# CPR Product Liability Toolkit

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EXECUTIVE SUMMARY

CPR’S TOOLKIT FOR THE EARLY RESOLUTION OF PRODUCT LIABILITY CLAIMS

The Business Case for Early Resolution of Claims

- Fewer than five percent of all product liability cases filed in court are tried to final judgment.

- In litigation, time is money and it is in the parties’ interests to minimize the amount expended in transactional costs—including counsel and expert fees and discovery costs.

- Settlements struck on the courthouse steps are often less favorable than settlements obtained earlier in the process and the transactions costs of waiting to the eve of trial can more than offset any perceived benefit of later settlement.

- Time spent by business on litigation is time taken from focusing on the core business.

THE CPR PROTOCOL FOR THE EARLY RESOLUTION OF PRODUCT LIABILITY CLAIMS

[Tab 1] provides a disciplined framework within which business can consistently achieve more efficient and cost-effective outcomes in product liability litigation. The Protocol consists of five elements:

- A Corporate Pledge to use the Protocol in all product liability cases—The Pledge serves as a “neutral” basis for beginning negotiations with the other party without any implications of weakness or fault. [CPR 21st Century Pledge and CPR Pledge—Tab 2]

- Whenever possible, incorporation of an Early Resolution process in any contractual agreements of a type that may result in product liability claims. Where that is not possible, a commitment to transform standard court-adjunct mediation (which is now nearly universal) into a substantive Early Resolution process using skilled settlement counsel and/or mediators. [CPR Model Mediation Clauses—Tab 3; Economic Litigation Agreement—Tab 4]

- Early Case Assessment to analyze the strengths and weaknesses and financial implications of a claim at its inception. The results of the Early Case Assessment form the foundation of the strategic plan for the case, including identification of necessary information exchange, identification of any issues that may require a decision prior to Early Resolution efforts, optimal timing of Early Resolution efforts, and the form of Early Resolution (negotiation or mediation) most likely to result in the desired outcome. [CPR Corporate Early Case Assessment Toolkit—Tab 5; CPR Suitability Guide—Tab 6; Early Case Assessment Executive Summary—Tab 7]

- Limited Early Information Exchange designed to assure that both parties have sufficient information upon which to reach Early Resolution. [Sample Agreement—Tab 8; for other examples, see CPR Economic Litigation Agreement—Tab 4 and CPR Global Rules for Accelerated Commercial Arbitration, Rules 11-12—Tab 9]

- Initiation of an Early Resolution process leveraging the results of the Early Case Assessment and Early Information Exchange and using skilled settlement counsel and/or a mediator to maximize the likelihood of success. [CPR Mediation Procedures—Tab 10; See discussion of roles and approaches in the Protocol—Tab 1 and Success Story—Tab 11]
TAB 1

The CPR Protocol for the Early Resolution of Product Liability Claims
CPR’s Protocol for the Early Resolution of Product Liability Claims

INTRODUCTION

Manufacturers are confronted regularly with a substantial volume of personal injury and property damage claims arising from use of their products, alleging defects in design, manufacture or inadequate warnings.

A substantial number of individual product claims and suits against manufacturers can be settled early, on reasonable terms, without adverse consequences to the broader interests of the claimant or the manufacturer, by adopting procedures encouraging best practices in managing claims towards early and fair settlement.

The following are some of the factors to be considered in formulating a statement of best practices in product cases:

1. It is in all parties’ interest to minimize the total amount expended in transactional costs, including the time of lawyers, corporate executives and experts.
2. Substantially more discovery is required – and, thus, substantially more expense is incurred -- in preparing for trial than in preparing for settlement negotiations.
3. Fewer than five percent of all product liability cases filed in court are tried to final judgment.
4. Settlements struck “on the courthouse steps” are not necessarily more favorable to either claimants or defendants than settlements obtained earlier in the process. Thus, many cases can be settled earlier than they currently do, on fair and reasonable terms.
5. When a claim is first asserted, the parties often lack the information needed to determine its value. Thus, some amount of information exchange is required to provide a platform for negotiated settlement.

In truth, many product cases that are destined to settle will actually settle much earlier, if

a. early on, and by informal means, the parties exchange sufficient information to evaluate the case;
b. rigorous settlement negotiations are opened promptly thereafter; and
c. in the event of an impasse, mediation is implemented rather than the negotiations' failing.

ADOPTING AN ADR POLICY AND PROCEDURE

The Committee recommends that companies adopt a general form of policy embracing alternative forms of dispute resolution when confronted with commercial disputes, including product liability cases. A form of such general policy statement is set forth in Exhibit A.

The Committee also recommends that companies confronted with product suits (a) identify the types of cases which are likely to be suitable for early settlement efforts; and (b) adopt a practice of making early good faith efforts:
(i) to arrange with the plaintiffs attorney for an informal exchange of information necessary to evaluate the case; and
(ii) following such evaluation, to strive for a fair disposition of the case.

Senior management “buy-in” is critical. Some attorneys find that certain of their clients remain concerned that proposing settlement early will signal weakness or lack of confidence in the product which is the subject of the claim, or that it will result in an increase in claim volume. The proposed procedure should be discussed with senior management, whose support should be sought. The economics of early settlement, versus the traditional approach, should be explained. If some managers believe a particular product should be defended regardless of cost, their views should be heard.

We recommend that the general counsel, after appropriate consultation with staff, provide ground rules as to the types of cases for which early settlement should be attempted. The degree of risk of loss in litigation in a particular case should not influence the determination as to whether to propose early settlement efforts. However, the defendant’s appraisal of risk of loss should and will influence the amount for which the defendant is prepared to settle. That appraisal may well change as the proposed procedure unfolds.

The general counsel should consider how best to assure implementation of the procedure. For most companies, words of encouragement or a written general policy statement need to be followed up by detailed procedures.

THE ROLE OF EARLY CASE ASSESSMENT

In today’s highly litigious business climate, many legal departments have worked to develop new definitions of “value” and “win” by treating disputes as a business process, and protracted litigation as a defect to be remedied. One effective tool for controlling disputes and reducing or eliminating litigation is the Early Case Assessment (ECA) process.

An ECA procedure provides a structured approach for conducting early evaluation of a dispute and can be adjusted by in-house counsel to meet the particular needs of their business. It can be applied in whole or part depending on dispute circumstances to conduct early, rapid and consistent analysis of a dispute to find the most effective resolution path geared toward limiting corporate expenditures, serving business concerns and utilizing the most appropriate conflict resolution process.

Early case assessment processes have become routine in companies that are committed to systematic use of ADR. These processes are intended to:

a. provide the responsible in-house attorney with a written guidance such as a screen, to assist in analyzing a case for early settlement suitability;

b. require an assessment as soon as possible, usually within 90 days of first notice of a claim, whether early settlement/mediation should be attempted;

c. require completion of a suitable form by the responsible attorney.

CPR provides a detailed, step-by-step guide for users who are less familiar with the concept of ECA and seek a more comprehensive analytical model. To download CPR’s Corporate Early Case Assessment Toolkit, visit www.cpradr.org. For sophisticated users who are familiar with
the elements of the ECA process, the Executive Summary of Building Corporate ADR, contained in Appendix B, contains an excellent checklist of steps to be taken.

The process calls for a team working together in a specified time frame to gather the key facts of the dispute, identify the key business concerns, assess the various risks and costs the dispute poses for the company, and make an informed choice or recommendation on how to handle the dispute.

While one of the possible recommendations could be to settle or resolve the dispute, CPR wishes to emphasize that these Guidelines are not about settlement, although that could be one possible outcome of Early Case Assessment. Instead, the focus is on evaluating the dispute so that an appropriate strategy can be formulated, whether that is settlement, full-bore litigation, or something in between, with an eye toward reducing or eliminating disputes as soon and as inexpensively as possible.

If the initial assessment results in a conclusion not to pursue settlement efforts at that time, or if the plaintiff's attorney is not then amenable to such efforts, the exercise should be repeated at critical junctures in the pre-trial process.

General guidelines should not be a substitute for the professional judgment of the attorney responsible for the case. In most corporate law departments that have a policy favoring early settlement efforts the attorney is given discretion as to how to handle the individual cases, subject to more or less formal guidelines. In some law departments the assessments of the first line attorney are monitored by a supervisory attorney.

CPR has long advocated that companies and law firms appoint a senior attorney as the point person for ADR—the ADR Counsel or Settlement Counsel. Unless the general counsel is prepared to assume this responsibility, (s)he should designate a senior staff member, or a small committee, with responsibility for assuring proper implementation and evaluation of the early settlement program. The company's policy and procedure with respect to early settlement should be communicated explicitly to outside counsel by retainer letter or in another manner, and compliance should be monitored.

**BENEFITS OF EARLY CASE ASSESSMENT**

- Enhanced, early case analysis
- Enhanced, early risk identification and analysis
- Enhanced, early evaluation of potential end-game solutions
- Enhanced ability to gauge business needs and solutions, and improved client relations
- A reduction in legal costs and expenses
- A reduction in settlement and resolution costs
- A reduction in the “claim-through-resolution” cycle time

As the accompanying article written by Phillip Armstrong for the American Corporate Counsel publication “Docket” (see Appendix D) sets forth so well, the ultimate benefit of early case evaluation and resolution exploration is the “endless hours of time and millions of dollars in expenses ...” that will revert to the Corporation’s bottom line.¹ This article is illustrative of the

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experience of many Corporations that have thoughtfully adopted an ADR program. Furthermore, there is little downside, if any, when early dispute resolution exploration is a general policy of the Corporation.

SUITABILITY FOR EARLY SETTLEMENT

The growing adoption of Early Case Assessment programs arises from the mandate of in-house legal departments to better and more effectively manage litigation, in terms of outcome and cost, and to do so with better calculation of the business interests and objectives implicated by that litigation.

In addition, in-house legal departments have at their disposal more and better tools for gathering necessary data to assess litigation risks and solutions, measure progress, communicate lessons learned, and track successful strategies and solutions. Early identification of risks, business prerogatives, likely outcomes, and potential alternative resolutions should be a part of every Early Case Assessment program.

Product claims vary greatly not only in severity of injury, but also in their potential effects on larger corporate interests. A cancer claim based upon exposure to a product, the carcinogenicity of which has not been established, raises different issues than the claim of a person injured by falling off a ladder.

Nevertheless, products claims seldom arise sui generis or without notice. The bulk of individual product liability claims for most companies involve cases:

a. in which the product at issue has been the subject of prior claims;
b. as to which the legal issues are fairly straightforward and only the facts are at serious issue;
c. that the company has been settling regularly, whether early or late in their cycles; and
d. that are not totally without merit on their face.

Cases such as those described above are manageable, and should be assessed systematically for early settlement efforts, whether they involve personal injury, property damage or both.

Additional factors weighing in favor of early settlement efforts are:

a. where the case is of modest size, and the costs of full-scale litigation are disproportionate to the liability at issue;
b. where there is little doubt about the company's liability; the amount of damages being chiefly at issue;
c. the case is pending in an uncertain or unfavorable forum; and
d. the parties are represented by counsel who may be trusted to act in good faith and be amenable to reasonable and fair settlement terms.

Once the responsible attorney determines that a case is suitable for early settlement efforts, that view should be communicated promptly to the counterparty's attorney.

A proposal to discuss settlement early on should not be interpreted as a sign of weakness or as lack of faith in the proposer's legal position. The attorney should be informed that the proposal is
made pursuant to policy or practice, regardless of the strength of the claim. Several hundred law firms and companies, including many of the nation's largest, have subscribed to the CPR Policy Statement on Alternatives to Litigation (Exhibit A). If the counterparty has signed that statement, reference to it will facilitate this point.

EXCHANGE OF INFORMATION

Counsel should consult on an early exchange of information of a nature which the parties would likely be obligated to provide later in the course of discovery. The information each side will require will depend on the circumstances of the case and on the attorneys' judgment.

Claimant should be prepared to provide the following information:

- a description of the incident or event out of which the claim arises, including the time and place and a particularized description of the product allegedly involved and how it was being used at the time of the incident;
- an itemization of medical expenses, special damages and wage and other economic losses;
- a particularized statement of the nature of the claim, including any facts supporting a design or manufacturing defect or warning inadequacy, and any existing test results;
- copies of all medical and hospital reports and records pertinent to the injuries sustained arising out of the incident or related to the parts of the body involved in the case;
- authorizations for income tax returns in case where a lost income claim is presented;
- witness statements;
- opportunity to examine the product or part in issue;
- opportunity to conduct an IME;
- disclosure of the identity of any experts plaintiff plans to use, and any available written expert report relating to the case.

Defendant should be prepared to deliver:

- A response to the claim, including defendant's defenses and the basis therefor;
- pertinent product documents, such as labels and manuals;
- pertinent information concerning similar incidents;
- disclosure of the identity of any experts the defendant plans to use, and any available written expert report relating to the case.

Additional requests by either party should be considered. If the defense requests that the claimant be examined by a doctor other than claimant's own physician, claimant will receive a copy of the examining doctor's report and test results.

Interviews of the claimants may be conducted, as well as any key witnesses, on an informal basis and subject to reasonable conditions, such as duration and location.

If the defense wishes to have the product tested, the plaintiffs attorney or consultant may wish to be present and/or to receive a copy of the test report. The plaintiff's attorney also may seek information as to prior similar product claims.
The Committee believes that the parties should strive to complete their informal information exchanges within 60 days of agreeing to explore early settlement.

Deferral of formal discovery should be agreed upon, while this process of preliminary fact-finding and negotiation is underway. The attorneys should confirm their understanding in writing. A simple agreement defining the scope and timing of the voluntary disclosure of information should be prepared. An example of such an agreement is attached as Exhibit C which includes a list of materials that could be exchanged during the preliminary fact-finding efforts. The parties, of course, may modify the agreement as their particular dispute warrants.

It is helpful if the attorneys have confidence in each other’s integrity. In any event, it is critical that each act in good faith and not attempt to mislead the other.

While the facts of each case differ, there usually are strong similarities among cases generated by a product line that gives rise to recurring claims. An attorney who has handled a series of such claims is well positioned to evaluate a new claim as to likelihood of liability and damages, once critical information regarding the circumstances of the case is determined.

The approach we propose will be novel to some attorneys. One or both counsel may need to be convinced that the other is acting in good faith, and that they are risking very little by agreeing to the procedure.

The experience of those who have tried this procedure is that the great majority of counterparties will agree quite readily to an informal information exchange and to early settlement negotiations, whether such negotiations are direct or facilitated by a mediator.

**SETTLEMENT NEGOTIATIONS**

Following the information exchange and evaluation of the claim, the attorneys should promptly engage in settlement negotiations, unless they have agreed to go directly into mediation without prior negotiations. These negotiations should commence within 30 days of the completion of informal information exchange.

Most advocates are capable of making objective evaluations of settlement value. Criteria exist for appraising the approximate value of a specific claim in a given locality. The counsel’s own experience in similar cases will serve as a guide, as will jury verdict research and local experience. At the outset, some parties may be unduly optimistic as to their chances, and over-optimism can lead to unrealistic initial positions. However, the high percentage of cases settled before trial suggests that most parties can and do appraise their cases realistically once the facts and theories of a case have been developed and understood.

The imminence of trial serves as a powerful incentive to both parties to engage in realistic negotiations. Other “settlement events,” such as mediation, also can induce both sides to focus on the case, to make a realistic assessment, and to negotiate seriously. Of course, the mediator’s role is to assist each party to realistically appraise each claim and defense, and to help them bridge the gap between their initial positions.

**MEDIATION**

There are a number of non-adjudicative ADR procedures in addition to mediation, including early neutral evaluation, the mini trial, neutral fact-finding, the summary jury trial, and non-
binding arbitration. However, mediation has become by far the most widely used of these procedures, and mediation is sufficiently flexible to encompass elements of all other procedures. The members of our Committee who use ADR are strong advocates of mediation. Mediation can be introduced at any time in the early settlement exploration process. The Committee believes that mediation should be commenced within 120 days of the agreement to explore early settlement.

Product liability disputes can be resolved through binding arbitration. However, it is rare for either party to prefer binding arbitration, and even more rare for both parties to agree to it. Consequently, we do not address this option.

An abundance of information is available on mediation, including many published by CPR Institute. It is not our purpose to add to the existing literature. However, some comments are in order:

a. **Parties engaging in mediation need a procedure.** The CPR Mediation Procedure was developed by a committee of highly experienced and respected mediators and practitioners. It is designed for parties who do not seek third-party administration of the process, trusting each other and the mediator to perform this function. It has stood the test of time and we recommend it.

b. Once the parties agree to mediation, **selection of the mediator** (discussed below) is one of the important decisions they have to make.

c. It is virtually essential to success that the claimant and the company representative with decision-making authority **participate in person** in the mediation.

d. It is common for the parties to **submit written statements** to the mediator before the first session, but some prefer to "start cold" and to educate the mediator during the session. Opening statements may be offered, but should not be made in a way so as to polarize the parties and hence reduce the likelihood of settlement.

e. The earlier the mediation is held, the greater the opportunities for savings in defense costs. However, each side must first **obtain sufficient information to evaluate the case** and engage in negotiations with a reasonable comfort level.

f. While the length of a mediation can vary considerably, typically mediations of product cases are concluded in **one all-day session**.

g. Under the CPR Procedure **either party can terminate the process at any time** after the first mediation session.

h. The "**success rate**" in mediation over time reported by CPR and other providers of mediation services is approximately **80 percent**. This figure is an understatement, in that it does not include cases that settle later in consequence of mediation.

i. The "**satisfaction rate**" on the part of attorneys and clients in successful mediations is **uniformly high**. For most persons mediation is a far more satisfying experience than litigation, even if they had to compromise to reach a settlement.

**I. Advocating in Mediation**

Counsel in mediation should be skilled negotiators and should have experience in negotiating settlements of similar cases. They should enter into the process with an open mind, not with a
fixed position. Hearing the counterparty’s account and appraising how persuasive a witness (s)he would be, appraising the effectiveness of the opposing attorney, and the mediator’s contributions, all are likely to have a significant impact on these people’s views of the case and of what represents a fair settlement.

II. The Mediator

Some experienced counsel divide mediators into deceptively neat categories: "facilitative" mediators and "evaluative" mediators. In theory, facilitative mediators will focus mainly on party interests and help the parties generate solutions, while evaluative mediators urge the parties to make frank assessments of the legal merits of their positions. Through pointed questioning they may lead the parties to reevaluate the likely outcome of a trial.

In practice, many mediators begin with a facilitative approach and shift to an evaluative approach as the mediation progresses. Nevertheless, it is useful for parties selecting a mediator to decide which style they prefer and to make their preferences known to the prospective mediator or the provider organization. Even an evaluative mediator seldom expresses an opinion on the likely outcome of the case in court, except as a last resort; and even then only if the parties request such an opinion and the mediator feels qualified to give it, subject to any limitations under applicable statutes, rules or ethical codes. Once having done so, the mediator's credibility and continued utility are likely to be seriously impaired, at least in the view of one of the parties, and further mediation efforts may prove futile.

Highly capable mediators are not in abundance. A combination of talents is required to assist parties to resolve intractable and emotional conflicts. The ability to build trust and credibility, creativity, an ability to overcome obstacles and a determination to achieve a settlement are particularly important.

Most users of mediation for product liability cases, including the members of our Committee, agree that the primary prerequisite in a mediator is process skill, not legal familiarity. Experience in the subject matter can be very helpful, but many a specialist (or retired judge) lacks the skill set that makes a good mediator. The parties may have difficulty agreeing on an attorney who regularly represents either plaintiffs or defendants, even if in fact that attorney is truly neutral and impartial.

Personal interviews of mediator candidates are not uncommon. In any event, the parties should request background information on mediator candidates.

Once a mediator has successfully concluded a mediation and has favorably impressed the parties or their counsel, the individual may be called on to serve in other cases.

III. Role of the Provider

Some parties have found that their counterparty is more receptive to a proposal to mediate that is made by a neutral organization that offers mediation services, rather than directly from the opposing counsel. Such an organization may be adept at explaining the advantages of mediation, deflecting suspicion about the motives for the suggestion, and addressing any concerns the party may raise. CPR and other neutral organizations regularly play this role.

IV. Role of Law Firms
The Legal Departments of some large companies will not only make assessments as to early settlement suitability but frequently will handle suitable cases. A majority of companies refer most matters in litigation to outside counsel, regardless of defense strategy. And, of course, claimants are almost invariably represented by counsel. Many law firms assume that they were hired to win, not to settle, that the client wants them to defend product cases in the traditional manner—unless they are told otherwise.

An increasing number of firms do take the initiative in suggesting attempts to settle early, particularly to long time clients, but it is logical for the client to take the initiative. Once informed of the client’s wishes, most law firms will cooperate fully in all stages of the process:

- identifying cases that lend themselves to the early settlement approach;
- convincing counterparties that the approach is advantageous to both parties;
- being forthcoming during informal information exchange;
- facilitating negotiations/mediation.

Representation of a client in mediation differs fundamentally from advocacy in court. Each party should select an attorney who is well versed in mediation representation and who also is skilled in negotiating settlements. Claimants often engage counsel on a contingency fee basis, which rewards early settlement. A pre-agreed flat fee per case, in early settlement bonus or other "alternative billing arrangements" give the defense firm a greater financial incentive for early settlement than the traditional hourly rate.

V. Role of Insurers

Many companies are effectively self-insured as to all or most product cases, and control their own defense. If the company’s liability is covered by insurance, the carrier should be consulted regarding the proposed procedure, which we believe most carriers will approve in principle. If authorization to settle individual cases is required, such authorization should be obtained in advance of a mediation session or final negotiations.

VI. Role of the Courts

Many state court systems also have adopted a variety of ADR programs or are considering such programs. The California, Florida and Texas programs stand out as being particularly far-reaching.

Many attorneys have become familiar with mediation and other forms of ADR through court programs. Under many court programs referral is mandatory and the parties have no say in the selection of the neutral. In jurisdictions in which referrals to mediation or other ADR are common, the court programs also have spurred wider use of private mediation, in which the parties can select a mediator of their choice and can exercise much better control of the process.

Members of our Committee see opportunities for the courts to play an even more effective role in encouraging early settlements.

a. In many courts that have mediation or similar programs, the procedure is triggered late in the pre-trial process. It is suggested that earlier procedures would be more useful.
b. Many court panels of mediators consist of unpaid volunteers. In some courts, the quality of mediators nevertheless is high. In others, the quality and effectiveness of some mediators may not command respect.

