your ‘Cred’ Allows You to Venture Where Others Might Fear to Tread**

You alone dare to take certain actions which will further adjustment of a business controversy. It may be necessary to “sell” ADR to executives who had an earlier bad experience and require convincing that a good compromise leaves both sides equally unhappy. If a manager has been instructed to make an unreachable goal, you can furnish cover by explaining the legally-driven risks of the best alternative to a negotiated or arbitrated outcome through public adjudication. That might require an artfully timed request to the outside lawyer for an updated case assessment, which will aid your immediate client in communication with senior management, legitimately portrayed as the legal team’s consensus. Conversely, your urgings to stand strong can hearten an overly conservative and wavering client who needs your experienced perspective to predict how complex facts likely will emerge from the legal mill to an acceptable outcome.

“**Achieving business objectives often may be different from merely ‘winning the case.’ As you advocate for ADR as a business risk mitigation engine, for the sake of all, you should begin every client contact by revisiting this question: ‘What are our business goals in this matter?’”**

**Think of Yourself as the Secret Weapon**

Direct action by inside counsel can emphasize the importance of a point or principle. If you speak up—or collar your opposite counterpart privately during a mediation conference that has bogged down despite your law firm’s best conduct, the counterparty will take note of that point in bold relief. The mediator will thank you for a willingness to move, a creative idea for value exchange, or a firm and fair explanation of a limit caused by business imperative. Of course, you will have coordinated with your team before moving. Be an energetic voice to the other side when it can count most.

**You Can Also Serve as the “Control Tower”**

In arbitration, consider being the active expert in a defined subject area, personally handling witnesses and documents. You might be the best person for the job due to long commercial participation. During case development and hearing, it also is valuable to be in a (slightly) detached role, relaying a trained perspective on how the arguments, personalities and tone are going over with the neutrals and opponent.

**Put Together the Nuts and Bolts**

Before you get the chance to try out the preceding advice, you must lay the foundation of making appropriately tailored dispute resolution practices available to your clients consistently over time, especially assuring that each contract uses a competent clause that will lie ready to assist the parties during future discord. It often is repeated, but remains true: in the closing moments of many deals, the drafters realize a need to plan for some combination of negotiation, mediation, arbitration and/or litigation, so someone fishes out a good-looking clause from a prior contract and inserts it. It is among the last provisions added. And yet when trouble erupts, what is the first thing researched? That clause. There’s something wrong with that. Too often, an ill-suited or even “pathological” clause confuses proceedings or disadvantages even the party that proposed it.

To prevent mishaps from ADR clauses, a legal department does well to promote the idea that just as every business arrangement is different, so should there be a different dispute procedure, fashioned by someone who a) understands the deal underway and b) is expert in ADR.
Establishing a departmental expert—a seasoned litigator or commercial lawyer—can be a foundation of promoting the company’s ADR culture.

Many easily-located resources from provider organizations can help with clause drafting at the time of contract (or even after disagreement surfaces, if need be). The best overall advice is to keep the provision as simple as possible, guiding a straight path to resolution using the fewest steps and special features.

“You alone dare to take certain actions which will further adjustment of a business controversy. It may be necessary to ‘sell’ ADR to executives who had an earlier bad experience and require convincing that a good compromise leaves both sides equally unhappy.”

When describing the panoply of ADR options, or predicting the likely course of an impending proceeding to either executives or in-house colleagues, try to build from the most basic concepts. A manager who has been through litigation before may think she knows how arbitration will go, but don’t allow anyone to be surprised by things you take for granted, such as the lack of appeal from arbitration or the ability to instruct a mediator to keep a secret. Your care will enhance connection and trust. As an in-house practitioner, my consistent experience was that never was another professional insulted by a return to elemental grounding; they were grateful.

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WHY ARBITRATE? As many cutting-edge companies are starting to realize, when appropriate and when structured using the best rules for your situation, arbitration is a powerful option that can cut costs and give you the flexibility, confidentiality, finality and neutrality that you need.
Online Dispute Resolution (ODR) and the Future of Law

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Commercial transactions routinely circle the globe in milliseconds. But if a problem arises, resolutions are still largely tied to paper-bound, in-person processes. Business has gone virtual, but the resolution of disputes is still primarily a face-to-face endeavor. To stay relevant to the challenges presented by global business we need to adapt our resolution systems to the new realities of a networked world.

This is the focus of the field of Online Dispute Resolution, or ODR, the application of information and communications technology to the task of resolving disputes. ODR emerged as dispute resolution for online commerce in the late 1990s, but it has since expanded to most areas of civil redress. As ODR solutions have evolved they have increasingly been applied to higher value and more complex cases. Because ODR need not be tied to precedent or jurisdiction, ODR solutions work the way the internet works: distributed, customized and scalable.

The chief challenge faced by ODR is that the pace of change in the law is often frustratingly slow. It is tempting to explain this slowness by saying that lawyers are resistant to change, but the new generation of legal leaders are far more open to technology than their predecessors. The reality is that the law is intentionally designed to move slowly and deliberately. For the law, a system in which due process is essential, “creative disruption” (the mantra of technology innovators) is anathema.