Members also point out that litigants often are reluctant to propose mediation but will readily agree to it if proposed by the court. They suggest that even if the court has not adopted a mediation program, it may be very helpful for the judge to urge the parties to agree to mediation of their dispute. Moreover, the court should encourage any party to let the judge or the judge's chambers know if it would welcome such a proposal-without attribution.

VII. Multiple Defendants

In all product liability cases, there is a dispute or controversy between a plaintiff and the defendant as to the liability of the defendant for the plaintiff’s injuries. In a subset of those cases, there is also a genuine dispute among multiple defendants as to their respective share of that liability. An example of this later type of case is where the plaintiff has sued both the product manufacturer and the manufacturer’s component part supplier on a defective design theory. The manufacturer may assert that the supplier did not merely build to the manufacturer’s specification but the supplier participated in the design process itself whereas the component part supplier views itself as having a very limited role in the product’s creation. The design responsibility dispute between the defendants will not only be detrimental to the defendants at trial, but it can also undermine the effectiveness of mediation if not properly addressed.

There are, at least, two different approaches to resolution of cross-claims and other disputes among defendants. One approach is for the disputing defendants, e.g., the manufacturer and component part supplier, to meet to discuss the issue and, in the event of impasse, to invite a mediator to assist them. As with the underlying claim, counsel for the defendants should come to the negotiation or mediation prepared to discuss the supporting facts and/or documents. The goal is to reach an agreement regarding the treatment of the underlying claim. The agreement can be in the form of a percentage of the ultimate settlement, a flat dollar amount, or any combination thereof.

Perhaps the more effective approach is for the disputing defendants to agree to submit to mediation after the claim with the plaintiff has been settled. This approach allows the parties to keep their focus on resolving the case with the plaintiff while keeping the conflicts among defendants a secondary issue. The defendants are able to keep a united defense during the mediation and not drive up the value of the case.

The selection of a mediator is particularly important in these types of cases. The mediator must have the ability to maintain focus on the dispute between the plaintiff and defendants while seeking to reconcile the differences between the defendants. In addition, a pre-existing good working relationship between the manufacturer and its component part supplier, as well as their respective counsel, greatly contributes toward the likelihood of a successful mediation.

A dispute between defendants need not undermine mediation but can afford an additional reason to proceed with mediation.

RECOMMENDATIONS AND SUMMARY

Our Committee recommends that claimants, defendants and their counsel adopt a cost-effective approach to resolving product claims. The elements of such approach:
a. adopt a policy favoring early settlement;

b. acquire skills and training, as well as a robust resource pool, in ADR and interest-based negotiation;

c. establish standardized and reliable criteria for determining whether a case is suitable for early settlement efforts;

d. review all claims for early settlement suitability;

e. as to cases believed to be suitable for early settlement, propose to the counterparty an informal exchange of information each side needs to evaluate the case for settlement purposes, followed by direct settlement negotiations and/or mediation.

The Committee concludes that parties and counsel that adopt and systematically follow this approach will find:

a. A high percentage of counterparties will agree to an informal information exchange and early settlement negotiations.

b. There is small "real-world" risk that such a proposal, made pursuant to company policy, will lead to inflated demands or unrealistic offers.

c. A high percentage of cases placed on an early settlement track will settle early on a reasonable basis, on terms similar to cases that settle after extensive trial preparation.

d. On average, this approach will result in a substantial reduction in counsel fees.

e. This approach will not lead to an increase in claim volume, so long as settlement payments are not excessive, and that no payments are made on cases that are fraudulent or without merit.

We know of no company or claimant's counsel that has adopted the above approach and has abandoned it or is not satisfied with the results.
TAB 2

CPR 21st Century Pledge and CPR Pledge
Our company believes the costs, delay and damage to relationships resulting from adversarial litigation practices have risen to levels that are unsustainable in the present day global business arena. Alternative dispute resolution (ADR) practices developed over the last 30 years have encouraged more cost-effective and collaborative solutions.

Nevertheless, we recognize innovation and advancement need to continue.

We believe it is a priority to explore the use of cost-efficient, sustainable, dispute resolution;

We believe that our businesses can and should engage in a systematic and collaborative approach to dispute management and resolution with domestic and global customers, suppliers, partners and competitors;

We believe that outside counsel can be an integral part of our dispute management team and law firms schooled in ADR can better serve our legal needs;

We believe that disputes can be resolved using ADR methods so that the outcome enhances both the company’s short and long term well-being, as well as sustaining its vital business relationships.

In recognition of the foregoing, we subscribe to the following statement of principle on behalf of our company and its global subsidiaries.

“Our company pledges to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes.”

Company: ____________________________
Senior Legal or Executive Officer: ____________________________
Signature: ____________________________
Print name: ____________________________
Date: ____________________________
More than 4,000 operating companies have committed to the CPR Corporate Policy Statement on Alternatives to Litigation®. The CPR Corporate Pledge, which was initiated in 1984, obliges subscribing companies to seriously explore negotiation, mediation or other ADR processes in conflicts arising with other signatories before pursuing full-scale litigation. The list of companies subscribing on behalf of themselves and their major operating subsidiaries is available on the CPR Website at www.cpradr.org.

CPR CORPORATE POLICY STATEMENT  
on ALTERNATIVES TO LITIGATION®

COMPANY

We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare businesses the high costs of litigation.

In recognition of the foregoing, we subscribe to the following statements of principle on behalf of our company and its domestic subsidiaries:*  

In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.

CHIEF EXECUTIVE OFFICER (Signature), Print Name

CHIEF LEGAL OFFICER (Signature), Print Name

DATE

*Our major operating subsidiaries are:

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WHY A CORPORATE POLICY STATEMENT ON ALTERNATIVES TO LITIGATION?

By James F. Henry, Former President
International Institute for Conflict Prevention & Resolution
(formerly the CPR Institute for Dispute Resolution)

"Too much . . . and too expensive."

That is the consensus about litigation in the business community. Even when lawsuits are settled out of court, which happens over 90% of the time, settlement usually occurs only as the trial date approaches and after most of the costs have been incurred. And all too often, the settlement is based strictly on the dispute’s perceived monetary value without adequate investigation of mutually-advantageous business solutions.

The purpose of the Corporate Policy Statement on Alternatives to Litigation is to encourage the early resolution of business disputes with creative, businesslike settlements achieved through mediation or other alternative dispute resolution (ADR) procedures. Once a dispute has erupted, emotions are at a high pitch and parties quickly assume an adversary stance. Each is likely to be concerned that suggesting private resolution will be viewed by the other as a sign of weakness. This danger is minimized when parties have adopted a corporate policy calling for exploration of ADR options before resorting to full-scale litigation in disputes with other companies subscribing to the same policy.

The Policy Statement helps subscribers get over the most important strategic hurdle to quick settlement: it lets them make the first move. Negotiations can begin early — before litigation takes on a life of its own.

That is the essence of the CPR Policy Statement. Those who adopt it can choose from the full spectrum of ADR techniques. These include but are not limited to the minitrial, mediation and neutral fact-finding — each has proven its value in helping executives and counsel arrive at economical, expeditious, mutually-acceptable results.

Both the nonbinding minitrial and mediation have been used successfully to resolve complex multimillion-dollar disputes involving, for example, commercial contracts, patents, construction contracts, joint ventures and transnational issues. Most mediations and minitrials have resulted in prompt settlements and dramatic reductions in legal costs and delay. Borden, Control Data, Eaton, Gillette, ITT, Motorola, Shell Oil, Standard Oil of Indiana, Texaco, TRW, Union Carbide and Wisconsin Electric are just some of the companies reporting economical, satisfying results with these ADR procedures.

It should be noted:

• The CPR Policy Statement is not a binding commitment to engage in negotiations or ADR, but is an expression of corporate policy. Subscribers undertake to act in good faith and to genuinely consider ADR. It is not intended, however, to create legally enforceable rights.

• The CPR Policy Statement does not preclude a subscriber from taking those preliminary actions advisable to protect its access to the courts — for example, filing a complaint for statute of limitations or venue purposes. Even when such actions have been taken, negotiation or ADR techniques can still be used.

• Vigorous advocacy is compatible with negotiation and ADR.

• Not every dispute is suitable for resolution through ADR techniques. If either party concludes that ADR would be inappropriate in a particular case — for example, if judicial determination of a critical legal issue is deemed essential — that party is not bound to explore ADR.

• The CPR Policy Statement raises the consciousness of executives and counsel regarding the use of ADR and encourages the systematic review of business disputes for their ADR potential.

• Subscribers may choose to modify the wording of the CPR Policy Statement in ways that do not change its spirit or intent. Even if ADR does not lead directly to a resolution, the effort increases chances of later settlement by establishing a channel of communications between parties and by giving each a better understanding of the other’s position.

The CPR Corporate Pledge has been actively supported by the Business Roundtable, the National Association of Manufacturers, the American Corporate Counsel Association and leading industrial organizations. More than 4,000 operating companies have committed to the CPR Corporate Pledge, including most of the largest corporations — a broad cross-section of American business that accounts for about one half of the aggregate of the gross national product. Companies are not just signing the CPR Pledge; they are using it to resolve significant disputes swiftly, privately and with dramatic cost savings. Efforts to avoid litigation are in the public interest and should reflect favorably on companies making such attempts.

Please note: This Commentary should not be construed as a part of the CPR Corporate Policy Statement. In signing the Policy Statement, a company is subscribing only to the terms of the Statement itself.
TAB 3

CPR Model Clauses
CPR’s Mediation Rules

CPR MODEL CLAUSES
FOR MEDIATION

Standard Contractual Provisions

A. Pre-Dispute Clause for Mediation

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this [Agreement] [Contract] promptly by mediation under the International Institute for Conflict Prevention & Resolution (“CPR”) Mediation Procedure [currently in effect OR in effect on the date of this Agreement], before resorting to arbitration or litigation. Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.

B. Pre-Dispute Clause for Mediation with Arbitration

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this [Agreement] [Contract] promptly by mediation under the International Institute for Conflict Prevention & Resolution (“CPR”) Mediation Procedure [currently in effect OR in effect on the date of this Agreement]. Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.

Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within ]45[ days after initiation of the mediation procedure] [within ]30[ days after appointment of a mediator], shall be finally resolved by arbitration in accordance with the CPR Rules for Administered Arbitration (the “Administered Rules” or “Rules”) by (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state).

C. Existing Dispute Submission Agreement for Mediation

We hereby agree to submit to confidential mediation under the CPR Mediation Procedure the following controversy: (Describe briefly)
TAB 4

Economic Litigation Agreement
ECONOMICAL LITIGATION AGREEMENTS ("ELA") FOR COMMERCIAL CONTRACTS AS A MEANS OF REDUCING CIVIL LITIGATION COSTS

"THE MODEL CIVIL LITIGATION PRENUP"
(2010 Edition)
STANDARD CONTRACTUAL PROVISION

The following model clause may be inserted into a commercial contract to incorporate by reference the terms of the International Institute for Conflict Prevention & Resolution Economical Litigation Agreement provisions. Because waiver of trial by jury has been held by several jurisdictions to be required to be “knowing, intelligent and voluntary” to be valid, the model clause makes explicit that the civil litigation shall be jury-waived. Some jurisdictions, such as California, explicitly prohibit advance waiver of trial by jury, so the model language defers to such explicit prohibitions. By incorporating a forum selection clause and choice of law clause in their contract, the parties can control whether any litigation occurs in jurisdictions that prohibit advance jury waiver.

XX. **Economical Litigation Agreement**: Any Dispute arising out of or relating to this contract, including the breach, termination or validity thereof, whether based on action in contract or tort, shall be finally resolved by civil litigation in accordance with the International Institute for Conflict Prevention & Resolution Economical Litigation Agreement (2010 edition), by a judge sitting without a jury. In jurisdictions where advance waiver of jury is prohibited as a matter of law, or where all parties to this agreement subsequently agree in writing, such Dispute shall be decided by a jury.
INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION
ECONOMICAL LITIGATION AGREEMENT
GENERAL PROVISIONS

Section 1. Purpose

1.1. Prompt and Affordable Justice. The purpose of the parties’ Economical Litigation Agreement (“ELA”) shall be to provide a means for the parties to secure prompt and affordable resolution of any Dispute arising out of or relating to their contract (“Dispute”). The parties have agreed to this ELA as an alternative to binding arbitration in which significant rights pursuant to civil litigation would have been waived. The ELA shall not have any effect on the court’s inherent ability to manage trial or to render judgment in accordance with applicable law.

1.2. Reservation of Arbitration. In the event a judge enters orders contrary to the terms of the ELA between the parties, both parties may by written agreement choose either to waive such provision of the ELA or to submit their Dispute instead to binding arbitration in accordance with the International Institute for Conflict Prevention & Resolution (“CPR”) Rules for Non-Administered Arbitration for determination by a sole arbitrator. In the event the parties fail to agree either to waive the affected provisions of the ELA or to submit their Dispute to binding arbitration, any party may seek a summary hearing and ruling from the ELA Arbitrator appointed pursuant to Section 6 that the judge’s order materially violates the terms of the ELA. If the ELA Arbitrator so rules, the parties shall submit the merits of their Dispute to binding arbitration before the ELA Arbitrator forthwith. By filing or responding to an action in court, the parties do not waive their right to have the Dispute decided by binding arbitration in such event. Any such arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof.

Section 2. Waiver of Right to Trial by Jury

2.1. Jury-Waived Trial. The parties agree that any trial of their Dispute shall be heard by a judge sitting without a jury and that their constitutional right to trial by jury is hereby waived.

2.2. Knowing, Intelligent and Voluntary Waiver. The parties knowingly, intelligently and voluntarily waive their right to trial by jury, after having opportunity to confer with counsel regarding such waiver. The parties acknowledge that they understand their right to trial by jury includes submitting their Dispute to a jury of their peers, randomly chosen from the community, in which they would have the opportunity to challenge any jurors whom they believe to be biased or for other good cause and that judgments only could be rendered upon a jury verdict determined by five/sixths of the jury or such other portion of agreement by the jurors as required by the applicable jurisdiction.
2.3. Exception. Where advance waiver of jury is prohibited as a matter of law, or where all parties agree in writing, the Dispute shall be decided by a jury.

Section 3. Pre-Litigation Mandatory Dispute Resolution

3.1. Exhaustion Required. Except as provided in 3.2, below, the parties agree that no party may file a civil complaint or petition against any party without first exhausting the pre-litigation Dispute resolution procedures contained in this section. The parties by written agreement may extend the deadlines described in this section and may agree to additional pre-litigation Dispute resolution activities.

3.2. Exception: Preservation of Statutes of Limitation Where an applicable statute of limitation may expire during the period required for mandatory pre-litigation Dispute resolution, where a party fails or refuses to timely agree to and execute a tolling agreement of the applicable statute of limitation to allow pre-litigation Dispute resolution to occur, a party may file a civil complaint or petition against such party but shall not serve such complaint or petition until the pre-litigation procedures described in this section have been exhausted, unless otherwise required by law to prevent expiration of such statutes.

3.3. Escalating Negotiation. The parties shall attempt in good faith to resolve any Dispute arising out of or relating to their contract promptly by negotiation between executives who have authority to settle the controversy, who are at a higher level of management than the persons with direct responsibility for administration of the contract and who have not been previously involved in the Dispute. Any party may give another party written notice of any Dispute not resolved in the normal course of business by letter or email captioned “Demand for Negotiation of Business Dispute.” Within 15 days after delivery of the notice, for which acknowledgment of receipt or receipted delivery has been made (“delivery”), the receiving party shall submit to the other a written response by letter or email. The notice and response shall include (i) a statement of each party’s position and a summary of arguments supporting that position, and (ii) the name and title of the executive who will represent that party and of any other person who will accompany the executive at any meeting or conference call. Within 30 days after delivery of the disputing party’s notice, the designated executives of both parties shall meet or confer telephonically or by video conference or in person at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the Dispute. All reasonable requests for information made by one party to the other shall be honored. All negotiations pursuant to this section are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence. The parties may be assisted by legal counsel during negotiations, but in no event shall outside legal counsel represent any party in such negotiations. All communication between parties in the negotiation shall occur between executives and not by their outside counsel.

3.4. Mandatory Mediation. If the Dispute has not been resolved by negotiation within 45 days after delivery of the disputing party’s notice, or if the parties failed to meet within 30 days as required by Section 3.3, the parties shall endeavor to settle the Dispute by mediation under the then current CPR rules with respect to the mediation of commercial Disputes, or such
other similar procedures as agreed to by the parties. Any mediation between the parties shall conclude no later than 90 days after delivery of the notice of Dispute negotiation.

Section 4. Waiver of Service of Process

4.1. Service by Overnight Delivery Service. Each party defendant agrees to waive service of process. In lieu of formal service of process, the parties agree that any complaint or petition shall be served by overnight delivery service to the business address of the chief executive officer for each party defendant and, if applicable, with a copy by overnight delivery service to the general counsel or senior legal officer of such party defendant.

4.2. Proof of Service. The parties agree that the tracking order showing overnight delivery shall be prima facie proof of service and may be filed as an exhibit with an affidavit of service by counsel for each party plaintiff with the court.

Section 5. Time for Responsive Pleading

5.1. Answer Extension as of Right. The parties agree that upon written notice by a defendant to the plaintiff(s) by letter or email to each plaintiff’s counsel, the time within which the defendant shall answer, move or otherwise respond to the complaint shall be extended an additional 15 days beyond the date such answer or response otherwise would be due under the applicable rules of civil procedure to the same extent as filing a stipulation and without need for a court motion or order. In the event the extended deadline falls on a weekend or legal holiday, the answer or response shall be due on the next business day following such weekend or legal holiday.

5.2. Counterclaim Reply Extension as of Right. In the event a party defendant files a counterclaim, the parties agree that upon written notice by a counterclaim defendant to the counterclaim plaintiff(s) by letter or email to counterclaim plaintiff’s counsel, the deadline for the counterclaim defendant to file an answer, move or otherwise respond shall be extended an additional 15 days beyond the date such answer or response otherwise would be due under the applicable rules of civil procedure to the same extent as filing a stipulation and without need for a court motion or order. In the event the extended deadline falls on a weekend or legal holiday, the answer or response shall be due on the next business day following such weekend or legal holiday.

Section 6. Appointment of ELA Arbitrator

6.1. Agreed Designation by Parties. Within seven business days after the filing of the answer, motion or response, the parties’ counsel shall confer for purposes of selecting an ELA Arbitrator who shall preside over all discovery process in the litigation.

6.2. Designation by CPR. Unless counsel for all parties agree on a particular ELA Arbitrator within seven business days after the filing of the answer, motion or other response, counsel for the plaintiff party shall notify CPR in writing, with a copy to counsel for each defendant party, of the need for an ELA Arbitrator in connection with the litigation. Such notice
shall include the names, addresses, telephone and fax numbers, and email addresses of all counsel as well as the names and addresses of all parties to the Dispute. Within seven business days from its receipt of such notice, CPR shall transmit to counsel for all parties a list of no fewer than five attorneys whom CPR has determined to be trained in ELA case management. Such list shall include a brief statement of each candidate’s qualifications and the candidate’s fees for serving as an ELA Arbitrator. Within seven business days after receipt of such list, each party shall provide to CPR without notice to the opposing party a ranking of the candidates in order of preference and shall note any objection it may have to any candidate. Any party failing without good cause to return the candidate list so marked within seven business days after delivery shall be deemed to have assented to all candidates listed. CPR shall designate as ELA Arbitrator the candidate willing to serve for whom the parties collectively have indicated the highest preference. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the ELA Arbitrator or if a party fails to participate in this procedure, CPR shall appoint a person whom it deems qualified to fill the position of ELA Arbitrator.

6.3. **Duties of ELA Arbitrator.** The parties agree that the ELA Arbitrator so designated shall have the power to administer and enforce the pre-trial discovery procedure agreed to by the parties pursuant to the ELA. The ELA Arbitrator shall be responsible for ensuring the prompt and affordable resolution of the parties’ Dispute by civil litigation to the point of settlement or disposition by motion or trial. All decisions by the ELA Arbitrator shall be preceded by a summary hearing at which counsel for all parties shall have an opportunity to be heard and, if necessary for decision by the ELA Arbitrator, to present and question evidence. The ELA Arbitrator shall have the power to award monetary damages and sanctions in accordance with the ELA which damages and sanctions shall have the force of a binding arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. Actions to confirm any award(s) rendered by the ELA Arbitrator may be entered in any court having appropriate venue and jurisdiction thereof at any time before settlement or within 30 days after the entry of judgment of the underlying Dispute.

6.4. **Costs of ELA Arbitrator.** The parties agree to bear equally the cost of the ELA Arbitrator’s services on an hourly rate, charged by the ELA Arbitrator and CPR, which shall be invoiced monthly by CPR.

6.5. **Appearances Before ELA Arbitrator.** All communications between the ELA Arbitrator and counsel for the parties may be by email, conference call, video conference or in person, provided that no counsel shall be required to travel further than five miles to attend a meeting in person. No party or counsel may engage in ex parte communications with the ELA Arbitrator.

6.6. **Discovery Motions and Compliance.** The parties agree that all motions regarding discovery and all issues concerning compliance with this ELA shall be submitted to and decided by the ELA Arbitrator and not by the court, except motions to compel discovery from non-party witness(es) in accordance with Section 13.1.1.
6.6.1. **Protective Orders.** Any party may seek to limit the scope of discovery that seeks privileged information or trade secrets by motion to the ELA Arbitrator, who shall weigh the relevance, materiality and relative harm to each party to decide the motion.

6.6.2. **Obligation to Confer.** Before filing any discovery-related motion with the ELA Arbitrator, the moving party shall confer with the opposing party to attempt a negotiated resolution.

Section 7. **Motion Practice**

7.1. **Page Limits.** Unless the court sua sponte orders otherwise or local rules of procedure require a lesser number of pages, the parties agree that no motion filed with the court or ELA Arbitrator shall exceed three pages in length, excluding caption and certificates of service, and no memorandum in support of any motion shall exceed ten pages in length, excluding caption, affidavits filed in support of such motions and certificates of service.

7.2. **Affidavit Summaries.** Unless otherwise ordered by the court, the parties agree that any affidavit filed in court or with the ELA Arbitrator shall be accompanied by an executive summary paragraph no longer than one page prepared by counsel for ease of reference before any statement by the affiant.

7.3. **Definition of “Page.”** For purposes of this section, a “page” shall be 8 ½ by 11 inch paper, 12 point font, with margins no less than one inch on the top, left and bottom margins and no less that ½ inch on the right margin, unless the civil rules or local rules of the court in which the litigation is being conducted provide otherwise, in which case such rule shall prevail.

7.4. **Waiver of Oral Argument Before the Court.** Except for motions to dismiss, judgment on the pleadings, or summary judgment, the parties agree that all pretrial motions before the court shall be submitted on the papers without oral argument, and no party shall request oral argument, except as the court may otherwise require.

Section 8. **Judicial Appearances**

8.1. **Personal Appearances Waived.** Unless the court otherwise requires, the parties agree that they jointly will request that all appearances by counsel for pre-trial conference, including the Rule 16 conference pursuant to the Federal Rules of Civil Procedure or conference pursuant to a comparable state rule of procedure, shall be by telephonic conference call or, if the court permits, video conference with the judge and counsel. No counsel shall appear in person before the judge if any other counsel is not so present, unless such absent counsel has consented in writing in advance of the hearing.

8.2. **Submission of ELA to Court.** At any conference with the court pursuant to Federal Rules of Civil Procedure Rule 16 or a comparable state rule of procedure, the parties agree that they shall jointly submit the ELA to the judge as their jointly stipulated discovery management procedure.
Section 9. Discovery Sequencing

9.1. Threshold Motions. In the event a defendant party files a motion to dismiss or for judgment on the pleadings, the parties agree that all discovery shall be stayed with the exception of discovery requests that directly concern the basis of that motion until the date the court issues its decision on that motion.

9.2. Summary Judgment Motions. In the event that any party files a motion for summary judgment, all discovery shall be stayed in the case from the date the opposition to the summary judgment motion is filed until the date the court issues its decision regarding summary judgment. For the purposes of this section, opposition solely grounded on Rule 56(f) of the Federal Rules of Civil Procedure or a comparable state rule of procedure shall not be considered to be an opposition for purposes of staying discovery. This section shall not apply to motions for partial summary judgment.

9.3. Preservation of Inherent Judicial Authority. Nothing in this section shall prevent the court from ordering or the parties from requesting that the proceedings be bifurcated to address or try distinct issues in sequence.

Section 10. Discovery Procedure

10.1. Mandatory Disclosure. The parties agree to engage in voluntary disclosure of relevant facts which shall be completed by any party before that party may initiate discovery of any kind. For purposes of disclosure, each party shall produce at its own expense or make available for inspection and copying at the reviewing party’s expense all non-electronic documents that support any claim or defense asserted by the party in the possession, custody or control of that document. Each party also shall provide a list of all persons with relevant personal knowledge of any claim or defense; for any such person not able to be contacted through party counsel, the list shall include current or last known contact information. The parties also shall disclose no later than 60 days before any evidentiary hearing or trial all documents in a party’s possession, custody or control which such party will offer as evidence or use for cross-examination.

10.2. Scope of Discovery. The parties agree that the scope of permissible discovery shall be information and documents that are both relevant and material to the underlying Dispute between the parties.

10.3. Non-Electronic Discovery Limits and Time for Response. The parties further agree to the following limits on non-electronic discovery based on the lesser of (a) the stated monetary consideration of the contract or (b) the amount claimed in the complaint or counterclaim (see Table 1 for summary chart). Where the value of the Dispute cannot be determined from the face of the contract, claim or counterclaim, upon request of any party, the ELA Arbitrator shall decide the alleged value of the Dispute solely for purposes of determining applicable discovery limits. All discovery interrogatories, document requests, requests for admissions and omnibus conditional discovery requests, shall be responded to within 30 days after the date of service, with three additional days for service by mail, or such additional time as
the parties may agree. If the day a response is required is a weekend or holiday, the response shall be due on the next following business day.

10.3.1. **Interrogatories.** Interrogatories propounded by any party shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No interrogatory shall contain multiple parts or subparts or consist of more than one sentence. All parties are entitled to one interrogatory seeking the name and contact information of all factual witnesses and one interrogatory seeking expert witness(es) information allowed by Rule 26(a)(2) of the Federal Rules of Civil Procedure or a comparable state rule of procedure, if applicable. The parties agree that each party shall be limited to the additional number of interrogatories specified below:

10.3.1.1. Disputes up to $400,000: 5;
10.3.1.2. Disputes up to $1,000,000: 10;
10.3.1.3. Disputes up to $10,000,000: 15;
10.3.1.4. Disputes $10,000,000 or more: 20, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.3.2. **Requests for Production of Documents:** Requests for Production of Documents shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No document request shall contain multiple parts or subparts or consist of more than one sentence. Document requests shall be deemed to exclude documents that exist in electronic form only, including emails, on the date the document request is made; electronic discovery shall be conducted exclusively in accordance with Section 12. Document requests may seek categories of documents relevant and material to the case. The parties agree that each party shall be limited to the number of requests specified below:

10.3.2.1. Disputes up to $400,000: 7;
10.3.2.2. Disputes up to $1,000,000: 14;
10.3.2.3. Disputes up to $10,000,000: 21;
10.3.2.4. Disputes $10,000,000 or more: 28, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.3.3. **Requests for Admission:** Requests for Admission shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No request shall contain multiple parts or subparts or consist of more than one sentence. The parties agree that each party shall be limited to the number of requests specified below:
10.3.3.1. Disputes up to $400,000: 6;
10.3.3.2. Disputes up to $1,000,000: 12;
10.3.3.3. Disputes up to $10,000,000: 18;
10.3.3.4. Disputes $10,000,000 or more: 24, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.4. Omnibus Conditional Discovery Requests. The parties may serve omnibus discovery requests on a conditional basis, consisting of a single document that includes interrogatories, document requests and requests for admission, in which any interrogatory or document request shall be deemed to be withdrawn if a request for admission to which such interrogatory or document request corresponds is admitted. For purposes of the discovery limits, any interrogatory or document request that is withdrawn because a corresponding request for admission has been admitted shall not be counted toward the limit of discovery for such party.

Section 11. Deposition Practice and Witness Interviews

11.1. Depositions Generally. The parties agree that depositions may be conducted by audio visual means by any party upon written notice to all other parties at least one week before the scheduled deposition. Depositions shall not exceed four hours of examination by any party or counsel, excluding recesses agreed to by all counsel or suspension required for resolution of disputes by the ELA Arbitrator. The court reporter shall be responsible for determining the amount of time remaining for each party to conduct an examination and shall be requested to advise such party 30 minutes before the four-hour limit is reached. Counsel for any party may appear at any deposition by conference call or video conference and the party taking such deposition shall make accommodation for such calls or video appearances to occur. The parties agree that deponents shall have seven business days after the court reporter mails the transcript of their testimony to their counsel to review and submit any errata sheet signed by the deponent regarding such deposition testimony.

11.2. Number of Depositions Allowed. The parties agree that the number of depositions shall be limited by the amount in controversy as defined in Section 10.3, and that each party shall be permitted to initiate no more than the following number of depositions. For purposes of these limits, a deposition pursuant to Rule 30 (b)(6) of the Federal Rules of Civil Procedure or comparable state rule of procedure shall be deemed to be one deposition regardless of how many witnesses are tendered by the party being deposed.

11.2.1. Disputes up to $400,000: 2;
11.2.2. Disputes up to $1,000,000: 4;
11.2.3. Disputes up to $10,000,000: 6;
11.2.4. Disputes $10,000,000 or more: 8, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

11.3. Informal Witness Interviews. In addition to depositions, counsel for any party shall be permitted to conduct informal witness interviews with any current or former employees of the opposing party or third persons by teleconference at which all counsel are invited to be present, provided that any counsel wishing to conduct an informal interview of a witness shall give written notice to counsel for all other parties at least seven business days before the interview, the interview is conducted by teleconference at which counsel for any party may dial in to participate, the conference call is audio recorded and the witness so advised at the outset of the interview, and the witness agrees at the outset of the interview to tell the truth. Any witness who fails to agree to be recorded or to agree to tell the truth, or refuses to cooperate with the interview as determined by the ELA Arbitrator, may be subject to deposition by the inquiring party in addition to the limits on number of depositions described above. No counsel may interview a witness longer than 45 minutes, provided that any other counsel for different parties participating in the conference call also may interview the witness in turn for up to 45 minutes each. Counsel for witnesses or any party for whom the witness is currently or was formerly employed may briefly interject cautions to the witness on matters of privilege during any counsel’s interview. Each party shall be permitted to initiate the following number of informal witness interviews:

11.3.1. Disputes up to $400,000: 3;

11.3.2. Disputes up to $1,000,000: 6;

11.3.3. Disputes up to $10,000,000: 9;

11.3.4. Disputes $10,000,000 or more: 12, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

11.3.5. Copy of Witness Interviews. Within seven business days after completion of the witness interview, the party initiating the witness interview shall provide a copy of the audio recording, either in analog or digital format, to all counsel who request it in writing or by email and to the witness.

Section 12. E-Discovery. Electronic discovery (“e-discovery”) refers to the preservation, search, collection, and production of electronic documents. E-discovery includes both key word-based searches for electronic documents as well as requests for specific electronic documents.

12.1. General

12.1.1. Scope. The parties agree that the scope of permissible e-discovery shall be documents both relevant and material to the underlying Dispute between the parties. The parties shall not be entitled to any e-discovery except as specifically set forth in Section 12. All e-discovery requests shall be responded to within 30 days after the date of service, with three additional days for service by mail, or such additional time as the parties may agree.
12.1.2. **Search Tools.** To the extent necessary, parties shall conduct key word-based searches using any software tool or tools that are capable of searching searchable files and e-mails, including the contents of e-mail archive files (such as .PST and .NSF), attachments, and the contents of files compressed using common formats, such as ZIP, RAR, GZIP, LHZ and TAR. E-mails shall be searched with a tool or tools capable of searching the FROM, TO, CC, BCC, SENT, RECEIVED and SUBJECT fields, the body of the e-mail, and any searchable attachments.

12.1.3. **Document Retrieval.** Specific electronic documents requested by a party may be retrieved in any manner at the sole discretion of the custodial party that does not alter the contents of the document. The retrieval may alter metadata with the exception of “created by” and “doc date.”

12.1.4. **Non-Searchable Files.** Parties are under no obligation to make non-searchable files searchable. Parties shall not produce a non-searchable version of a document when a searchable version exists and can be accessed by the same custodian.

12.1.5. **Format.** Spreadsheets, or the exported contents of databases, shall be produced in native format, unless the native format would render the data not reasonably accessible because it would require software not licensed to the requesting party. In such case, the spreadsheet or database export shall be produced in an alternate searchable format that maintains the organization of the spreadsheet or database export to the extent possible. All other documents need not be produced in native format and, at the sole discretion of the custodial party, may instead be produced in alternate formats that are at least as searchable as the documents’ native format.

12.1.6. **Identification.** An identification of a document’s custodian shall be provided with each document or group of documents.

12.1.7. **Preservation of Privileges and Work Product.** The parties agree that the attorney-client privilege and work product doctrine and any other privileges recognized in the jurisdiction which laws govern the substantive Dispute shall not be waived by disclosure of any privileged information to any other party. Notwithstanding any such disclosure during e-discovery, the parties reserve the right to object and move to strike any privileged or work product-protected information to the court in connection with any submission to or introduction of evidence to the court. Nothing in Section 12 shall prevent the custodial party from objecting to the production of privileged documents or attorney work product. A party shall be under no obligation to withhold documents subject to privilege or work product protections prior to production, and the parties agree that a failure to withhold such documents prior to production shall not constitute a waiver of the applicable privilege or work product protections.

12.1.8. **Protective Relief.** To the extent a party believes that a request for electronic discovery is beyond the scope of discovery or made for an improper purpose, that party may submit a discovery motion seeking relief to the ELA Arbitrator.
12.2. Presumptions. It shall be presumed that:

12.2.1. Metadata. Metadata or slack space need not be searched or produced, with the exception of “created by” and “doc date.”

12.2.2. Reasonable Accessibility. Electronic repositories that are not reasonably accessible because of undue burden or cost need not be restored, searched, or produced. Examples of not reasonably accessible repositories include backup tapes that are intended for disaster recovery purposes and that are not searchable, legacy data from obsolete systems and not readable, and deleted data potentially discoverable through forensics.

12.2.3. Personal Digital Devices. Electronic information residing on PDAs, Smartphones, and instant messaging systems need not be searched, collected or produced unless such repository is the only place where particular discoverable information resides.

12.2.4. Voicemail. Voicemail systems need not be searched, collected or produced.

12.2.5. Foreign Privacy Laws. Repositories of documents subject to the European Union’s Data Protection Directive or other foreign laws restricting the processing or transfer of data to the United States for use in civil litigation (“Foreign Privacy Laws”) need not be searched and documents subject to Foreign Privacy Laws need not be produced.

12.3. Overcoming Presumptions. A party seeking to rebut the presumptions set forth in Section 12.2 may submit a discovery motion to the ELA Arbitrator showing good cause why such discovery is essential to a claim or defense along with an explanation why the same or equivalent information cannot be found from a different source.

12.4. Preservation. Custodial parties shall take reasonable steps to preserve electronic documents that reasonably can be anticipated to be relevant and material to a Dispute.

12.4.1. Exception: Written Information Management Policy. Notwithstanding the above, to the extent an organization has a written information management policy, that organization may continue to follow that policy, including the destruction of documents in the ordinary course of business, with the exception of documents located in repositories accessible by a custodian. Such repositories must continue to be preserved during the pendency of the Dispute even if documents in such repositories were scheduled for destruction in the ordinary course of business unless, after a good faith investigation by the custodial party, a party has a good faith reasonable belief that no documents that are relevant and material to a known Dispute are located in a particular repository.

12.4.2. Exception: Permission of ELA Arbitrator. To the extent a custodial party believes that the preservation of a particular electronic repository is unreasonably
burdensome, the custodial party can seek relief by motion to the ELA Arbitrator, with a specific showing of the burden that makes preservation unreasonable.

12.5. E-Discovery Limits. The parties agree to the following limits on e-discovery determined by the amount in controversy based on the lesser of (a) the stated monetary consideration of the contract or (b) the amount claimed in the complaint or counterclaim (see Table 2 for summary chart). Where the value of the dispute cannot be determined from the face of the contract, claim or counterclaim, upon request of any party, the ELA Arbitrator shall decide the alleged value of the dispute solely for purposes of determining applicable discovery limits.

12.5.1. Document Requests for Specific Electronic Documents. Requests for Specific Electronic Documents shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No request for electronic documents shall contain multiple parts and subparts or consist of more than one sentence. Requests for Specific Electronic Documents shall reasonably describe the specific electronic document that is sought. In the case of a database or spreadsheet, the Request shall further reasonably identify the specific tables or records requested. Requests for Specific Electronic Documents shall not seek broad categories of documents or require key word searches. To the extent a database subject to a Request for Specific Electronic Documents has a built-in search capability, the parties shall not be required to use any search tools to extract relevant records from the database other than that built-in capability. The parties agree that each party shall be limited to the number of requests specified below:

12.5.1.1. Disputes up to $400,000: 4;
12.5.1.2. Disputes up to $1,000,000: 7;
12.5.1.3. Disputes up to $10,000,000: 15;
12.5.1.4. Disputes $10,000,000 or more; 25 plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

12.5.2. Document Requests for Key Word Searches. Requests for Key Word Searches of Electronic Documents shall include an identification of the custodians whose electronic repositories are to be searched, along with a single set of key words that will be searched in those repositories. Requests shall not contain any other instructions and shall not include any definitions other than shorthand expression of relevant parties, places or events. No request for key word searches shall contain multiple parts and subparts or consist of more than one sentence.

12.5.2.1. General

12.5.2.1.1. Designation of Custodian. Subject to the limitations set forth below, a party may designate any current or former employee or executive of
another party as a custodian if there is a reasonable basis for believing that custodian has relevant
documents.

12.5.2.1.2. **Scope of Search.** For each identified
custodian, subject to the limitations of Section 12, searches shall be run in the Custodian’s live
and archived e-mail and work computer(s) (desktop and/or laptop). Searches also shall be run in
any network locations that are associated with the custodian’s work computer, including group
shares, that, after a reasonable investigation by the custodial party, are determined to be
reasonably likely to contain relevant and material information.

12.6.2.1.3. **Limits of Search.** The custodial party shall
not be obligated to search an electronic repository if, after a reasonable investigation by the
custodial party, it is determined to not be reasonably likely to contain relevant information, even
though that electronic repository is accessible by the custodian.

12.5.2.1.4. **Key Words.** Key words shall consist of
words or Boolean phrases with proximity believed to be reasonably likely to return a reasonable
volume of relevant documents. A key word shall not include a word that is not substantively
related to the dispute (such as “and”). Key words shall not include the name of a product, a
party, or a current or former employee or executive of a party, but may include these words in
combination with other key words. A Boolean combination of key words shall count as a single
key word. Key words may include a reasonable use of wild cards and root extenders.

12.5.2.1.5. **Number of Key Word Search Requests.**
A party shall make no more than two requests for key word searches, which may include in total
the key word search limits described below.

12.5.2.1.6. **Protective Orders.** A custodial party that
believes that a requested key word or custodian was selected for an improper purpose, or would
result in an unreasonable volume of documents, after consultation with opposing counsel to
attempt to resolve the issue by agreement, can file a motion with the ELA Arbitrator requesting
relief. Such motion shall include the results of sampling, or other evidence, showing the
unreasonableness of the requested key word or custodian.

12.5.2.2. **Key Word Search Limits.** The parties agree that each
party’s Requests for Key Word Searches shall be limited as specified below:

12.5.2.2.1. Disputes up to $400,000: No Requests for
Key Word Searches allowed.

12.5.2.2.2. Disputes up to $1,000,000: Requests for
Key Word Searches may be sent in the form of an e-document request as follows: Identifying no
more than 4 custodians of information; for a period of time no more than six months, which may
include multiple periods of time aggregating to no more than six months; and involving not more
than six key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

12.5.2.2.3. Disputes up to $10,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 8 custodians of information; for a period of time no more than 1 year, which may include multiple periods of time aggregating to no more than one year; and involving not more than 18 key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

12.5.2.2.4. Disputes more than $10,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 16 custodians of information; for a period of time no more than three years, which may include multiple periods of time aggregating to no more than three years; involving not more than 40 key words likely to lead to the discovery of information both relevant and material to the underlying dispute; and upon an assertion that additional requests are necessary to discover information both relevant and material to the underlying dispute, the ELA Arbitrator may allow additional e-discovery at the request of any party.

Section 13. Discovery Disputes and Cost-Shifting

13.1. Exclusive Authority of ELA Arbitrator. Any discovery-related motion, including motions for protective orders, motions to compel, motions for sanctions, and motions regarding e-discovery, shall be served on all other parties and then sent to the ELA Arbitrator without filing in court. The ELA Arbitrator shall invite any opposition to be submitted in writing and then shall convene a hearing at which all interested parties may be heard. After the hearing, the ELA Arbitrator shall enter an order regarding discovery, including the presumption of an award of attorneys’ fees to the prevailing party in accordance with Section 13.2., which shall have the force of an arbitration award.

13.1.1. Exception: Non-Party Witness Subpoenas and Compelled Testimony. In the event a non-party witness will not voluntarily submit to discovery in accordance with this ELA, the party seeking discovery may initiate subpoenas and seek judicial orders to compel compliance with such discovery.

13.1.2. Exception: Preclusive Motions. Nothing in this ELA shall preclude any party from seeking a judicial order to preclude from hearing or trial any discovery that was not timely disclosed in accordance with the requirements of this ELA, in addition to damages and costs to be awarded by the ELA Arbitrator.

13.2. Attorney Fee Shifting. Unless the ELA Arbitrator finds that the discovery dispute was (a) reasonable and (b) not susceptible of voluntary resolution between counsel, the ELA Arbitrator shall determine and award attorneys’ fees incurred by the party who prevailed in any discovery dispute to be paid by the opposing party. In making the determination whether a dispute was susceptible of voluntary agreement by counsel, the ELA Arbitrator shall consider
whether any counsel engaged in lack of civility or professional courtesy. The parties agree that
the ELA Arbitrator shall award damages in the amount of increased costs of litigation as well as
reasonable costs and attorneys’ fees to any party who prevails in a hearing before the ELA
Arbitrator to enforce the terms of their ELA.

Section 14. Further Agreement of Parties

The parties may agree in writing at any time to additional or different procedures
consistent with the purpose of this ELA.
<table>
<thead>
<tr>
<th></th>
<th>Interrogatories</th>
<th>Document Requests</th>
<th>RFAs</th>
<th>Depositions</th>
<th>Interviews</th>
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</thead>
<tbody>
<tr>
<td>Up to $400,000</td>
<td>5</td>
<td>7</td>
<td>6</td>
<td>2</td>
<td>3</td>
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<tr>
<td>Up to $1,000,000</td>
<td>10</td>
<td>14</td>
<td>12</td>
<td>4</td>
<td>6</td>
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<td>15</td>
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<td>18</td>
<td>6</td>
<td>9</td>
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<td>28+</td>
<td>24+</td>
<td>8+</td>
<td>12+</td>
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</tbody>
</table>

[+ = Additional found by ELA Arbitrator to be necessary to prepare for dispositive motion or trial.]
# TABLE 2: E-DISCOVERY LIMITS

<table>
<thead>
<tr>
<th>Requests for Specific E-Documents</th>
<th>Key Word: Custodians</th>
<th>Key Word: Time Period</th>
<th>Key Words Number</th>
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</thead>
<tbody>
<tr>
<td>Up to $400,000</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Up to $1,000,000</td>
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<td>4</td>
<td>6 months</td>
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<tr>
<td>Up to $10,000,000</td>
<td>15</td>
<td>8</td>
<td>1 year</td>
</tr>
<tr>
<td>$10,000,000 or more</td>
<td>25 +</td>
<td>16 +</td>
<td>3 years +</td>
</tr>
</tbody>
</table>

[+ = Any additional found by ELA Arbitrator to be necessary to prepare for dispositive motion or trial.]
TAB 5

CPR Corporate Early Case Assessment Toolkit
CPR Corporate Early Case Assessment Toolkit

This Toolkit outlines a simple conflict management process designed to facilitate more informed and expedited decision-making at the early stages of a dispute. The toolkit was created by leading members of CPR, including corporate counsel, outside counsel and academics and reflects best practice in commercial dispute resolution.

Full material can be accessed by CPR members.
TAB 6
CPR Suitability Guide
CPR Suitability Guide

The Guide is applicable to a wide range of disputes and is designed to assist lawyers and clients in determining whether a particular dispute is suitable for resolution through ADR, and the form of ADR most suitable to the matter. It addresses mediation, other non-binding ADR processes, arbitration and litigation.