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The law, however, is not immune to change. Driven by pressures to provide greater access to justice, greater relevance to the needs of today’s economy, and the growing importance of information security—the law is evolving to incorporate ODR because this solution is uniquely capable of keeping pace with those issues. As technology creates opportunity, it also poses new challenges, and technology is essential to addressing those challenges.

For example, as technology has expanded our reach,
“Through its unique ability to go beyond addressing challenges and to provide processes that better meet all users’ needs, ODR has huge potential to transform every aspect of dispute resolution.”
legal systems around the world are facing extraordinary challenges in providing access to justice. Twenty years ago, the only entities with cross-border, international disputes were businesses, and most likely the average value of those disputes was in the hundreds of thousands, if not the millions, of dollars. Dispute resolution techniques were tailored to their needs, and current costs reflect that. Today, any consumer with a Web browser can make a purchase anywhere in the world. Teenagers have commercial disputes that can touch several continents in a matter of milliseconds. The expensive and manual commercial arbitration processes of old won’t work for these new kinds of disputes. While the rich can afford high priced lawyers, the poor—and, increasingly, the middle class—are left to fend for themselves as pro se litigants. We need a more streamlined and efficient form of dispute resolution that works for all types of cases and litigants. Over the next few years, ODR will help to meet that need, and in so doing, will expand access to fair and effective dispute resolution to populations that are currently underserved—not only facilitating the resolution of commercial disputes, but increasing access to justice across other realms of human existence.

The promise of ODR is driven home by the market’s response to the U.S. Supreme Court’s decision in the AT&T v. Concepcion case. Companies are rapidly incorporating mandatory arbitration into their consumer contracts, eliminating the prospect of class action or court based hearings in those cases. The benefits of this approach go beyond more efficient dispute resolution. As one major corporation and CPR member recently observed, its consumer arbitration program has improved its customer service across the board because it enhances the company’s ability to engage with a customer in the earliest stage of a dispute, and uses information gleaned from individual cases to identify and address issues for its consumers as a whole.

There is, however, a significant challenge embedded in taking this approach. Available arbitration mechanisms are still largely paper-based, manual processes. The minimum filing fee for these processes can be in excess of $1,000. How is it that these consumer arbitration cases, many of which will be only for a couple hundred dollars, will be addressed through flows that cost more than a thousand dollars to initiate? The only answer is technology. Online arbitration can offer streamlined flows at a price point that can handle these kinds of low dollar value consumer cases while still providing a procedurally fair and unbiased process. Equally, important, as research by eBay and PayPal has shown, as ODR expands access to effective dispute resolution, it will enhance relationships and build customer loyalty.

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These fundamentals drive adoption of ODR and fund creation of an ODR infrastructure, but that infrastructure is not limited to commercial uses. Governmental entities are embracing ODR to better serve citizens, courts are embracing ODR in areas such as family law, and ODR has the potential to enable the law to leapfrog traditional impediments to access to justice in the same way that mobile phones have enabled people around the world to escape the limits of landlines.

Likewise, ODR addresses information security—an issue that is critical to business success and to individual peace of mind. In today’s networked world, the very network and innovation that drives business can also threaten business, and most critically, its customers. Every time an in-house lawyer sends a legal document via email, they are essentially engaging in ODR—only a very primitive and not necessarily secure version. Managing threats to the security of data when it is in the hand of others is on the mind of every general counsel and chief risk officer. Dispute resolvers in particular
have a professional obligation to ensure the security of information shared in resolution processes. Effective, secure and formal ODR is the only way to ensure that confidential information remains protected, and that dispute resolution service providers meet their ethical obligations.

“Dispute resolvers in particular have a professional obligation to ensure the security of information shared in resolution processes.”

A Word to the Wise Inside Counsel

Through its unique ability to go beyond addressing challenges and to provide processes that better meet all users’ needs, ODR has huge potential to transform every aspect of dispute resolution. This transformation will include all forms of dispute resolution, including the traditional forms of arbitration, and will introduce new approaches to dispute resolution as well. Technology-facilitated resolution will expand the reach and scope of dispute resolution across all types of modern business, large and small, for cases, large and small. Using ODR will enable businesses to enhance dispute resolution for all customers, including consumers, and in so doing, enhance business itself.

We see a bright future for ODR. A future in which the value of ODR to all is so obvious that we will one day say "what took us so long?"

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The International Institute for Conflict Prevention & Resolution (CPR) is an independent nonprofit organization that, for more than 35 years, has helped global businesses prevent and resolve commercial disputes effectively and efficiently. Our membership consists of top corporations and law firms, academic and government institutions, and leading mediators and arbitrators around the world. We are unique as: (1) a thought leader, driving a global dispute resolution culture; (2) a developer of cutting-edge tools and resources, powered by the collective innovation of its membership; and (3) an ADR provider offering innovative, practical arbitration rules, mediation and other dispute resolution procedures, and neutrals worldwide.