**Full material can be accessed by CPR members.**
Early Case Assessment
Executive Summary
Early Case Assessment Executive Summary

A model report case management recommendations resulting from an early case assessment.

**Full material can be accessed by CPR members.**
TAB 8

Sample Agreement
Sample Agreement

A model agreement for information exchange to support a dispute resolution process.

Full material can be accessed by CPR members.
TAB 9

CPR Global Rules for Accelerated Commercial Arbitration
Rules 11-12
Global Rules for Accelerated Commercial Arbitration

Effective August 20, 2009

CPR PROCEDURES & CLAUSES
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ABOUT CPR

The International Institute for Conflict Prevention & Resolution (CPR) is a nonprofit “think tank” organization that promotes excellence and innovation in commercial dispute resolution, serving as a primary multinational resource for the avoidance, management, and resolution of business-related disputes.

CPR Members – Our membership comprises General Counsel and senior lawyers of Fortune 1000 organizations, as well as partners in top law firms from around the world. It is a committed and active membership, diligently participating in CPR activities and serving on industry-specific committees.

CPR’s Panels of Distinguished Neutrals – CPR’s Panels consist of the highest-quality arbitrators and mediators, with specialization in more than 20 practice areas and industries. As part of CPR’s nomination process, we check not only the suitability, but the availability of all neutrals nominated, as well as disclose any conflicts of interest up front.

CPR Pledge Signers – More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation©. Moreover, better than 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation©, including 400 of the nation’s 500 largest firms. This “Pledge” has been invaluable in bringing disputing parties to the negotiating table.

CPR’s Commitment – As we celebrate more than 30 years of achievement, we continue to dedicate the organization to providing effective, innovative ways of preventing and resolving disputes affecting business enterprises. We do so through leadership and advocacy, and by providing comprehensive resources, such as education, training, consultation, neutrals, as well as a networking and collaboration platform for businesses, the judiciary, government, and other institutions.
I. INTRODUCTION TO THE ACCELERATED RULES FOR COMMERCIAL ARBITRATION

The Global Rules for Accelerated Commercial Arbitration (the “Accelerated Rules”) establish a procedure for resolving commercial disputes in an expeditious manner. The Accelerated Rules have been developed by the International Institute for Conflict Prevention & Resolution (the “CPR Institute”), a thought leader in alternative dispute resolution, and address the problems that have been encountered when using truncated provisions for expedited arbitration. These rules can be used in administered or non-administered arbitrations. In order that speed be built into all aspects of the arbitral process, prospective arbitrators and counsel need to know before selection that this will be an expedited process so that they can be selected with the issue of schedule firmly in mind. The flexibility of the Accelerated Rules permits the Arbitral Tribunal to set the proceeding on its own track to resolve a dispute as quickly as the parties desire but not longer than six months except as permitted by the agreement of the parties or by the Accelerated Rules. The Accelerated Rules are global in that they can be applied to any subject matter and can function in different jurisdictions and legal cultures around the globe to produce a fair, economical and speedy resolution. The Accelerated Rules consist of the actual Rules and the Appendix containing forms and protocols. Appendix A contains sample provisions to incorporate the Accelerated Rules into contracts or to submit existing disputes to arbitration under the Accelerated Rules.

II. ACCELERATED RULES

Accelerated Rule 1: Scope of Application

1.1 The Accelerated Rules shall apply where the parties have incorporated the Accelerated Rules in the agreement to arbitrate. Unless the parties otherwise agree, the Accelerated Rules, with any amendments as of the date of the commencement of the arbitration, shall apply.

1.2 The Accelerated Rules shall govern the arbitration except that where any of these Accelerated Rules is in conflict with a mandatory provision of applicable arbitration law, that provision of law shall prevail. It shall be the obligation of the parties to call to the attention of the Arbitral Tribunal any such conflicting provision of law and the failure of any party to do so shall be deemed a waiver of any right of such party to require the Arbitral Tribunal to apply such law.

1.3 Arbitration under the Accelerated Rules is considered a private proceeding for the resolution of a business dispute. In order to encourage the parties to settle a dispute on their own accord, settlement discussions or mediation proceedings shall not be admissible in the arbitration proceeding without the consent of all parties. Moreover, in any arbitration conducted under the Accelerated Rules, information that is received from the other side during the arbitration proceedings and that the recipient does not already have or that is not public shall be used only for the purposes of the arbitration proceeding. The Arbitral Tribunal may enter such confidentiality order(s) as it determines is necessary under the circumstances.

1.4 Under the Accelerated Rules, the term “Arbitral Tribunal” shall mean one or more arbitrators; the term “Claimant” shall include one or more claimants; and, the term “Respondent” shall include one or more respondents. The term “Award” shall mean the final award of the Arbitral Tribunal but does not preclude the entry of interim awards or partial awards during the process. “Commencement of Arbitration” shall be deemed to occur upon the service of the Notice to Arbitrate on the Respondent. “Selection of the Arbitral Tribunal” shall be deemed to occur, after the exhaustion of any challenges, upon the selection of the Arbitral Tribunal that determines the dispute on the merits.

1.5 By agreeing to arbitrate under the Accelerated Rules, the parties agree to expedite the arbitration process and to place a high priority on efficiency of procedure consistent with a reasonable, but not exhaustive, opportunity for each of the parties to present its case. Proceeding under the Accelerated Rules constitutes an acknowledgement by the parties to the proceeding that the procedures are sufficient to allow the presentation of any claim or defense.

1.5.1 The parties may set the time for an award in the arbitration agreement or by agreement after the Notice of Arbitration is served and,
unless the parties agree otherwise, the Arbitral Tribunal shall follow such time limitations in establishing a timetable for rendering the Award.

1.5.2. Otherwise, the Arbitral Tribunal shall establish a schedule for the arbitration that will result in issuance of an Award in as short a period as feasible under the circumstances, consistent with the reasonable needs of the parties, the subject matter of the arbitration and such other factors as the Arbitral Tribunal determines to be appropriate, but not later than six (6) months from the Selection of the Arbitral Tribunal.

All time periods and procedures under the Accelerated Rules can be modified by the Arbitral Tribunal so as to render the Award within the schedule established by the parties or by the Arbitral Tribunal.

1.6. The Arbitral Tribunal is actively to manage the arbitration proceeding and may limit the evidence presented at the proceedings, impose time limits on each party’s presentation of testimony or otherwise control the proceedings as is necessary in the discretion of the Arbitral Tribunal to arrive at a speedy, just Award. The Arbitral Tribunal may also proceed simultaneously with different phases of the arbitration, and otherwise exercise discretion to manage the proceedings to conform to the overall time limit. In extraordinary circumstances that, in the judgment of the Arbitral Tribunal, are causes beyond the control of the parties or the Arbitral Tribunal, the Arbitral Tribunal may enlarge the time period for rendering the Award.

Accelerated Rule 2: Jurisdiction and Applicable Law

2.1 The Arbitral Tribunal, when appointed, shall have the exclusive authority to resolve any disputes over the scope, interpretation and application of the Accelerated Rules.

2.2 The parties further agree to submit to the Arbitral Tribunal, when appointed, any dispute pertaining to the jurisdiction of the Arbitral Tribunal or the arbitrability of disputes, including any disputes over the existence, validity or scope of the agreement to arbitrate or the proper parties to the arbitration. For the purposes of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

2.3 Any challenges to the jurisdiction of the Arbitral Tribunal, except challenges based on the Award itself, shall be made no later than the statement of defense or, with respect to a counterclaim, the reply to the counterclaim.

2.4 The Arbitral Tribunal may consolidate the arbitration with any other pending arbitration if there is consent of all parties to the consolidated proceeding and it will not delay the arbitration hearing.

2.5 The Arbitral Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Arbitral Tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

2.6 In the absence of an agreement among the parties to the arbitration, the Arbitral Tribunal shall decide the place, or legal seat, of the arbitration and the language(s) to be used in the proceedings. In all circumstances, in the interest of expediting the schedule, the Arbitral Tribunal shall have discretion to decide the most convenient location of any hearings.

2.7 An Award made pursuant to the Accelerated Rules shall constitute, without more, presumptive proof of the existence and validity of an agreement to arbitrate.

Accelerated Rule 3: Permissible Forms of Notice and Time Period Calculations

3.1 Notices or other communications required under the Accelerated Rules shall be in writing and delivered to the address specified in writing by the recipient or, if no address has been specified, to the last known business or residence address of the recipient. Notices and communications may be given via e-mail, courier, facsimile transmission, overnight mail or any means approved by the Arbitral Tribunal. To the extent technically feasible, copies of notices and communications shall be sent on the day of transmission by e-mail to all recipients. Notices and communications shall be deemed to be effective as
of the earlier of physical or electronic receipt. Proof of transmission shall be deemed prima facie proof of receipt of any notice or communication given under the Accelerated Rules if provided by electronic means. Any disputes with regard to receipt of an electronic communications under these Rules shall be resolved by reference to the most recent UNCITRAL Model Law on Electronic Commerce in effect at the time of the Arbitration.

3.2 Time periods specified by the Accelerated Rules or established by the Arbitral Tribunal shall start to run on the day following the day when a notice or communication is received and shall end at the close of business on the last day of the specified time period, unless the last day occurs on a non-business day or a recognized holiday at the location of receipt, in which case the notice period shall end at the close of business on the next generally recognized business day at the location of receipt.

**Accelerated Rule 4: Commencement of Arbitration**

The party commencing arbitration (the “Claimant”) shall transmit to the other party (the “Respondent”) a Notice of Arbitration. The Notice of Arbitration shall be served as required by any agreement of the parties and, in the absence of such agreement, shall be served in accordance with the Accelerated Rules. If the parties have agreed on a particular dispute resolution institute (the “Appointing Authority”) to be the non-administering or administering authority for resolution of the dispute, a copy of the Notice of Arbitration shall be simultaneously sent to the Appointing Authority together with a remittance in the amount required by the Appointing Authority for filing or otherwise. In the absence of any agreement on a specifically named Appointing Authority, selection of these Accelerated Rules shall be an agreement to have the CPR Institute serve as the Appointing Authority hereunder.

**Accelerated Rule 5: The Notice of Arbitration**

The Notice of Arbitration may be in the form of a letter or a pleading but must contain in the text or attachments the following information:

- **a.** The names, addresses, phone, email and fax numbers of the Claimant and the Respondent and the parties’ representatives (and positions) involved in the dispute to the extent known;
- **b.** The names, addresses, phone, email and fax numbers of counsel for the Claimant and the Respondent to the extent known;
- **c.** A demand for arbitration with a short description of the dispute and of the relief sought, including amounts claimed;
- **d.** The relevant agreements, including the excerpted text of any arbitration clause or the arbitration submission agreement that is involved;
- **e.** The text of any applicable contractual notice clause and an attestation of compliance therewith;
- **f.** The number of arbitrators required by any arbitration agreement and a description of any requested expertise for any non-party selected arbitrator;
- **g.** The full name, address, phone and fax numbers and email address of any party-selected arbitrator for the Claimant pursuant to the arbitration clause or any other selection process applicable to the arbitration proceeding;
- **h.** The agreed place of arbitration, language(s) for the arbitration proceeding, and any suggestion as to the most convenient place for any hearings, in the event a party believes it would be convenient to hold any hearings at a location other than the agreed place of arbitration.

The Notice of Arbitration may be combined by the Claimant with its Statement of Claim and, if so combined, the time periods applicable to the Statement of Claim shall run from the service of the Notice of Arbitration.

**Accelerated Rule 6: Selection of the Arbitral Tribunal**

Unless the parties have agreed otherwise, selection of the Accelerated Rules to govern an arbitration proceeding shall mean that the Arbitral Tribunal shall consist of one arbitrator. The Appointing Authority shall appoint the Arbitral Tribunal pursuant to its selection procedure but should disqualify any arbitrator who is not available to handle the arbitration within the expedited time periods established by the Accelerated Rules. In the event that the CPR Institute is to select the Arbitral Tribunal, the procedure set forth in Appendix B shall be followed.
6.1 Where an arbitrator is to be party selected, if a party fails to nominate an arbitrator within the time period established by an arbitration clause or, in the absence of such a provision, within the time period established by the Appointing Authority, on the request of any party, the Appointing Authority shall appoint a neutral as set forth herein.

6.2 A party’s failure to submit a conflicts list or failure to make a full disclosure of all parties or non-parties who could conceivably be expected to be involved in the arbitration shall be deemed a waiver by that party of any later conflicts that may arise if such disclosure were made at the time of arbitrator selection and no arbitrator shall be required to be disqualified in light of such waiver. An arbitrator may decide, nonetheless, to withdraw if such withdrawal will permit the parties to complete the arbitration within the time limitations as set forth in the Accelerated Rules.

6.3 All arbitrators appointed in any arbitration proceeding under the Accelerated Rules shall be independent and impartial and shall be obligated to act as a neutral in matters connected with the arbitral proceeding. Each arbitrator shall sign, under oath, a statement of neutrality and shall disclose any facts or circumstances which may call into question his or her neutrality in light of the disclosures made by the parties. Any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator’s independence or impartiality, provided that a party may challenge an arbitrator whom it has appointed only for reasons of which it becomes aware after the appointment has been made.

6.4 A party may challenge an arbitrator only by a notice in writing to the Appointing Authority, with a copy to the other parties, given no later than five (5) business days after the challenging party (i) receives notification of the appointment of that arbitrator, or (ii) becomes aware of a circumstance that would form the basis for a challenge to the continued service of the arbitrator, whichever is later. The notice shall state the reasons for the challenge with specificity. Where possible, the Appointing Authority will not disclose to the arbitrator the name of the challenging party. If the other party does not agree to the challenge or the arbitrator fails to voluntarily withdraw, the Appointing Authority shall decide the challenge after providing the non-challenging party and the arbitrator(s) with an opportunity to comment on the challenge.

Accelerated Rule 7: Statements of Claim, Defense and Counterclaim

7.1 The Statement of Claim

The purpose of the Statement of Claim is to define the issues to be arbitrated and to provide the Respondent with sufficient information to respond directly to the factual and legal positions that comprise the claim. No later than ten (10) days after service of the Notice of Arbitration, the Claimant shall serve upon the Respondent its Statement of Claim. The Statement of Claim shall include:

a. A detailed statement of the Claimant’s claim in numbered paragraphs including a comprehensive description of the testimonial and documentary evidence that claimant intends to offer to support the claim;

b. A detailed statement of the relief sought and any damages claimed;

c. The legal authorities relied upon by Claimant for each element of its claim;

d. The names and addresses of the reasonably known fact witnesses Claimant intends to present to prove each element of its claim;

e. The names and addresses of any expert witnesses retained by Claimant to give testimony at the arbitration proceeding together with curricula vitae;

f. Copies of documents that support each element of Claimant’s claim or, if such documents are not served with the Statement of Claim, an explanation as to why such documents are unavailable, a time for making such documents available, and identification, by location and file, the documents in the party’s possession, custody or control that may be relevant to the Statement of Claim.

7.2 The Statement of Defense

Within thirty (30) days after receipt of the Statement of Claim, the Respondent shall deliver to the Claimant a Statement of Defense with a substantive response to all elements of the Statement of Claim and any other grounds that constitute a defense to
7.4 Effect of Admissions

The admissions of a party shall be binding for purposes of the arbitration proceeding in which the admission occurs. The Accelerated Rules recognize that a party may choose to admit a fact because of the cost of contesting the issue, to expedite the proceeding or for other reasons without agreeing to be bound outside of these arbitration proceedings. However, by agreeing to arbitrate under the Accelerated Rules, each party agrees that the Award shall be res judicata as to any and all claims or defenses raised in the arbitration proceeding and for that purpose, each party shall be bound by admissions made in the arbitration proceeding.

7.5 Amendments

Claims, Defenses or Counterclaims within the scope of the arbitration agreement may be freely added or amended prior to the Initial Conference, and thereafter with the consent of the Tribunal provided that the amendment or any necessary reply will not unduly delay the arbitration proceeding.

7.6 The Arbitral Tribunal shall have full and complete authority to alter any of the time periods set forth for Statements of Claims, Defenses or Counterclaims. Where any party has good cause for its inability to abide by the time period for delivery of its Statement of Claim, Defense, Counterclaim or Reply, that party may apply to the Arbitral Tribunal or, if the Arbitral Tribunal has not been fully constituted, to the Appointing Authority before the expiration of the time period, to request a later deadline. Such period or periods may be modified as appropriate under the circumstances.

Accelerated Rule 8: Withdrawal of Claims and Determinations upon the Record

8.1 Unless all parties have consented, or the permission of the Arbitral Tribunal has been obtained, no claim may be withdrawn after a Statement of Defense has been served, except with prejudice.

8.2 Upon the good faith request of a party with a demonstration of good cause and appropriate notice, the Arbitral Tribunal may make a determination that a particular issue or claim may be considered upon the submitted record without taking oral testimony when:

the Statement of Claim, except that the time period for delivery of the Statement of Defense may be extended to sixty (60) days where warranted either by the nature of the matter or if the amount of controversy exceeds ten million dollars ($10,000,000). In its substantive response, the Respondent is under a good faith obligation to admit so much of each statement in the Statement of Claim as it finds is true even if the statement as a whole cannot be admitted. The Statement of Defense shall include:

a. A detailed statement of the grounds for each substantive response or defenses in numbered paragraphs including a comprehensive description of the testimonial and documentary evidence that Respondent intends to offer to support each response or defense;

b. The legal authorities relied upon by Respondent for each element of its defense;

c. The names and addresses of the reasonably known fact witnesses Respondent intends to present to prove each denial or defense;

d. The names and addresses of any expert witnesses retained by Respondent to give testimony at the arbitration proceeding together with curricula vitae;

e. Copies of the documents that evidence each element of Respondent’s defense or, in the absence thereof, an explanation as to why such documents are unavailable and a time for making such documents available, and identification by location and file of documents in the party’s possession, custody or control that may be relevant to the Statement of Defense.

7.3 Statement of Counterclaim and Reply

The Respondent may include in its Statement of Defense any Statement of Counterclaim within the scope of the arbitration agreement. If it does so, the Statement of Counterclaim shall be in form and substance identical to the elements of the Statement of Claim and the Reply to the Counterclaim shall be in form and substance identical to the Statement of Defense and served within twenty (20) days after receipt of the Statement of Counterclaim.
9.4 The award or order for interim measures shall remain in effect until modified or vacated by the special arbitrator or the Arbitral Tribunal. If the Arbitral Tribunal is constituted before the special arbitrator has rendered an award or order, the special arbitrator shall retain jurisdiction to render such award or order unless the Arbitral Tribunal directs otherwise. Once the Arbitral Tribunal has been constituted, the Arbitral Tribunal may modify or vacate the award or order rendered by the special arbitrator.

9.5 Any award or order entered under this Rule 9 may be treated as an interim award so that it may be enforced as necessary in a court of appropriate jurisdiction or may be treated as part of the Award or both.

Accelerated Rule 10: The Initial Conference

10.1 Within seven (7) days after the Arbitral Tribunal is selected or at such other time as the Arbitral Tribunal shall direct, the Arbitral Tribunal shall convene an Initial Conference for the purpose of planning and scheduling the arbitration proceeding. The Initial Conference may be conducted by conference call and may consist of one or a series of conferences. Each party, or the party's business representative with appropriate authority, and counsel, if any, should participate in the Initial Conference but the Initial Conference may proceed after due notice, notwithstanding the nonparticipation of a party or counsel. It shall be the objective of the Initial Conference to establish an efficient, workable and detailed protocol for the conduct of the arbitration on a cost effective, expedited basis to ensure the prompt and judicious determination of the issues in dispute. All parties shall cooperate fully with each other and with the Arbitral Tribunal to achieve this objective.

10.2 At least two (2) days prior to the Initial Conference, the parties shall jointly submit to the Arbitral Tribunal a completed Initial Conference Form as attached to these Rules in Appendix D or as directed by the Arbitral Tribunal. The submitted Conference Form shall note any disagreements in the positions of the parties.
Arbitral Tribunal may appoint a neutral expert to be paid for by the parties as a cost of the proceeding to expedite disclosure.

11.3 At any time before the arbitration is concluded, the Arbitral Tribunal may, upon its own initiative, direct any participant in the arbitration to produce to the Tribunal and to the other parties any documents that the Arbitral Tribunal believes to be relevant and material to the outcome of the case.

11.4 The Arbitral Tribunal may exclude from disclosure documents for any of the following reasons:

a. Lack of sufficient relevance or materiality;

b. Legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

c. Unreasonable burden (including financial burden to the producing party) to produce the requested evidence;

d. Loss or destruction of the document that has been reasonably shown to have occurred;

e. Grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

f. Grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling;

g. Considerations of fairness or equality of the parties that the Arbitral Tribunal determines to be compelling; or

h. Security concerns or privacy rights of a party or witness that outweigh the need of another party to the proceeding to have access to the evidence.

11.5 In case of the failure of a party to produce a document as required by the Accelerated Rules or as ordered by the Arbitral Tribunal, the Arbitral Tribunal may draw adverse inferences and/or the Arbitral Tribunal may take into consideration such failure in awarding the costs of the arbitration proceeding.
**Accelerated Rule 12: Disclosure of Witnesses**

12.1 Exchange of Witness Statements

The Arbitral Tribunal shall establish the dates for identifying witnesses and for the exchange of written witness statements and rebuttals as appropriate. A party need not re-serve witness statements included with either the Statement of Claim, Statement of Defense, Counterclaim or any Reply thereto.

12.2 Witnesses with Witness Statement

A party shall be responsible for producing and making available for examination any person for whom it intends to submit a witness statement. A witness need not appear if the other side gives notice that it does not intend to cross-examine or if the witness is excused by the Arbitral Tribunal pursuant to the Accelerated Rules. If a party will be unable or is unwilling to produce at the hearing any witness whose evidence it intends to submit by witness statement, the party shall give reasonable notice in writing to all parties that the party does not intend to produce the witness and request that the Arbitral Tribunal excuse the witness from appearing.

12.3 Other Witnesses

Any other persons may be ordered through appropriate process to appear as witnesses at the hearing as ordered by the Arbitral Tribunal. If ordered by the Arbitral Tribunal, a party shall be responsible for producing and making available for examination any person within its employ.

12.4 The Arbitral Tribunal shall control the appearance and testimony of all witnesses under Accelerated Rule 13. Without limiting the discretion under Accelerated Rule 13, the Arbitral Tribunal may excuse from appearance any witness whose attendance would impose a burden on the witness or the party responsible for producing the witness that is not justified by the importance of the testimony being offered.

12.5 The Arbitral Tribunal may summon witnesses or documents as it deems appropriate either at the request of a party or upon its own initiative. Any summons served on a non-party shall be served in conformance with the requirements for service in the jurisdiction in which it is served.

12.6 In case of the failure of a party to produce a witness as required by the Accelerated Rules or as ordered by the Arbitral Tribunal, the Arbitral Tribunal may draw adverse inferences and/or the Arbitral Tribunal may take into consideration such failure in awarding the costs of the arbitration proceeding.

**Accelerated Rule 13: The Hearing**

13.1 It shall be within the discretion of the Arbitral Tribunal to determine the need for a hearing, the length of the hearing and the procedure to be followed at the hearing, including the application of appropriate standards for evidence. The Arbitral Tribunal shall have the right to limit the introduction of oral testimony, to limit the taking of oral testimony to certain issues in the case, to require witness statements in lieu of direct testimony, to limit the amount of time that each party has to present oral testimony and to cross examine another party’s witnesses, and to determine the order of proof and the procedure for taking oral testimony. Where appropriate, hearings may be conducted telephonically or by video (including web-based video conferencing) so long as all parties who wish to do so may be present in person or by electronic means.

13.2 Witnesses, including experts, may be submitted through written statements or reports and received into evidence by the Arbitral Tribunal. Each statement should be signed by the witness, contain an affirmation of its truth and be sufficiently detailed to constitute the entire evidence of that witness. The Arbitral Tribunal should permit cross-examination of witnesses whose testimony is submitted by written statement whenever necessary to the Arbitral Tribunal’s decision. The Arbitral Tribunal shall accord such weight to witness statements submitted without cross-examination as the Arbitral Tribunal deems appropriate under all of the circumstances.

13.3 In conducting the hearing, the Arbitral Tribunal will give deference to any issues of privilege, confidentiality or work product that are brought to its attention and, if the Arbitral Tribunal concludes
that the privilege should apply, exclude such evidence from the hearing.

13.4 The Arbitral Tribunal may proceed with the hearing in the absence of one or more parties who have received due notice of the hearing.

13.5 The Arbitral Tribunal shall close the hearing after it has heard and received all evidence that it deems material to the dispute and any arguments presented to the Arbitral Tribunal orally or in the form of post-hearing briefs. Prior to the Final Award, the Arbitral Tribunal shall have the discretion to reopen the hearing.

**Accelerated Rule 14: Noncompliance and Default**

Whenever a party fails to comply with the Accelerated Rules, or any order of the Arbitral Tribunal in a manner deemed material by the Arbitral Tribunal, the Arbitral Tribunal shall fix a date for compliance and, if the party does not comply by such date, the Arbitral Tribunal may impose a remedy it deems just, including an award of costs or an award on default. Prior to entering an award on default, the Arbitral Tribunal shall require the non-defaulting party to produce evidence and legal argument in support of its contentions as the Arbitral Tribunal shall deem sufficient to establish the claim or defense and any damages. The Arbitral Tribunal may receive such evidence and argument without the defaulting party’s presence or participation.

**Accelerated Rule 15: Waiver of Exemplary or Punitive Damages**

The parties to any arbitration under the Accelerated Rules waive any exemplary or punitive damages of any kind and agree to receive only such damages as may otherwise be permitted by law or statute applicable to claims in the arbitration proceeding. This waiver shall not apply to any claims where such waiver is contrary to statutory or regulatory law.

**Accelerated Rule 16: The Award**

16.1 Except as otherwise permitted by the Accelerated Rules, the Award shall be rendered no later than thirty (30) days after the close of the hearing, and shall be a reasoned award unless the parties otherwise agree. In keeping with the accelerated nature of the proceeding, the award shall be as concise as circumstances permit. The date for rendering an Award may be extended by consent of the parties or, if warranted, by extraordinary circumstances in the judgment of the Arbitral Tribunal. An award may be rendered by a majority of the Arbitral Tribunal. The Arbitral Tribunal shall be free to award damages and such other remedies as it deems appropriate under the circumstances of the case so long as it does not exceed the powers granted to it by the parties’ contract or submission. The Award may include interest both pre-award and prospectively until the Award is paid in full. The Arbitral Tribunal shall have the authority to award the reasonable direct or indirect costs to any party on account of another party’s noncompliance with any order of the Arbitral Tribunal during the arbitral proceeding.

16.2 The form of the Award shall be in the discretion of the Arbitral Tribunal except that (a) in the absence of the parties’ specifying the form of the Award, the form of the Award shall comply with the rules for enforceability in the jurisdiction in which the arbitration is held and (b) the Arbitral Tribunal shall render a Reasoned Award if either party requests. In the event of a default, the form of the Award shall comply with the rules for enforceability in the jurisdiction in which the arbitration is held and, for international arbitrations, shall be in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or such other legal basis as is sufficient in the territory where the Award will be relied upon, and should state the procedural due process accorded the defaulting party. The Award shall resolve and dispose of each and every claim submitted to Arbitral Tribunal.

16.3 The Award shall be served as provided for service of documents in the Accelerated Rules.

16.4 Within seven (7) days after the Award has been notified to the parties, any party may make an application to the Arbitral Tribunal for specified corrections of the Award. Copies of this application shall be transmitted, simultaneously with its submission to the Arbitral Tribunal, to all other parties by the same means of transmission employed for its submission to the Arbitral Tribunal.
16.4.1. Only applications for corrections that, if made, would require alteration of the Award’s final dispositions shall be admissible.

16.4.2. The Arbitral Tribunal shall determine the procedure to be followed in ruling on the application, including the time to be afforded to adverse parties to respond to the application, but must rule on the application within 30 days of its submission, unless the Arbitral Tribunal, for adequate reasons stated, extends this period.

16.4.3. An application for correction shall not affect the finality of the Award. However, the Arbitral Tribunal will not be functus officio until it has finally ruled upon the application. The Arbitral Tribunal addressed with an application for correction may stay enforcement and execution of the Award upon such terms as it deems appropriate.

**Accelerated Rule 17: Costs**

17.1 Subject to any agreement between the parties to the contrary, the Arbitral Tribunal shall apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding and the result of the arbitration. The Arbitral Tribunal shall fix the costs of arbitration or any part thereof in an award. The costs of arbitration include:

a. The fees and expenses of members of the Arbitral Tribunal;

b. The costs of expert advice and other assistance engaged by the Arbitral Tribunal;

c. The travel, translation, and other expenses of witnesses to such extent as the Arbitral Tribunal may deem appropriate;

d. The costs for legal representation and assistance and experts incurred by party to such extent as the Arbitral Tribunal may deem appropriate;

e. The charges and expenses of Appointing Authority or any other neutral organization with respect to the arbitration;

f. The costs of a transcript, if any, and the costs of meeting and hearing facilities.

17.2 The Arbitral Tribunal may request each party to deposit an appropriate amount as an advance for the Arbitral Tribunal’s costs of conducting the arbitration and, during the course of the proceeding, it may request supplementary deposits from the parties. Any such funds shall be held and disbursed in such manner as the Arbitral Tribunal may deem appropriate.

17.3 If the requested deposits are not paid in full within ten (10) days after receipt of the request, the Arbitral Tribunal shall so inform the parties in order that jointly or severally they may make the requested payment. If such payment is not made, the Arbitral Tribunal may suspend or terminate the proceedings. Either party may pay another party’s share of the cost and such payment shall be taxed against the nonpaying party as a cost of the arbitration in the Award.

**Accelerated Rule 18: Waiver**

18.1 By agreeing to arbitrate under the Accelerated Rules, the parties waive any other legal procedure that is inconsistent with the expedited nature of these Rules or the Arbitral Tribunal’s authority over the arbitration proceedings.

18.2 The failure of a party promptly to object in writing to any violation of the Accelerated Rules shall be deemed a waiver of such violation unless in the discretion of the Arbitral Tribunal there is demonstrable good cause for such failure.

18.3 The failure of a party to object in writing to the continued service of an arbitrator in accordance with Rule 6.4 shall be deemed a waiver thereof by such party.

**Accelerated Rule 19: Settlement and Mediation**

19.1 The Accelerated Rules encourage all parties to discuss settlement at any time during the arbitration process. The Arbitral Tribunal may suggest that the parties explore settlement of one or more issues that are involved in the arbitration proceeding.
19.2 With the consent of the parties, the Arbitral Tribunal at any stage of the proceeding may arrange for mediation of the claims asserted in the arbitration by a mediator acceptable to the parties who may be a member of the Arbitral Tribunal. The parties shall agree upon the terms and conditions under which the mediation shall be conducted including use of the Appointing Authority’s mediation procedures and, upon request of either party, the Arbitral Tribunal may settle any dispute regarding the procedure to be used in mediation.

19.3 The Arbitral Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent or the parties have consented to a member of the Arbitral Tribunal serving as mediator.

19.4 If the parties settle the dispute before an Award is made, the Arbitral Tribunal shall terminate the arbitration and, if requested by all parties and accepted by the Arbitral Tribunal, may record the settlement in the form of an Award made by consent of the parties.

19.5 Unless otherwise ordered by the Arbitral Tribunal, mediation shall be conducted simultaneously with these arbitration proceedings so as not to delay the date established for the hearing or the schedule for the proceedings.

Accelerated Rule 20: Actions Against the Appointing Authority or the Arbitrator(s)

Neither the Appointing Authority nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules.

APPENDIX A

PROPOSED ARBITRATION CLAUSE OR SUBMITTAL TO ARBITRATION UNDER THESE ACCELERATED RULES

A. PRE-DISPUTE CLAUSE: STANDARD

“Any dispute arising out of or relating to the agreement to arbitrate or this contract, including the making, breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention & Resolution Global Rules for Accelerated Commercial Arbitration (the “Accelerated Rules”), in effect on the date the arbitration is commenced. Judgment upon the Award rendered by the Arbitral Tribunal may be entered by any court having jurisdiction over any party or any of its assets. The place of the arbitration shall be (city, country). The language shall be (specify).”

B. PRE-DISPUTE CLAUSE: ALTERNATIVE ONE

“Any dispute arising out of or relating to the agreement to arbitrate or this contract, including the making, breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention & Resolution Global Rules for Accelerated Commercial Arbitration (the “Accelerated Rules”), in effect on the date the arbitration is commenced. Judgment upon the Award rendered by the Arbitral Tribunal may be entered by any court having jurisdiction over any party or any of its assets. The place of the arbitration shall be (city, country). The language shall be (specify).”

C. PRE-DISPUTE CLAUSE: ALTERNATIVE TWO

“Any dispute arising out of or relating to the agreement to arbitrate or this contract, including the making, breach, termination or validity
thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention & Resolution (“CPR Institute”) Global Rules for Accelerated Commercial Arbitration (the “Accelerated Rules”). In the event that the amount in controversy exceeds ten million dollars, then, notwithstanding anything to the contrary in the Accelerated Rules, the time period for completion of the arbitration under Accelerated Rule 1.3 shall be enlarged from six (6) months to twelve (12) months and the Arbitral Tribunal shall consist of [number] arbitrator[s].

The Arbitral Tribunal shall determine any dispute regarding the applicable rules and no such dispute shall invalidate any prior action in the arbitration proceeding. Judgment upon the Award rendered by the Arbitral Tribunal may be entered by any court having jurisdiction over any party or any of its assets. The place of the arbitration shall be (city, country). The language shall be (specify).”

D. THE CPR INSTITUTE ARBITRATION APPEAL PROCEDURE

(Insert if desired. If not included, this appeal procedure will be deemed not to apply).

“Unless otherwise agreed by the parties in writing, within 30 days of receipt by the parties of a final arbitration award in any arbitration arising out of or related to this agreement, an appeal may be taken from such final award under the CPR Institute Arbitration Appeal Procedure, in effect at the commencement of the appeal. The appeal shall be heard by three former judges appointed by CPR who will apply the following grounds for appeal:

i) the award contains material and prejudicial errors of law of such nature that it does not rest on any appropriate legal basis;

ii) the award contains factual findings clearly unsupported by the record;

iii) the award was procured by corruption, fraud, or undue means;

iv) there was evident partiality or corruption in the arbitrators, or either of them; or

v) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

No appeal may be filed unless the arbitrators in the original arbitration were required by the parties to reach a decision in compliance with applicable law and issue a written award setting forth the factual and legal basis; and a record was made of all hearings and evidence in such original arbitration proceeding.

Unless otherwise agreed to by the parties and the Appeal Tribunal, the appeal shall be conducted at the place of the original arbitration and in the language of that arbitration.

The decision of the Appeal Tribunal shall constitute the final award and shall finally dispose of the matters in dispute.”

E. EXISTING DISPUTE SUBMISSION AGREEMENT

The undersigned parties hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution Global Rules for Accelerated Commercial Arbitration (the “Accelerated Rules”) in effect on the date of this agreement, the following dispute:

(Describe briefly providing a short description of the dispute and of the relief sought, including amounts claimed by all parties)

For purposes of the Accelerated Rules, [name of party or parties] shall be designated the Claimant and [name of party or parties] shall be designated the Respondent. The above dispute shall be submitted to:

- one neutral arbitrator to be appointed as provided in the Accelerated Rules;
- or three neutral arbitrators to be appointed as provided in the Accelerated Rules.
The Claimant and Respondent believe that it would be helpful, but not required, to the resolution of the dispute if the arbitrator(s) had the following qualifications or expertise: (describe briefly, including Claimant and Respondent’s separate views of the qualifications)

We are attaching to this submission agreement the names and addresses of all involved parties, their representatives and of the potential witnesses for each party, if any.

We shall faithfully observe this agreement and the Accelerated Rules and we shall abide by and perform any Award rendered by the Arbitral Tribunal. Judgment upon the Award rendered by the Arbitral Tribunal may be entered by any court having proper jurisdiction. The place of the arbitration shall be __________ (specify city, country). The language of the arbitration shall be _______ (specify).”

See Clause B, above if parties wish to agree to use the CPR Institute Arbitration Appeal Procedure, as well, in their submission agreement.

This submission shall be treated as the Notice of Arbitration under the Accelerated Rules.

APPENDIX B
ARBITRAL TRIBUNAL SELECTION BY THE CPR INSTITUTE

1. On an expedited basis, by teleconference or otherwise, the CPR Institute will convene the parties, counsel or a designated representative to discuss (i) the number of arbitrators to be selected and the timing of selection of any party selected arbitrator, (ii) the subject matter and qualifications of any arbitrator, (iii) the submission of conflict lists which shall include the name and address of all entities and witnesses that are reasonably anticipated to be involved in the arbitration, (iv) any other information that a party deems appropriate to bring to the CPR Institute’s attention in connection with the selection of arbitrator(s) and (v) the fee and deadline for payment of the respective parties’ share if not already paid. Either party may pay the fee due for the other if the fee is not paid by the deadline or the CPR Institute may suspend the selection process until payment is made. Fees paid to the CPR Institute may be assessed by the Arbitral Tribunal against one or more parties in the Arbitral Tribunal’s discretion as part of the Award.

2. As expeditiously as possible after the conference call, the CPR Institute will query its neutrals and transmit to the parties a list of proposed arbitrators accompanied by a package of information that shall include each arbitrator’s biographical information, availability and disclosures. If either party so requests, the CPR Institute will include in such package the names of the parties and counsel from any prior arbitration proceeding involving such neutral where prior parties have consented to such disclosure.

3. Not later than five (5) days thereafter, the parties shall return ranked lists to the CPR Institute together with specific objections to any of the candidates. The neutral, with highest combined ranking from the parties, shall be appointed; if more than one neutral is to be appointed, the panel shall be filled by those neutrals with the highest combined ranking in order of ranking. In the event that a party fails timely to return its selections, the CPR Institute may proceed with the selection in the absence of a party’s rankings. If neither party returns its rankings, if there is a tie in the rankings, or if there are other circumstances where a complete Arbitral Tribunal cannot be
APPENDIX C

INTERIM MEASURES PROTOCOL

The protocol for obtaining interim measures under the Accelerated Rules before a special arbitrator shall be as follows:

1. Prior to the constitution of the Arbitral Tribunal, any party may request that interim measures be granted under this Rule against any other party by a special arbitrator appointed for that purpose. Interim measures under this Rule are requested by written application to the CPR Institute and simultaneously served on all parties, entitled “Request for Interim Measures of Protection By a Special Arbitrator,” describing in reasonable detail the relief sought, the party against whom the relief is sought, the grounds for the relief, and, if practicable, the evidence and law supporting the request. The request shall be served in accordance with the Accelerated Rules, and shall certify that all other parties affected have been notified of the request or explain the steps taken to notify such parties.

2. The request for interim measures shall be accompanied by an initial deposit of $5,000, paid to the CPR Institute by wire, check, credit card or draft. The CPR Institute shall promptly determine, pursuant to its administrative rules, any further deposit due to cover the fee of the CPR Institute and the remuneration of the special arbitrator, which amount shall be paid within the time period determined by the CPR Institute.

3. If the parties agree upon a special arbitrator within one business day of the request, that arbitrator shall be appointed. If there is no such timely agreement, the CPR Institute shall appoint a special arbitrator from a list of arbitrators maintained by the CPR Institute for that purpose. To the extent practicable, the CPR Institute shall appoint the special arbitrator within one business day of the CPR Institute’s receipt of the application for interim measures under this Rule. The special arbitrator’s fee shall be determined by the CPR Institute in consultation with the special arbitrator. The special arbitrator’s fee and reasonable out-of-pocket expenses shall be paid from the deposit made with the CPR Institute.
4. Prior to accepting appointment, a special arbitrator candidate shall disclose to the CPR Institute any circumstances that might give rise to justifiable doubt regarding the arbitrator’s independence or impartiality. Any challenge to the appointment of a special arbitrator must be made within one business day of the challenging party’s receipt of the CPR Institute’s notification of the appointment of the arbitrator and the circumstances disclosed. To the extent practicable, the CPR Institute shall rule on the challenge within one business day after the CPR Institute’s receipt of the challenge. The CPR Institute’s ruling on the challenge shall be final. In the event of death, incapacity, resignation or successful challenge of a special arbitrator, the CPR Institute shall appoint a replacement forthwith in accordance with these procedures.

5. The special arbitrator shall determine the procedure to be followed, which shall include, whenever possible, reasonable notice to, and an opportunity for hearing (either in person, by teleconference or other appropriate means), all affected parties. The special arbitrator shall conduct the proceedings as expeditiously as possible, and shall have all of the powers vested in the Arbitral Tribunal under the Accelerated Rules, including the power to rule on his/her own jurisdiction.

6. Except in the event of extraordinary circumstances, the ruling on the request for interim measures shall be made as soon as practicable, and no later than fifteen (15) days from the appointment of the special arbitrator.

7. The special arbitrator may grant such interim measures as necessary, including but not limited to measures for the preservation of assets, the conservation of goods or the sale of perishable goods.

8. The ruling on the request for interim measures shall be made by award or order. The award or order may be made conditional upon the provision of security or any act or omission specified in the award or order. The award or order may provide for the payment of a specified amount in case of noncompliance with its terms or such other sanctions which shall apply from the date of the interim award.

9. The award or order shall specify the relief awarded or denied, shall determine the cost of the proceedings, including the CPR Institute’s administrative fee, the arbitrator’s fee and expenses as determined by the CPR Institute, and either apportion such costs among the parties as the special arbitrator deems appropriate or defer any apportionment until the Award. The special arbitrator may also apportion the parties’ reasonable attorneys’ fees and expenses in the award or order or in a supplementary award or order.
APPENDIX D

INITIAL CONFERENCE FORM

At least two (2) days prior to the Initial Conference, the parties shall submit to the Arbitral Tribunal a completed copy of this Initial Conference Form. To expedite the initial conference itself, this should be a joint submission and the parties should note on the Form any disagreements. If the Initial Conference Form is not joint, it should be served on the other party when it is submitted to the Arbitral Tribunal.

Each party should inform the Arbitral Tribunal of its views on the following matters for purposes of the Initial Conference:

a. When would you like the arbitration hearing to occur, where do you want them to occur and how long do you anticipate your affirmative case will take?

b. What is proposed as a detailed schedule for the entire arbitration, including the date, duration and location of any required hearing?

c. In what language should the arbitration be conducted and do you anticipate any requirements for translating documents or witnesses into the language of the arbitration?

d. Is there agreement on the arbitration clause, the arbitration rules and the jurisdiction of the Arbitral Tribunal?

e. Are there any modifications to the arbitration rules or protocols that have been agreed upon by the parties?

f. What is the proper law to be applied to substantive matters?

g. What are the specific issues to be decided in the arbitration, and are there any issues which can be decided on the written record either by agreement of the parties or because there are no material facts in dispute?

h. What is the agreed or suggested schedule for any document disclosures in addition to that required by the Statements of Claim and Defense?
i. Do you anticipate that any additional document disclosure is necessary, and, if so, state what documents are sought and the grounds that demonstrate “substantial need” sufficient to warrant additional disclosure and the suggested deadlines for such disclosure?

j. Will you offer witness statements for elements of your case or defense, and, if so, what are the suggested deadlines for exchange of statements, rebuttals and for providing notice regarding witnesses as provided in the Accelerated Rules?

k. Will you present expert testimony as part of your case or defense and, if so, what is the expected subject matter of the expert testimony, and what are the suggested deadlines for disclosure of any expert reports and expert witnesses?

l. Would you be willing to use a joint neutral expert appointed by the Arbitral Tribunal in place of separate party experts?

m. Are there witnesses who are not able to travel to the arbitration hearing and can they be presented by video conference or other suitable alternatives?

n. Are there any unusual circumstances that require special procedures to gather or preserve evidence necessary for the determination of the issues to be decided?

o. Are there any anticipated requests for interim relief and, if so, what are they and when do you suggest that they be considered by the Arbitral Tribunal?

p. Are there facts that can be stipulated to or other agreements such as the authentication and admission of exhibits that can be reached in order to shorten the proceeding?

q. What are the suggested order, manner and procedure for submission of any memoranda, and presenting proof, including the submission of written testimony in advance of the arbitration hearing?

r. Is a transcript of the arbitration hearing desired and, if so, what arrangements have you made for contracting and paying for the record?

s. What would you suggest for time limits to be allocated to each party during arbitration hearing, including the procedure for keeping track of time at the hearing?

t. Given the anticipated schedule for the proceeding, what would you suggest for the manner and timing of requests for costs and counsel fees as part of the Award?

u. What is the date when you would like to receive the Award in this case?

v. Are there any other issues that the Arbitral Tribunal needs to address or matter that should be brought to the attention of the Arbitral Tribunal that may affect scheduling this arbitration proceeding?

Respectfully submitted on behalf of Claimant


Respectfully submitted on behalf of Respondent
PRINCIPLES

CPR brings a distinct viewpoint to the field of domestic and international dispute resolution. Its tenets:

1. Most disputes are best resolved privately and by agreement.
2. Principals should play a key role in dispute resolution and should approach a dispute as a problem to be solved, not a contest to be won.
3. A skilled and respected neutral third party can play a critical role in bringing about agreement.
4. Efforts should first be made to reach agreement by unaided negotiation.
5. If such efforts are unsuccessful, resolution by a non-adjudicative procedure, such as mediation, should next be pursued. These procedures remain available even while litigation or arbitration is pending.
6. If adjudication by a neutral third party is required, a well-conducted arbitration proceeding usually is preferable to litigation.
7. During an arbitration proceeding the door to settlement should remain open. Arbitrators may suggest that the parties explore settlement, employing a mediator if appropriate.
8. Arbitration proceedings often can be conducted efficiently by the Arbitral Tribunal without administration by a neutral organization, or limiting the role of such an organization to assistance in arbitrator selection or ruling on challenges to arbitrators, if necessary.

The Globel Rules for Accelerated Commercial Arbitration reflect these principles.
TAB 10

CPR Mediation Procedures
TAB 10a

CPR Mediation Procedure
ABOUT CPR

The International Institute for Conflict Prevention & Resolution (formerly the CPR Institute for Dispute Resolution) is a membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.

CPR Members – General counsel and senior lawyers of Fortune 500 organizations as well as partners in the top law firms around the world. It is a committed and active membership, diligently participating in CPR activities and serving on committees.

The CPR 1,000 – 1,000 of the highest quality arbitrators and mediators, with specialization in over 17 practice areas and industries. As part of CPR’s nomination process, we check not only the suitability, but the availability of all neutrals nominated, as well as disclose any conflicts of interest up front.

CPR Pledge Signers – More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation©. Moreover, better than 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation©, including 400 of the nation’s 500 largest firms. This Pledge has been invaluable in bringing disputing parties to the negotiating table.

CPR’s Commitment – As we celebrate 25 years of achievement, we continue to dedicate the organization to providing effective, innovative ways of preventing and resolving disputes affecting business enterprises. We do so through leadership and advocacy, and by providing comprehensive resources such as information, training, consultation, neutrals, and networking for business, the judiciary, government, and other institutions.
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Please note that the Mediation Commentary is an integral part of the CPR Mediation Procedure. The CPR Mediation Procedure and Commentary is available at www.cpradr.org along with the CPR Mediation Analysis Screen (2001) and other useful ADR resources.
INTRODUCTION
The most widely used ADR process, mediation is a process in which a third party neutral — a mediator — meets with the disputing parties and actively assists them in reaching a settlement.

Mediation is private and confidential, flexible and informal. Typically, it is concluded expeditiously at moderate cost. The subject matter can be complex or simple, the stakes large or small, the number of parties few or many. The process typically is far less adversarial than litigation or arbitration, and therefore less disruptive of business relationships. Since other options are not foreclosed if mediation should fail, entering into a mediation process presents few risks.

Frequently cited advantages of mediation include:
• Substantial cost savings
• Promptness of resolution
• Creative, business-driven solutions
• Control over the outcome
• Preservation of business relationships
• Privacy and confidentiality

The procedure set forth below can be incorporated by reference in the dispute resolution clause of a business agreement or in a submission agreement entered into after a dispute has arisen (see Form annexed to the procedure). The procedure is suitable for transnational disputes as well as for disputes between U.S. parties.

CPR CLAUSES

Abbreviated Clauses for Standard Business Agreements

Negotiation Clause
The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives.

Mediation Clause
The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the [then current] CPR Mediation Procedure [in effect on the date of this Agreement], before resorting to arbitration or litigation.
Mediation with Arbitration, if Necessary
The parties shall endeavor to resolve any dispute arising out of or relating to this agreement by mediation under the CPR Mediation Procedure. Unless the parties agree otherwise, the mediator will be selected from the CPR Panels of Distinguished Neutrals. Any controversy or claim arising out of or relating to this contract or the breach, termination or validity thereof, which remains unresolved 45 days after appointment of a mediator, shall be settled by arbitration by [a sole] [three] arbitrator(s) in accordance with the CPR Rules for Non-Administered Arbitration, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

Arbitration Clause
Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be settled by arbitration by [a sole] [three] arbitrator(s) in accordance with the CPR Rules for Non-Administered Arbitration, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

For detailed ADR clauses for business agreements, see A Drafter's Guide to CPR Dispute Resolution Clauses.

THE CPR MEDIATION PROCEDURE
(Revised and effective as of April 1, 1998)

1. Agreement to Mediate
The CPR Mediation Procedure (the “Procedure”) may be adopted by agreement of the parties, with or without modification, before or after a dispute has arisen. The following provisions are suggested:

A. Pre-dispute Clause
The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the [then current] CPR Mediation Procedure [in effect on the date of this Agreement], before resorting to arbitration or litigation.

B. Existing Dispute Submission Agreement
We hereby agree to submit to confidential mediation under the CPR Mediation Procedure the following controversy: (Describe briefly)
2. Selecting the Mediator

Unless the parties agree otherwise, the mediator shall be selected from the CPR Panels of Neutrals. If the parties cannot agree promptly on a mediator, they will notify CPR of their need for assistance in selecting a mediator, informing CPR of any preferences as to matters such as candidates’ mediation style, subject matter expertise and geographic location. CPR will submit to the parties the names of not less than three candidates, with their resumes and hourly rates. If the parties are unable to agree on a candidate from the list within seven days following receipt of the list, each party will, within 15 days following receipt of the list, send to CPR the list of candidates ranked in descending order of preference. The candidate with the lowest combined score will be appointed as the mediator by CPR. CPR will break any tie.

Before proposing any mediator candidate, CPR will request the candidate to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate’s impartiality. If a clear conflict is disclosed, the individual will not be proposed. Other circumstances a candidate discloses to CPR will be disclosed to the parties. A party may challenge a mediator candidate if it knows of any circumstances giving rise to reasonable doubt regarding the candidate’s impartiality.

The mediator’s rate of compensation will be determined before appointment. Such compensation, and any other costs of the process, will be shared equally by the parties unless they otherwise agree. If a party withdraws from a multiparty mediation but the procedure continues, the withdrawing party will not be responsible for any costs incurred after it has notified the mediator and the other parties of its withdrawal.

Before appointment, the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously. It is strongly advised that the parties and the mediator enter into a retention agreement. A model agreement is attached hereto as a Form.

3. Ground Rules of Proceeding

The following ground rules will apply, subject to any changes on which the parties and the mediator agree.

(a) The process is non-binding.
(b) Each party may withdraw at any time after attending the first session, and before execution of a written settlement agreement, by written notice to the mediator and the other party or parties.

(c) The mediator shall be neutral and impartial.

(d) The mediator shall control the procedural aspects of the mediation. The parties will cooperate fully with the mediator.

   i. The mediator is free to meet and communicate separately with each party.

   ii. The mediator will decide when to hold joint meetings with the parties and when to hold separate meetings. The mediator will fix the time and place of each session and its agenda in consultation with the parties. There will be no stenographic record of any meeting. Formal rules of evidence or procedure will not apply.

(e) Each party will be represented at each mediation conference by a business executive or other person authorized to negotiate a resolution of the dispute, unless excused by the mediator as to a particular conference. Each party may be represented by more than one person, e.g. a business executive and an attorney. The mediator may limit the number of persons representing each party.

(f) Each party will be represented by counsel to advise it in the mediation, whether or not such counsel is present at mediation conferences.

(g) The process will be conducted expeditiously. Each representative will make every effort to be available for meetings.

(h) The mediator will not transmit information received in confidence from any party to any other party or any third party unless authorized to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.

(i) Unless the parties agree otherwise, they will refrain from pursuing litigation or any administrative or judicial remedies during the mediation process or for a set period of time, insofar as they can do so without prejudicing their legal rights.
(j) Unless all parties and the mediator otherwise agree in writing, the mediator and any persons assisting the mediator will be disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation).

(k) If the dispute goes into arbitration, the mediator shall not serve as an arbitrator, unless the parties and the mediator otherwise agree in writing.

(l) The mediator may obtain assistance and independent expert advice, with the prior agreement of and at the expense of the parties. Any person proposed as an independent expert also will be required to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate’s impartiality.

(m) Neither CPR nor the mediator shall be liable for any act or omission in connection with the mediation, except for its/his/her own willful misconduct.

(n) The mediator may withdraw at any time by written notice to the parties (i) for serious personal reasons, (ii) if the mediator believes that a party is not acting in good faith, or (iii) if the mediator concludes that further mediation efforts would not be useful. If the mediator withdraws pursuant to (i) or (ii), he or she need not state the reason for withdrawal.

4. Exchange of Information

If any party has a substantial need for documents or other material in the possession of another party, or for other discovery that may facilitate a settlement, the parties shall attempt to agree thereon. Should they fail to agree, either party may request a joint consultation with the mediator who shall assist the parties in reaching agreement.

The parties shall exchange with each other, with a copy to the mediator, the names and job titles of all individuals who will attend the joint mediation session.

At the conclusion of the mediation process, upon the request of a party which provided documents or other material to one or more other parties, the recipients shall return the same to the originating party without retaining copies.
5. Presentation to the Mediator

Before dealing with the substance of the dispute, the parties and the mediator will discuss preliminary matters, such as possible modification of the procedure, place and time of meetings, and each party’s need for documents or other information in the possession of the other.

At least 10 business days before the first substantive mediation conference, unless otherwise agreed, each party will submit to the mediator a written statement summarizing the background and present status of the dispute, including any settlement efforts that have occurred, and such other material and information as the mediator requests or the party deems helpful to familiarize the mediator with the dispute. It is desirable for the submission to include an analysis of the party’s real interests and needs and of its litigation risks. The parties may agree to submit jointly certain records and other materials. The mediator may request any party to provide clarification and additional information.

The parties are encouraged to discuss the exchange of all or certain materials they submit to the mediator to further each party’s understanding of the other party’s viewpoints. The mediator may request the parties to submit a joint statement of facts. Except as the parties otherwise agree, the mediator shall keep confidential any written materials or information that are submitted to him or her. The parties and their representatives are not entitled to receive or review any materials or information submitted to the mediator by another party or representative without the concurrence of the latter. At the conclusion of the mediation process, upon request of a party, the mediator will return to that party all written materials and information which that party had provided to the mediator without retaining copies thereof or certify as to the destruction of such materials.

At the first substantive mediation conference each party will make an opening statement.

6. Negotiations

The mediator may facilitate settlement in any manner the mediator believes is appropriate. The mediator will help the parties focus on their underlying interests and concerns, explore resolution alternatives and develop settlement options. The mediator will decide when to hold joint meetings, and when to confer separately with each party.
The parties are expected to initiate and convey to the mediator proposals for settlement. Each party shall provide a rationale for any settlement terms proposed.

Finally, if the parties fail to develop mutually acceptable settlement terms, before terminating the procedure, and only with the consent of the parties, (a) the mediator may submit to the parties a final settlement proposal; and (b) if the mediator believes he/she is qualified to do so, the mediator may give the parties an evaluation (which if all parties choose, and the mediator agrees, may be in writing) of the likely outcome of the case if it were tried to final judgment, subject to any limitations under any applicable mediation statutes/rules, court rules or ethical codes. Thereupon, the mediator may suggest further discussions to explore whether the mediator’s evaluation or proposal may lead to a resolution.

Efforts to reach a settlement will continue until (a) a written settlement is reached, or (b) the mediator concludes and informs the parties that further efforts would not be useful, or (c) one of the parties or the mediator withdraws from the process. However, if there are more than two parties, the remaining parties may elect to continue following the withdrawal of a party.

7. Settlement
If a settlement is reached, a preliminary memorandum of understanding or term sheet normally will be prepared and signed or initialed before the parties separate. Thereafter, unless the mediator undertakes to do so, representatives of the parties will promptly draft a written settlement document incorporating all settlement terms. This draft will be circulated, amended as necessary, and formally executed. If litigation is pending, the settlement may provide that the parties will request dismissal of the case. The parties also may request the court to enter the settlement agreement as a consent judgment.

8. Failure to Agree
If a resolution is not reached, the mediator will discuss with the parties the possibility of their agreeing on advisory or binding arbitration, “last offer” arbitration or another form of ADR. If the parties agree in principle, the mediator may offer to assist them in structuring a procedure designed to result in a prompt, economical process. The mediator will not serve as arbitrator, unless all parties agree.
9. Confidentiality

The entire mediation process is confidential. Unless agreed among all the parties or required to do so by law, the parties and the mediator shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceeding. If litigation is pending, the participants may, however, advise the court of the schedule and overall status of the mediation for purposes of litigation management. Any written settlement agreement resulting from the mediation may be disclosed for purposes of enforcement.

Under this procedure, the entire process is a compromise negotiation subject to Federal Rule of Evidence 408 and all state counterparts, together with any applicable statute protecting the confidentiality of mediation. All offers, promises, conduct and statements, whether oral or written, made in the course of the proceeding by any of the parties, their agents, employees, experts and attorneys, and by the mediator are confidential. Such offers, promises, conduct and statements are privileged under any applicable mediation privilege and are inadmissible and not discoverable for any purpose, including impeachment, in litigation between the parties. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable solely as a result of its presentation or use during the mediation.

The exchange of any tangible material shall be without prejudice to any claim that such material is privileged or protected as work-product within the meaning of Federal Rule of Civil Procedure 26 and all state and local counterparts.

The mediator and any documents and information in the mediator’s possession will not be subpoenaed in any such investigation, action or proceeding, and all parties will oppose any effort to have the mediator or documents subpoenaed. The mediator will promptly advise the parties of any attempt to compel him/her to divulge information received in mediation.
FORM

CPR Model Agreement for Parties and Mediator*

Agreement made ___________________________, ______________ (date)

between ____________________________________________________

represented by ______________________________________________

and __________________________________________________________

represented by ______________________________________________

and __________________________________________________________

(the Mediator)

A dispute has arisen between the parties (the “Dispute”). The parties have agreed to participate in a mediation proceeding (the “Proceeding”) under the CPR Mediation Procedure [as modified by mutual agreement] (the “Procedure”). The parties have chosen the Mediator for the Proceeding. The parties and the Mediator agree as follows:

A. Duties and Obligations

1. The Mediator and each of the parties agree to be bound by and to comply faithfully with the Procedure, including without limitation the provisions regarding confidentiality.

2. The Mediator has no previous commitments that may significantly delay the expeditious conduct of the proceeding and will not make any such commitments.

3. The Mediator, the International Institute for Conflict Prevention and Resolution (CPR) and their employees, agents and partners shall not be liable for any act or omission in connection with the Proceeding, other than as a result of its/his/her own willful misconduct.

*This form assumes that the mediator is affiliated with a firm. If that is not the case, delete paras. C.3., D.2. and references to the mediator’s firm in paras. B.1. and C.1.
B. Disclosure of Prior Relationships

1. The Mediator has made a reasonable effort to learn and has disclosed to the parties in writing (a) all business or professional relationships the Mediator and/or the Mediator’s firm have had with the parties or their law firms within the past five years, including all instances in which the Mediator or the Mediator’s firm served as an attorney for any party or adverse to any party; (b) any financial interest the Mediator has in any party; (c) any significant social, business or professional relationship the Mediator has had with an officer or employee of a party or with an individual representing a party in the Proceeding; and (d) any other circumstances that may create doubt regarding the Mediator’s impartiality in the Proceeding.

2. Each party and its law firm has made a reasonable effort to learn and has disclosed to every other party and the Mediator in writing any relationships of a nature described in paragraph B.1. not previously identified and disclosed by the Mediator.

3. The parties and the Mediator are satisfied that any relationships disclosed pursuant to paragraphs B.1. and B.2. will not affect the Mediator’s independence or impartiality. Notwithstanding such relationships or others the Mediator and the parties did not discover despite good faith efforts, the parties wish the Mediator to serve in the Proceeding, waiving any claim based on said relationships, and the Mediator agrees to so serve.

4. The disclosure obligations in paragraphs B.1. and B.2. are continuing until the Proceeding is concluded. The ability of the Mediator to continue serving in this capacity shall be explored with each such disclosure.

C. Future Relationships

1. Neither the Mediator nor the Mediator’s firm shall undertake any work for or against a party regarding the Dispute.

2. Neither the Mediator nor any person assisting the Mediator with this Proceeding shall personally work on any matter for or against a party, regardless of specific subject matter, prior to six months following cessation of the Mediator’s services in the Proceeding.
3. The Mediator’s firm may work on matters for or against a party during the pendency of the Proceeding if such matters are unrelated to the Dispute. The Mediator shall establish appropriate safeguards to insure that other members and employees of the firm working on such matters unrelated to the Dispute do not have access to any confidential information obtained by the Mediator during the course of the Proceeding.

D. Compensation

1. The Mediator shall be compensated for time expended in connection with the Proceeding at the rate of $___________, plus reasonable travel and other out-of-pocket expenses. The Mediator’s fee shall be shared equally by the parties. No part of such fee shall accrue to CPR.

2. The Mediator may utilize members and employees of the firm to assist in connection with the Proceeding and may bill the parties for the time expended by any such persons, to the extent and at a rate agreed upon in advance by the parties.

_______________________________ ______________________________
Party                                                     Party

by______________________ by ____________________________
Party’s Attorney                                       Party’s Attorney

______________________________________________________________
Mediator
TAB 10b

CPR European Mediation Procedure
In this informal process, the mediator facilitates negotiation among the parties and their lawyers to help them reach settlement. The mediator can help parties identify interests, develop settlement options and overcome barriers to settlement.

Dans cette procédure informelle, le "Médiateur" assiste les parties et leurs avocats dans leurs négociations, afin d’aboutir à une transaction. Ce Médiateur peut aider les parties à identifier les intérêts en jeu, à mettre des solutions pour une transaction, et à surmonter les obstacles à une transaction.

In diesem nicht förmlichen Verfahren vermittelt ein Mediator bei den Verhandlungen zwischen den Parteien und ihren Anwälten um zu einem Vergleich zu gelangen. Der Mediator kann die Parteien dabei unterstützen, ihre Interessen zu identifizieren, verschiedene Vergleichsmöglichkeiten zu entwickeln und Hindernisse zu überwinden, die einem Vergleich abschließ entgegenstehen.

In questa procedura informale, il mediatoro facilita le trattative tra le parti e i loro avvocati al fine di aiutarli a raggiungere un accordo. Il mediatore può assistiroti parti ad identificare i rispettivi interessi, sviluppare le condizioni di un accordo e superare gli ostacoli alla definizione della vertenza.

En este procedimiento informal, el mediador facilita las negociaciones entre las partes y sus abogados para alcanzar un acuerdo. El mediador puede ayudar a las partes a identificar intereses, desarrollar las soluciones alternativas y superar los obstáculos a una solución del conflicto.

Mediation is a process in which a third party neutral — a mediator — sits down with the disputing parties and actively assists them in reaching a settlement. CPR uses the expression "mediation" to cover both the concepts of mediation and conciliation. The process is designed to assist parties in reaching a commercially attractive settlement, with minimum time and cost.

The CPR European Mediation Procedure is designed to provide a model for the format and procedure of a mediation, although the emphasis is on flexibility and minimising the imposition of rules on the parties. The commentary explains the model rules and the reasoning behind them. It gives guidance on the conduct of a mediation, particularly on the initiation of the process and selection of a mediator.

1. PROPOSING MEDIATION
2. SELECTING THE MEDIATOR
3. GROUND RULES OF PROCEEDING
4. EXCHANGE OF INFORMATION
5. PRESENTATION TO THE MEDIATOR
6. NEGOTIATION OF TERMS
1. PROPOSING MEDIATION

Mediation can be used in disputes including those where numerous parties are involved. Any party to a business dispute may propose the use of mediation to the other party or parties. If the parties have made a contractual commitment to mediate disputes between them, or if they have subscribed to another commitment to engage in alternative dispute resolutions (ADR), that commitment or policy may be invoked. Sometimes a neutral organisation may help persuade a party to engage in mediation. CPR may be requested to play that role.

2. SELECTING THE MEDIATOR

Unless the parties promptly, as part of their agreement to mediate, agree on a mediator, they will notify CPR of their need for assistance in selecting a mediator, informing CPR of any preferences as to matters such as candidates’ mediation style, technical and/or legal expertise, competence in certain languages or geographic location. In international disputes, CPR will endeavor to appoint a mediator from a country other than that of either of the parties, unless the parties agree otherwise.

CPR will convene the parties, in person or by telephone, to attempt to select a mediator by agreement. If the parties do not promptly reach agreement, CPR will submit to the parties the names of not less than three candidates, with their resumes and hourly rates. If the parties are unable to agree on a candidate from the list within seven days following receipt of the list, each party will, within 10 days following receipt of the list, send to CPR the list of candidates ranked in descending order of preference. The candidate with the lowest combined score will be appointed as the mediator by CPR. CPR will break any tie.

Before proposing any mediator candidate, CPR will request the candidate to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate’s impartiality. If a clear conflict is disclosed, the individual will not be proposed and CPR will promptly propose another candidate. Other circumstances a candidate discloses to CPR will be disclosed to the parties. A party may challenge a mediator candidate if it knows of any circumstances giving rise to reasonable doubt regarding the candidate’s impartiality.

The mediator’s fees will be determined before appointment. Those fees, and any other costs of the process, will be shared equally by the parties unless they otherwise agree. If a party withdraws from a multiparty mediation but the procedure continues, the withdrawing party will not be responsible for any costs incurred after it has notified the mediator and the other parties of its withdrawal. Shared costs will not include costs that each party incurs in preparing its own case, attending meetings and instructing representatives. The parties will bear these costs themselves.

Before appointment, the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously. It is strongly advised that the parties and the mediator enter into a mediation agreement. A model agreement is attached.

3. GROUND RULES OF PROCEEDING

The following ground rules will apply, subject to any changes on which the parties and the mediator agree.

3.1 The process is voluntary and depends on the co-operation of the parties. The mediator does not issue a binding decision.

3.2 Each party may withdraw at any time by written notice to the mediator and the other party or parties.

3.3 The mediator is neutral, independent and impartial.

3.4 The mediator controls the procedural aspects of the mediation. The parties cooperate fully with the mediator.
   (a) The mediator is free to meet and communicate separately with each party.
   (b) The mediator decides when to hold joint meetings with the parties and when to hold separate meetings. The mediator fixes the time and place of each session and its agenda in consultation with the parties. There is no formal written, audio or video record of any meeting. Formal rules of evidence or procedure do not apply.
   (c) Unless otherwise agreed by the parties, the mediator decides, if necessary, the language in which the mediation is to be conducted and whether any documents should be translated.
3.5 Each party is represented at each mediation conference by a business executive authorized to negotiate a resolution of the dispute and to execute a settlement agreement. Each party may be represented by more than one person, e.g. a business executive and a lawyer. The mediator may limit the number of persons representing each party.

3.6 The process is to be conducted expeditiously. Each representative undertakes to make every effort to be available for meetings.

3.7 The mediator does not transmit information received in confidence from any party to any other party or any third party, unless authorised to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.

3.8 The mediator and any persons assisting the mediator is disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation).

3.9 If the dispute goes into arbitration, the mediator will not serve as an arbitrator.

3.10 The mediator may obtain assistance and independent expert advice, with the prior agreement of and at the expense of the parties. Any candidate proposed as an independent expert will also be required to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate's impartiality.

3.11 Neither CPR nor the mediator is liable for any act or omission in connection with the mediation, except for its/his/her own willful misconduct or gross negligence.

3.12 The mediator may withdraw at any time by written notice to the parties. Either party may seek assistance from CPR in such a situation.

3.13 At the inception of the mediation process, each party and representative agrees in writing to all provisions of this Model Procedure, as modified by agreement of the parties. A model mediation agreement is attached.

3.14 With the approval of the parties, the mediator may sit with a trainee mediator, who may observe the process, but takes no active part in it and charges no fee. The trainee will be bound by the same obligations of confidentiality as the mediator.

4. EXCHANGE OF INFORMATION

Each party shall produce the documents it relies on in the mediation and may, but shall not be obliged to, produce any further documents requested by the mediator or the other party.

At the conclusion of the mediation process, upon the request of a party which provided documents or other material to one or more other parties, the recipients undertake to return them to the originating party without retaining copies thereof. All documents and other information provided to a party, in the course of a mediation, shall be used by that party exclusively for the purposes of the mediation.

5. PRESENTATION TO THE MEDIATOR

Before dealing with the substance of the dispute, the parties and the mediator discuss preliminary matters, such as possible modification of the ground rules, place and time of meetings, and each party's need for documents or other information in the possession of the other.

At least five business days before the first substantive mediation conference, unless otherwise agreed, each party submits to the mediator a written statement summarising the background and present status of the dispute and such other material and information as it deems helpful to familiarise the mediator with the dispute. The parties may agree to submit jointly certain other materials. The mediator may request any party to provide clarification and additional information. The mediator may limit the length of written statements and supporting material. The mediator may direct the parties to exchange concise written statements and other materials they submit to the mediator to further each party's understanding of the other party's viewpoints.

Except as the parties otherwise agree, the mediator keeps confidential any written materials or information that are submitted to him or her. The parties and their representatives are not entitled to receive or review any materials or information submitted to the mediator by another party or representative without the concurrence of the latter.

At the conclusion of the mediation process, upon request of a party, the mediator without retaining copies returns to that party all written materials and information which that party had provided to the mediator.
6. NEGOTIATION OF TERMS

The mediator may promote settlement in any manner the mediator believes is appropriate. The mediator helps the parties focus on their underlying interests and concerns, explore resolution alternatives and develop settlement options. The mediator decides when to hold joint meetings, and when to confer separately with each party.

The mediator expects the parties to make settlement proposals.

Finally, if the parties fail to develop mutually acceptable settlement terms, before terminating the procedure, and only with the consent of the parties, (a) the mediator may submit to the parties a final settlement proposal which the mediator considers fair and equitable to all parties; and (b) if the mediator believes he/she is qualified to do so, the mediator may give the parties an evaluation (which if the parties choose will be in writing) of the likely outcome of the case if it were tried to final judgment. Thereupon, the mediator may suggest further discussions to explore whether the mediator's evaluation or proposal may lead to a resolution.

Efforts to reach a settlement continue until (a) a written settlement is reached, or (b) the mediator concludes and informs the parties that further efforts would not be useful, or (c) one of the parties or the mediator withdraws from the process. However, if there are more than two parties, the remaining parties may elect to continue following the withdrawal of a party.

7. SETTLEMENT

If a settlement is reached, the representatives of the parties draft a written settlement document incorporating all settlement terms, which may include mutual general releases from or discharges of all liability relating to the subject matter of the dispute. This draft will be circulated among the parties and the mediator, amended as necessary, and formally executed. Initially, a preliminary memorandum of understanding may be prepared at the mediation and executed by the parties; the memorandum should make it expressly clear whether it is intended to be binding or not.

If litigation is pending, the settlement may provide that the parties will request the court to make an appropriate order disposing of the case promptly upon execution of the settlement agreement. The settlement agreement may also be entered as a consent judgment.

8. FAILURE TO AGREE

If a resolution is not reached, the mediator discusses with the parties the possibility of their agreeing on arbitration or another form of ADR. If the parties agree in principle, the mediator may offer to assist them in structuring a procedure designed to result in a prompt, economical process.

9. CONFIDENTIALITY

For Austrian, Belgian, Dutch, English, French, German, Italian, Scottish, Spanish, Swedish and Swiss mediations: The parties agree that the mediation process, and all negotiations, statements and documents expressly prepared for the purposes of the mediation shall be "without prejudice". The entire mediation process is confidential. Unless agreed among all the parties or required by law or ordered by the Court, the parties and the mediator may not disclose to any person any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceeding. If litigation is pending, the participants may, however, inform the court of the schedule and overall status of the mediation for purposes of litigation management.

MEDIATION COMMENTARY

SUITABILITY FOR MEDIATION

Most bona-fide disputes are amenable to settlement by negotiation. Mediation is a facilitated form of negotiation. Virtually every case in which negotiation is appropriate but difficult is suitable for mediation whether direct negotiations have taken place or litigation is pending. Mediation can be particularly helpful if there is an opportunity to structure a creative business solution. When a dispute involves several or many parties it may not be essential for all to be at the table, but any party crucial to a settlement must be represented. Mediation is often seen as a process to be used at the outset of a dispute, but can be initiated at any time, and can take place whilst litigation is ongoing. Mediation differs from arbitration in that participation is entirely voluntary and the process depends on the cooperation of the parties. The mediator does not issue a binding decision. A successful mediation results in a settlement agreement. The parties have complete control over whether they agree or not and, if they do, over the content of the agreement. Mediation is a much quicker form of dispute resolution than arbitration and is also not constrained in its form by statutes or arbitral rules.
The following is a partial list of the many types of domestic and international business disputes that have been successfully mediated:

- bankruptcy and creditor/debtor issues
- commercial, financial and real estate transactions
- construction
- copyright
- defamations
- eminent domain
- employment
- environmental
- insurance coverage
- mineral extraction
- partnerships or joint ventures
- patents, trade secret, technology
- personal injury
- private antitrust
- product liability
- professional malpractice
- regulatory matters
- securities
- trademarks and unfair competition

Mediation has become the most popular choice of parties seeking a non-binding form of dispute resolution. However, other forms of non-binding ADR do exist, and there are cases for which non-binding procedures may not be appropriate. CPR will, on request, be happy to provide you with more information about those.

WHY MEDIATION WORKS

A high percentage of mediations of business disputes result in a resolution. Even when agreement does not occur during the proceeding, the greatly enhanced mutual understanding substantially improves the prospects for a later agreement. Satisfaction with the process on the part of users is very high.

What are the reasons for the success of the process? Each case has unique aspects, but the following factors are common:

- Disputes ostensibly between dispassionate corporate entities involve human beings endowed with emotions. The mediator can help the parties deal with emotional issues. Discussions in the presence of a mediator tend to reduce misunderstandings and antagonism frequently subsides. Concerns beyond legal issues are discussed. The process itself presents a joint challenge to all participants to devise solutions. The momentum of mediation leads to accommodation. Settlement represents success for all involved.

- Just as an impending trial often induces litigants to stop posturing and seriously seek a settlement, commitment of the parties to a mediation is likely to motivate them to "bite the bullet" rather than to postpone unpleasant decisions. The mediator will reinforce this motivation.

- The mediator can establish ground rules designed to maximise the chances of success.

- The mediator may first urge discussion of non-controversial subjects or those for which agreement is readily achieved and postpone consideration of difficult issues. These early agreements help build a spirit of co-operation.

- Mediation provides the parties with an opportunity — at little or no risk — to crystallise issues and learn more about the other party’s perceptions of the pertinent facts.

- In caucusing with each party, the mediator can diplomatically urge that party to face facts and dispel unrealistic expectations such as over-optimism regarding chances of prevailing in court. The mediator also can point to the costs and burdens of prolonged litigation.

- Once the mediator understands the true interests of each party, he or she can recommend opportunities for common gains. Many business disputes are resolved through innovative business arrangements not previously contemplated.

THE PARTIES

The factors favouring mediation are likely to be particularly strong when, but for the dispute, the parties would or could be in a continuing business relationship. The settlement then may well take the form of a renegotiated contract.
or some other business deal including, where appropriate, new provisions for remaining disputes or new disputes which arise in future.

Where the parties are unevenly matched with respect to business sophistication, economic resources, or information concerning the underlying facts, the "stronger" party may be able to impose lopsided settlement terms. However, this imbalance is not necessarily a reason to reject mediation. The imbalance may well be offset by the calibre of the person(s) representing the "weaker" party, and a settlement through mediation may be more desirable for even a "weak" party than the alternatives of direct negotiation or litigation with its "win-lose" outcome, high costs and other burdens. Mediators may be effective in counteracting "power imbalances" to facilitate an equitable solution.

Personal and emotional factors cannot be ignored. Animosity is likely to get in the way of unaided negotiation and to underscore the need for skillful mediation. A key function of a mediator is to defuse hostility and distrust and to encourage cooperation.

Bringing about a settlement may be more difficult if there are numerous parties with dissimilar interests; however, mediations involving many parties have been successfully concluded.

THE CASE

Fact Issues Predominate

Cases involving predominantly fact issues or mixed questions of fact and law tend to be well suited for mediation. In mediation, the parties need not resolve fact issues to agree on a resolution of their dispute.

Stakes

Even when a party believes that a vital interest rides on the outcome of a case, it may well favour mediation over the uncertain decision of a judge, jury or arbitrator. The parties remain in control of the outcome; if the mediation is unsuccessful, other options remain. If the stakes are moderate, mediation may also be appealing; for one thing, the cost and burdens of litigation may be disproportionate even for the winner of a lawsuit.

Opportunities for Joint Gains

Many business disputes are not solely about whether X owes Y money, and if so, how much. Frequently, there are opportunities for non-cash settlements which a court or arbitrator generally cannot impose. Even if the subject matter is limited to money, there may be differences in the availability and cost of credit to the parties, or in the value of delayed payments, which can be exploited to add to the value of a settlement to each side. Development of such "value-creating" solutions requires cooperation between the parties. This is easier to foster with the help of a mediator.

Costs and Time

The direct and indirect costs and burdens of full-scale litigation are likely to be of a different order of magnitude from those of mediation. Even parties with ample resources are likely to welcome the potential savings in the time and costs of dispute resolution.

Confidentiality

Parties to a business dispute frequently are anxious to avoid giving publicity to the details of their transactions. The privacy and confidentiality of mediation is likely to be seen as a significant advantage.

THE MEDIATOR

The selection of a highly trained and capable mediator is absolutely vital. A mediator is not vested with the legal authority of a judge or arbitrator, but must rely on his or her own resources. To effectively mediate a complex business dispute, a mediator must possess a combination of qualifications. The ideal mediator:

- is absolutely impartial and fair and so perceived
- has a personal stature that commands respect
- Inspires trust and motivates people to confide in him or her
- Is able to size up people, understand their motivations and relate easily to them
- sets a tone of civility and consideration in dealings with others
- Is a good listener
- is capable of understanding the law and facts of a dispute, including surrounding circumstances
- is able to analyse complex problems and get to the core
- is creative, imaginative and ingenious in developing proposals and knows when to make them
- is a problem solver
is articulate and persuasive
- possesses a thorough understanding of the negotiation process
- Is flexible, patient, persistent, indefatigable, and upbeat in the face of difficulties
- is an energetic leader, a person who can stimulate others and make things happen
- has experience as a mediator

The size and complexity of the case will influence the selection of the mediator. In a major case, the mediator might be a former judge, a leading lawyer, a professor of a law school or business school, a senior executive, or a skilled conflict resolution professional. An evident flair for dispute resolution is as important as long experience.

The styles, personalities and orientations of mediators vary significantly. Some mediators are facilitative and focus predominantly on party interests and insist on party-generated solutions, while evaluative mediators focus centrally on the positions of the parties and the merits of the legal claims. Strict facilitators will not offer opinions about legal claims or court outcomes. Other facilitators will not offer such opinions unless party interests have been fully explored and parties directly request the opinions. Evaluators tend to approach mediation as an opportunity to offer realistic assessments of legal claims and predictions of court outcome. They may bypass interest exploration. Many mediators tend to favour one school of thought, although some will both facilitate and evaluate. A mediator's orientation will affect the mediator's techniques throughout the process.

These differences should be borne in mind in selecting a mediator. However, in advance of a mediation parties and their lawyers may not perceive opportunities for interest exploration that a skilled facilitative mediator can uncover. CPR believes that unless it is certain that such opportunities do not exist, the parties will be best served by a mediator who can play both roles. When CPR is asked to assist in the selection process, the parties' preferences should be discussed.

When legal issues are critical, there may be significant advantages to selecting as the mediator a lawyer or legal academic with expertise in the field (e.g., patent, trademark, construction). Similarly, when the subject matter is technical, it may well be desirable to select a person who has an understanding of the technology. Some experienced mediation practitioners, however, believe that even in legally or technically complex disputes, the key to resolution does not lie in adding yet another expert to the process. Instead, they prefer a mediator who is a skilled deal-maker and who can shift the parties' focus from resolving the legal or technical dispute to reaching a mutually satisfactory business agreement.

In most cases a single mediator will be used; however, in complex cases the mediator may need assistance, and it is helpful for the mediator to be able to discuss issues or possible solutions with another neutral person familiar with the case. Occasionally, using two mediators may have advantages. They can represent different disciplines relevant to the dispute, e.g. science and law. Alternatively, one could possess relevant technical expertise and the other could be a deal-maker. By conferring with each other they may develop additional settlement options. There is a risk that the two mediators may not be in sync, in which case using both can actually be counterproductive.

It is critical that the mediator be totally impartial and be so perceived by all parties. When CPR is asked to nominate candidates, it will not propose any individual who has disclosed a clear conflict. As to candidates CPR proposes, it will disclose to the parties any circumstances made known to CPR that could cause doubt but that the parties probably will not regard as disbaring.

The mediator's fee and other expenses of a mediation are normally shared equally. However, sometimes a party proposing mediation will offer to bear the expense of the early phase of the procedure in order to induce the other party or parties to try the process. There also may be reasons not to allocate expenses on a per capita basis.

The mediator may well need administrative assistance, legal research, or other forms of assistance. It is desirable for the mediator and the parties to discuss early the types of assistance likely to be needed and the mediator's resources for obtaining such assistance.

THE MEDIATION PROCESS

There is a range of approaches to mediation, going from "facilitative mediation" to "evaluative mediation." In the former, the mediator, usually meeting separately with each party, first explores with the parties their underlying interests. Having identified these interests, the mediator and the parties explore opportunities for a creative solution, such as a mutually-advantageous new business arrangement. This approach is likely to be most effective when a business relationship already exists between the parties. In facilitative mediation the mediator ordinarily will not offer opinions on the merits of the case or the positions of the parties.

In evaluative mediation the focus is more on the parties' legal rights and obligations, the strengths and weaknesses of their legal positions, the likely outcome if the case were tried in court, and what represents a fair settlement. This approach is likely to be used if the case does not present opportunities for facilitative mediation or if the facilitative
mediation approach has been unsuccessful.

Many cases call for both approaches. The two approaches can be combined or alternated, with the mediator providing an evaluation during the later phase of the mediation on one or more remaining issues after facilitative mediation has been partially successful in moving the parties toward settlement. The mediator should give such an evaluation only with the prior consent of all parties and on an issue on which he or she has strong expertise. Before giving an opinion on a disputed legal issue it may be advisable for the mediator to request the lawyers to submit briefs on the issue. Once having given the evaluation, the mediator's impartiality may be impaired in the view of a party whose position is weakened by the evaluation.

There is no one right way to conduct a mediation. The Model Procedure set forth above represents a process that appears logical and has proven effective in numerous cases. One advantage of the model is that it can be readily modified to fit the circumstances of the case and the wishes of the parties.

INITIAL CONSULTATION WITH MEDIATOR

The initial consultation of the parties with the mediator serves several purposes:

• The parties are given an opportunity to size up the mediator. If one or more parties do not gain a favorable impression, a substitution may be proposed.

• The mediator will discuss the entire mediation process, including the ground rules, with the parties. They may agree on modifications.

• If they have not done so previously, they should develop a retention agreement with the mediator.

• A meeting schedule may be discussed.

• The mediator and the parties will discuss the role(s) the mediator will play.

• The parties will begin to familiarise the mediator with the dispute.

• The mediator can confirm that the parties have a genuine interest in resolving their dispute through the mediation process, and that they have the persistence to stick with the process.

• The parties' representatives will begin to talk to each other in a manner appropriate to their joint goal of reaching an accommodation.

• There will be discussion of who will represent the parties at future sessions, and the extent of their authority. If the stakes are large, it may not be possible for the negotiators to have complete authority to sign a settlement agreement, but each should have authority to negotiate a settlement, and the authority of the negotiators should be comparable.

• The exchange of certain documents may be discussed.

• If litigation is pending between the parties regarding the subject matter of the mediation, the parties and the mediator may discuss the suspension or curtailment of discovery and other pre-trial activities. They also may discuss whether the court should be informed of the mediation, and whether court approval of curtailment of pre-trial activities is required.

In a relatively simple case, a discussion of the preliminary matters listed above may be followed immediately by a joint session as described below.

FAMILIARISING THE MEDIATOR WITH THE CASE

The mediator must be familiarised with the dispute, and the parties must be given an opportunity to state their case. The mediator usually will ask the parties to submit on an agreed time schedule such written materials as they consider necessary or advisable. A statement summarising the background and status of the dispute is likely to be the principal document. If litigation is pending, court documents such as pleadings and briefs may be submitted. If an exchange of certain documents between the parties has been agreed upon, that exchange also should occur during this phase of the proceeding.
JOINT SESSIONS AND CAUCUSES

Following submission of these written materials, a joint session is likely to be scheduled (but need not be) at which the parties' representatives will state their views orally in an informal manner and will address the conflicting views of the other party or parties. Each party will present its position in what it considers the most effective manner. Usually there will be opportunities for rebuttal and for discussion and clarification of issues. The formality of the rules of evidence will not hinder the proceedings and the presentations will not be transcribed. The mediator will prescribe the sequence of presentations, may impose time limits and is likely to ask clarifying questions.

Following the joint session, the mediator is likely to caucus with each party. The parties will be encouraged to be more candid in such a private meeting in the knowledge that their confidences will be respected and not disclosed without their specific consent. The mediator may well elicit in confidence information not disclosed at the joint session. The mediator may explore certain aspects of the party's presentation and may request additional materials. The mediator will explore with each business executive his or her company's underlying interests and aims, will identify barriers to settlement and will help the parties address those barriers.

The mediator must understand the case fully from each side's perspective; the mediator should then assure that each side better understands how the case looks from the other side's viewpoint. The mediator should avoid expressing views on legal issues early in the process or without the parties' consent.

The mediator, to be effective, must be kept fully informed of all developments and must be able to control dialogue between the parties. The mediator may conclude at a given stage that it is preferable to keep the parties apart.

DEVELOPING INFORMATION

Even when there are no issues of credibility, the "facts" relevant to a dispute can be elusive. The party submissions to the mediator or statements made in meetings may well indicate that the parties see the facts differently, or draw different conclusions from them. At times, it will be useful for the mediator to address any such differences and seek to bring about agreement on the most salient facts and the issues of the dispute. At other times, focusing on the facts may be counterproductive if it will encourage the parties to focus on past disputes rather than on reaching an arrangement that will enable them to better deal with each other in the future. An "agreement to disagree" on past facts may still be used productively to reach a forward-looking solution. This is a case-by-case decision for the mediator.

Some controversies hinge on key factual issues which can be resolved by an independent expert operating under ground rules on which the parties have agreed. Does the machine perform in accordance with contractual specifications? Is the former executive using information proprietary to the former employer? Were the soil conditions as represented to the contractor, and if not, how much additional expense was incurred? Once such critical questions have been answered by a neutral expert, the controversy may, as a practical matter, resolve itself. In appropriate cases, the parties and the mediator should consider retaining an independent expert.

NEGOTIATION OF SETTLEMENT TERMS

Negotiation is most productive when the parties focus on their underlying interests and concerns, avoiding fixed positions which often obscure what a party really wants. The mediator can help the parties crystallise their own interests and understand each other's interests, defuse adversarial stances and develop a more cooperative approach. The mediator can narrow or expand the range of issues as appropriate for effective resolution of a particular dispute.

Settlement proposals are likely to be generated through discussion in caucus. The mediator can help each party to generate ideas, to develop options and alternative proposals that will lead to a mutually acceptable solution, and to try out unusual solutions in a relatively safe and confidential setting.

The first settlement proposal, by whomever made, is not likely to be the last. Hopefully, it will provide a basis for negotiation. At this juncture, some experienced mediators will usually engage in "shuttle diplomacy," i.e. meet with the parties individually to try to bridge a gap or develop a more acceptable solution; other mediators are likely to conduct joint sessions to bring the parties together. When conveying one party's position to the other, the mediator must take care to state that position accurately. On some occasions, the mediator may consider it advisable to meet with the principals of the parties, separately or together, outside the presence of lawyers. Any such meetings should occur only if the principals and their lawyers agree to them.

Some mediators prepare the first draft of a settlement agreement, seek the parties' comments, and prepare successive drafts until all parties are in agreement.
Section 6 of the Model Procedure contemplates that if the parties do not develop mutually acceptable settlement terms the mediator, only with the parties' consent, (a) may submit a settlement proposal, and (b) if the mediator feels qualified to do so, may give the parties an evaluation of the likely outcome of the case in court. When submitting a settlement proposal it may be advisable for the mediator to assure the parties that acceptance of the proposal by either party will not be communicated to the other, unless and until the other also accepts.

If agreement is reached on settlement terms, by whatever technique, a settlement agreement is drafted by the mediator or a party representative, circulated, edited as necessary and executed. A memorandum of understanding may be prepared first.

When it is clear that no agreement can be reached through mediation, other alternatives to litigation remain. The mediator may discuss with the parties whether arbitration or another form of ADR may be preferable to a lawsuit. In particular, a "last offer" arbitration would require each side to submit an offer to an arbitrator who would be required to select the offer he or she considers the more reasonable. If the parties agree in principle, the mediator may be able to help them structure appropriate ground rules. It is not desirable to permit a mediator to become an arbitrator once the mediation process has concluded, as that may well inhibit discussions in caucus between each party and the mediator. It is also doubtful whether the mediator can serve as the arbitrator since the parties are likely to have given the mediator significant confidential information that will not be placed in evidence in an arbitration but may influence an arbitrator's decision.

**BARRIERS TO SETTLEMENT**

The primary aim of mediation is to facilitate faster, less costly and more productive settlements. Common barriers to settlement are outlined below. These barriers should be identified and addressed in a mediation proceeding, and often they can be overcome.

**Differing Perceptions**

Perceptions can differ about a number of issues relevant to settlement. Do the parties have different views regarding what the facts are? Do they disagree about what proposition the facts prove? Is this disagreement based on each side having access to limited information? Is disagreement primarily the result of each side's partisan assessments of the evidence and its implications? Do the parties have different views as to how the law will be applied or as to the likelihood of success at trial? Do the parties have different views of what is at stake? Do they make different assessments concerning the value of those stakes? It is very common for each party to be unduly optimistic about its chances of success at trial, particularly during the early stages of litigation. A mediation proceeding is likely to lead to a much more realistic appraisal and thereby greatly enhance prospects for settlement.

**Extrinsic Pressures, Linkage**

Are there pressures working on one or more parties that cut against prompt settlement? Do time constraints operate differently on the parties? Has personal animosity hindered rational decision making? Is resolution of this dispute linked to other similar disputes, pending or contemplated? Does either side have constituencies that would criticise a settlement? Are there "strategic" considerations to avoid settlement, e.g., to discourage other suits?

**Process Failures**

Communication problems between the parties or their lawyers are a common barrier. Does the negotiation process afford sufficient opportunities to devise and explore settlement options? Do the lawyers have different incentives than the parties in interest?

**Delay Considered Advantageous**

A party may believe, rightly or wrongly, that it will benefit from delay. When a dispute arises while a business relationship is ongoing, both parties have an incentive to put the matter behind them, although mediation itself is also open to abuse by a party seeking to delay. Even when there is no continuing relationship, there are likely to be advantages to all parties in having the matter resolved.

**Parties**

Are all of the parties with a stake in the dispute available for negotiation? Should non-disputants with a stake (e.g., insurers) be invited to participate?

**Information**

Parties may believe that they are not in a position to properly assess their own or the other side's position until, for example, after disclosure of documents, statements of witnesses or reports of experts in a litigation process. This is an argument more for postponement of settlement than for its abandonment.
"SELLING" MEDIATION TO THE OTHER PARTY

The other party may well have to be "sold" on mediation, especially if it lacks prior experience. A suggestion or offer to mediate may not suffice. The advantages of mediation to both sides should be carefully explained. The proposer should emphasise that:

- The procedure is voluntary, non-binding, "without prejudice" and confidential.
- The parties retain control over the outcome.
- This particular dispute is well suited to mediation and mediation has worked in comparable situations.
- There is a likelihood of substantial savings in legal fees and other litigation costs and of a much quicker and more satisfactory outcome.
- The risk for each party is minimal.
- Mediation is much less adversarial and disruptive of business relationships than litigation or arbitration.
- The mediator must be acceptable to both parties.
- The ground rules must be acceptable to both parties.
- Either party may withdraw at any time after the first session.
- The cost of the procedure is likely to be relatively modest.
- Experience shows that the chances of success are high.
- The proposer will negotiate in good faith and trusts the other party will do likewise.
- Even if the procedure should not succeed, something will be gained through better mutual understanding.
- If the parties have a contractual relationship and the contract calls for ADR, the relevant clause should be invoked. If the initiating party has subscribed to a CPR policy on ADR, the policy may be invoked even if the other party is not a subscriber. Special inducements to use ADR sometimes can persuade the adversary into the process, such as:
  - Monetary Incentives: Offers to pay for the initial meeting with a mediator to determine if the process can be helpful to the parties, with shared costs beyond the first meeting; offers to pay the entire mediator fee unless the mediation is successful.
  - Allowing the Opponent to Select the Neutral so long as significant conflicts of interest are not present. This technique has been used so the opponent feels confident in the neutral and may accept any recommendations more readily. When the opponent cannot be convinced to use ADR for the entire matter, isolating a key issue or factual dispute, or even the damage portion for submission to ADR, might result in partial ADR use.

Consideration should be given to who should approach whom. Who is most likely to be receptive to early settlement and ADR? Who has had prior ADR experience? Who appears to be the principal decision-maker on the issue? Success will depend in part on the persuasiveness of the proposer.

If the persons to be induced to mediate are not familiar with the process, it may help to provide them with a copy of this paper or with other reading material. Moreover, a neutral organisation, such as CPR, may play a useful role in persuading parties of the advantages of mediation.

THE ROLES OF EXECUTIVES AND LAWYERS

In a mediation, the business executive and the lawyer function as a team. Business executives have the best understanding of their company’s interests and are the most likely to embrace creative, business-oriented solutions. It is preferable for a company to be represented by an executive who does not feel a need to defend past actions, who can be relatively objective and unemotional, but who has a thorough knowledge of the facts. It will be helpful for the executives representing the parties to relate well to each other and to be experienced negotiators. Each executive should be a decision maker authorized to negotiate a settlement, subject to board of directors approval if need be.
Success in negotiation, as at trial, depends on thorough preparation on the part of each participant. As a rule, the lawyer will prepare the client for the mediation. Normally, the lawyer will make the opening statement, presenting the company's views in joint session. When it comes to discussing business interests and exploring options for settlement, the executive should take the leading role.

The company's lawyer, who may be a senior in-house or outside lawyer, has a critical role to play which requires different skills from courtroom advocacy:

**Counseling and Preparation**
- Counsel on the advisability of settlement and mediation
- Persuade parties to agree to the process
- Design or adapt the procedure
- Select the mediator
- Educate the executive about the process and the legal issues
- Help the executive think through goals for the process
- Draft statements for submission to the mediator
  - Prepare for effective presentations by lawyers and client
- Counsel on management or suspension of litigation
- Assure the confidentiality of the process

**Participation in Proceeding**
- Advocate in a non-confrontational manner designed to impress the mediator and other side with the reasonableness of your position
- Listen carefully to the other side's statements, so as to understand their interests
- Ask questions
- Answer questions about legal claims, etc.
- Serve as a sounding board for the client, brainstorming and discussing settlement options as the mediation progresses
- Help the client articulate business concerns and formulate proposals
- Avoid compromise of the client's litigation position should the mediation fail
- Be aware of legal ramifications of possible solutions and options
- Draft the settlement agreement and assure its enforceability

**ROLE OF NEUTRAL ORGANIZATION**

Mediation services are being offered by an increasing number of international, national, regional and local organisations. Essentially, three types of services may be provided:

- Help bring parties to the table, i.e. secure their agreement to participate in the process.
- Identify candidates well qualified to serve as mediator in the particular dispute, secure the agreement of all parties to the retention of one of the candidates, recruit that person and make remuneration arrangements.
• Administer the proceeding.

Once an adversarial relationship has developed, a party who wishes to engage in mediation may be reluctant to take the lead in "selling" mediation to its adversaries or may have difficulty persuading them to mediate. A neutral organisation can play a useful role in explaining the mediation process and its advantages to parties whose agreement to participate is being sought. CPR has successfully played that role in numerous cases involving both small and very large numbers of parties.

Selection of a well qualified mediator in whom all parties have confidence is the most critical step in assuring the success of the mediation. Parties often need the assistance of a neutral organisation in the selection process. CPR's Panels of Distinguished Neutrals include persons having the highest qualifications and CPR regularly assists parties in selecting the "right" mediator, including European members of its International Panel of Distinguished Neutrals.

Given the highly informal and voluntary nature of mediation, CPR believes that once the mediator is in place, the parties and the mediator usually do not need a neutral organisation as an "administrator" of the process.

ROLE OF INSURERS

In certain cases one or more insurers are direct parties to the dispute, as in a coverage dispute with a policyholder or in an allocation dispute among insurers. Obviously, these insurers must be at the table.

In other cases, the immediate parties are not insurers, but one or more insurers are expected to bear all or part of the liability of a party, and any settlement therefore will be subject to their approval. Under these circumstances, it is essential for the policyholder to assure in advance that the insurers do not object to the insured's participation in the mediation. It will be desirable for the insurers to agree informally in advance to the parameters of a settlement, and for the insured to keep the insurers informed as the mediation progresses. Representation of the insurers in the mediation, or in certain phases, can be considered. Before agreeing to a settlement the policyholder would need to assure that the terms are acceptable to the insurers. Reaching an agreement with the other side, subject to uncertain insurer approval, is not a desirable solution.

If insurers are denying coverage to which a policyholder believes it is entitled, or if differences exist among two or more insurers as to allocation of coverage among them, a second mediation may be in order, entirely separate from mediation of the underlying dispute or meshed with it. Sometimes it is productive to involve insurers in the primary mediation process, as well as to conduct a "secondary" insurance mediation.

LENGTH OF PROCEDURE

The length of a mediation depends on factors such as the complexity of the case, the number and availability of the parties, the urgency, and the difficulty of reaching agreement on the facts and on settlement terms. The mediator should discuss with the parties the likely length of time required for each phase of the proceeding. Moreover, even during the early phases of the procedure the party representatives will develop a sense of the likelihood of success and of the approximate length of time that will be required. Note that under the CPR Mediation Procedure any party may withdraw from the mediation at any time after the first session.

It is not uncommon for parties to agree to mediation on the express condition that a party will be permitted to commence litigation or arbitration (or resume if it has been suspended) if the mediation is not concluded within a specified period. Presumably that option will not be exercised if, when the deadline is reached, the prospective plaintiff is optimistic as to the outcome of the mediation. If litigation has already commenced, the commencement of mediation does not operate to stay those proceedings, unless the parties agree to this with the Court. [Check position in particular jurisdictions].

THE SITE

If possible, the mediation should occur at a convenient neutral, congenial site, typically the mediator's office. There should be sufficient space for both joint sessions and separate caucuses. Normally the mediator will attempt to reach agreement with the parties on the site, which need not be the same for all meetings.

CONFIDENTIALITY

Among dispute resolution processes, mediation offers a maximum degree of confidentiality and privacy. Contractual and legal protections provide additional assurances against use or disclosure of mediation statements or documents. These confidentiality protections contrast sharply with the public nature of the litigation process and its procedures that lend it to public disclosure.
CONTRACTUAL PROTECTIONS

In mediation, parties can increase the chances that participants will maintain the confidentiality of the process by entering into various confidentiality agreements.

- Parties and mediators can execute a written confidentiality agreement. Adoption of the CPR Mediation Procedure provides these assurances of confidentiality, proscribes transcription of meetings and requires the mediator to return documents to the originating party upon request without retention of copies.

- If a witness or expert attends a mediation, some parties and mediators take the precaution of having them sign a confidentiality agreement as well. Confidentiality contracts are well advised in view of limitations, gaps and variations in existing legal confidentiality protections. Some courts may intrude into mediation confidentiality since the law is still developing in this area. Nonetheless, confidentiality agreements may support party damage claims in the face of party breach. Some mediators may require indemnification from the parties for expenses they incurred in defending the confidentiality of the process and the documents it produces.

COMMON LAW

Some courts may decide to protect confidentiality, but this cannot be relied on.

PROBLEMS IN SPECIFIC JURISDICTIONS

**Austria:** It is not possible under Austrian Law to exclude the liability of the mediator and the CPR, either for gross negligence or for willful misconduct. Clause 3.11 of the rules will therefore not apply in full in Austria.

**Belgium:** Lawyers have a different status as regards confidentiality from non-lawyers. Thus a lawyer who has acted as a mediator or adviser to a party will be more able to invoke professional confidentiality provisions in subsequent litigation. Clause 9 of the rules needs to be considered in this context in Belgium.

There is a danger that a written evaluation given by a mediator pursuant to clause 6 of the rules might not subsequently remain confidential.

**Germany:** A mediator will not be able to claim the same protection as the judge or arbitrator from being called as a witness in subsequent litigation or arbitration. The parties can agree not to call the mediator as a witness, which agreement will be upheld in the civil courts or arbitrations, but not in the administrative or criminal courts.

The recommended form of confidentiality agreements is as follows:

- "All written and oral information, documents, etc., disclosed in the course of the mediation proceedings are to be kept confidential and are exempted from any use outside the mediation proceedings."

- "All statements, proposals (especially settlement offers), etc. are made 'Ohne Präjudz Für die Sach-und Rechtslage'."

**Italy:** As regards confidentiality, lawyers have a different status from non-lawyers. Thus, unlike a non-lawyer, a lawyer who has acted as a mediator or in any ADR capacity will be able to invoke professional confidentiality in subsequent litigation. Clause 9 of the rules needs to be considered in the context.

**Spain:** Liability can be excluded for the mediator, except for fraud. Lawyers have greater confidentiality protection than non-lawyers.

**Sweden:** Again professional confidentiality privilege can be invoked by lawyers but not by non-lawyers. Thus non-lawyers who act as advisers or mediators may be required to testify in court.

**Switzerland:** Mediators are held to a fiduciary duty of confidentiality whether they are lawyers or not, provided the information they receive is marked confidential.
TAB 11

Success Stories
HOW TO MANAGE DISPUTES IN A FLAT WORLD
A consistent and coordinated approach to dispute management can make this global function more creative and cost-effective. Single-point accountability is one option for managing a litigation portfolio. It enables best practices in the critical areas of early case assessment and budgeting, coordination with outside counsel, and the collection and review of information for regulatory purposes. Ongoing education and training provide the right resolution resources, both internally and externally.

By Peter J. Rees QC and Kathleen Bryan

You hear it all the time: “The world is flat” and “Our business is truly global, with the majority of our profits coming from markets outside the United States.” Indeed, large businesses are now almost always multinational, with markets on every continent.

The legal function, however, has not always kept up. It can still have a predominantly local focus, because laws are country-based and local expertise is often necessary to provide the proper understanding of very different legal systems. In the past, litigation risk for major corporations had been primarily a US phenomenon, with the majority of the focus, staffing, cost and exposure in the United States. This is changing, and savvy companies are getting ahead of the curve by taking a global approach to dispute management.
Three factors primarily drive the change to a global approach. First, the level and "Americanization" of disputes — both litigation and arbitration — is increasing outside the United States. Greater regulation, a move in some countries to create an enforcement scheme through private remedies, and a gradual breakdown in solving issues through local relationships all contribute to an increase in litigiousness around the world.

Second, management of disputes is a distinct skill set that can and should be handled by lawyers trained in that specialty, rather than handled by in-house commercial lawyers or simply turned over to outside counsel. While reliance on local outside counsel is necessary for specific legal knowledge, local court experience and, in many jurisdictions outside the United States, rights of audience, in-house lawyers with dispute management skills are needed to manage outside counsel, take a risked approach to the dispute and improve results.

Third, adopting a company-wide system for handling disputes is vital if a global perspective is to be taken on risk management and cost-effective dispute resolution. This is epitomized by the International Institute for Conflict Prevention and Resolution's ("CPR Institute") 21st Century Corporate ADR Pledge. As a signatory to the CPR Institute's 21st Century Pledge, Shell has committed to approach its entire portfolio of disputes in a way that understands the pros and cons of the one-size-fits-all litigation model, and explores alternatives, including consensual ones, to resolve matters more quickly and with less cost. This approach applies equally to US and non-US matters, and requires training and educating business people, as well as in-house and outside lawyers supporting the company.

Traditionally, companies have approached each case in its particular jurisdiction and solely on its own merits, using litigation or arbitration process tools and expertise. A more sophisticated approach, however, considers the wide spectrum of alternative dispute resolution (ADR) options, de-escalates conflict, creates feedback loops and prevention opportunities, and examines how this case, and all cases with similar attributes, might be resolved more quickly and more effectively before the transaction costs increase. To be highly skilled in ADR, lawyers need resources, training and the ability to share innovations with each other as they develop.

To respond to this need, Shell created a global disputes function to establish single-point accountability for the management of Shell's litigation portfolio. This single-point accountability enables Shell to drive best practices in the critical areas of early case assessment (ECA) and budgeting, coordination with outside counsel, and the collection and review of information for regulatory purposes. It enables a common approach to dispute analysis, strategy and resolution, and ensures a thorough understanding of the available tools and techniques. In doing this, it receives valuable assistance through the resources and training of the CPR Institute to help educate its in-house lawyers and outside law firms.

This consistent and coordinated approach to dispute management promises to move this global function to more creative and cost-effective solutions, which will assist Shell in maintaining and building relationships with its stakeholders, and adopting a focused and appropriate approach to each of its disputes. This article illustrates how to establish a robust dispute management system and shows why it is most effectively deployed on a global basis for large companies.

**Design a system**

Companies are accustomed to creating programs and systems for almost every aspect of their business, as evidenced by the growth in process and manufacturing systems (e.g., Six Sigma, Malcolm Baldrige National Quality Award, etc.); corporate social responsibility accountability (e.g., the Global Reporting Initiative's Content Index, the United Nations' Global Compact); compliance systems (e.g., US Federal Sentencing Guidelines), and so on.

Nevertheless, the development of an integrated system to help companies manage their litigation has been largely nonexistent until recently. Aside from fairly widespread employment grievance systems and in mass claims situations, many companies have tended to handle each dispute independently.

Several studies have demonstrated the benefits of employing a systematic approach to dispute management. In 2003, a study by the American Arbitration Association (AAA) found that the “dispute-wise” companies reported “stronger relationships with customers, suppliers, employees and partners” and “lower legal department budgets.” The price/earnings ratios for the dispute-wise companies were also higher.
In 2007, the London law firm of Herbert Smith conducted an ADR usage survey of 21 European companies, and concluded:

Embedded Users (companies which used ADR consistently and earlier in the process) achieved greater savings in external legal costs and in management time spent on dispute resolution. They also enjoyed the most constructive relationships with their external dispute resolution lawyers, taking positive steps to align the approach of their external dispute resolution lawyers on ADR with their own views.

Companies that have both developed systems and a willingness to share their results have consistently shown significant cost savings in addition to improved relationships. For example, Bloomington, Minn.-based lawn mower manufacturer, the Toro Company, documented estimated savings of more than $100 million in legal costs and claimant compensation between 1991 and 2005; Georgia Pacific saved almost $45 million from 1995 to 2006.

A systematic approach provides appropriate and adequate checks and balances to help overcome the natural human tendency to escalate conflict. The typical “escalation cycle” means that the longer a conflict continues, the more intense and complex it will become. This is demonstrated by the five common transformations that often occur as a conflict escalates:
1. Tactics shift from light to heavy.
2. Issues proliferate.
3. Stereotyping and demonizing ensue.
4. Good intentions give way to bad.
5. Conflict expands to include more parties.

Escalating threats and intimidation triggers a loss of face and decreases the counterparty’s willingness to engage in collaboration and compromise. Thus, early intervention and analysis, and scheduled “brakes” in the process provide the most significant opportunities to achieve better and earlier resolution of disputes.

Furthermore, the programs themselves need to build in self-assessment methods to maintain their viability. As discussed below, conflict resolution methods are developing rapidly. Programs must measure, assess and adjust to ensure that the company’s ADR efforts continue to reduce litigation, and produce faster and measurably more effective results than traditional litigation.

Educate, educate, educate
“Litigation is war” is a common refrain, and bitter experience bears this out. The long discovery process, the aggressive tactical maneuvering and the win/lose mentality of the protagonists create hostilities that last long after the final ruling. Historically, lawyers have been trained only in the litigation model, and may lack the skills and understanding of other approaches to dispute resolution. Despite significant gains in scholarship and teaching of a multifaceted approach to addressing conflict, in law schools across the United States (and, indeed, in many other parts of the world), primary analytical skills instruction still tends to lead to a courtroom to resolve problems.

More significant, business leaders may have their own impressions of the “weakness” of taking anything less than a full-blown litigation stance. To fill this gap, in-house lawyers need to learn, and to require their outside counsel to understand and embrace, a culture of conflict resolution that extends from the macro perspective of systems design to ways of addressing individualized case details that can minimize the impact of disputes.

The company should invest in education and training in order to provide the right dispute resolution

Adopting a company-wide system for handling disputes is vital if a global perspective is to be taken on risk management and cost-effective dispute resolution.

resources, both internally and externally. This is not a static skill. As noted throughout this article, there are new techniques and tools arriving continually. Increasing our understanding of the elements of decision-making is producing new interpersonal settlement techniques.

The 21st-century lawyer should be trained as a problem solver and as a conflict manager, and understand the difference between rights-based and interest-based problem solving. Today’s lawyers need to be skilled at more than just “zero sum” or adversarial negotiation. They should understand how identifying the parties’ interests and bargaining on the basis of increasing the value of those interests can yield better results and create more flexibility for all the parties involved.

Drafting dispute resolution clauses
In most companies, and, indeed, in many law firms, the litigation lawyers are disconnected from the transactional lawyers who advise the business managers making the deals and contracting with suppliers, joint venture partners and vendors. Consequently, the dispute resolution clause is frequently inserted at the last minute, often using boilerplate language that is not customized to the situation or thought through in terms of optimizing legal outcomes. As in most aspects of life, a one-size-fits-all approach rarely produces optimal results. With better feedback and connections between the litigation and transactional lawyers, and resources and training in
Requirements for effective ADR system

An effective ADR system requires buy-in from senior management, the entire law department and outside counsel representing the company.

Elements of a systems approach:
- A defined program;
- Buy-in from senior management;
- Commitment to continuing conflict competence education for managers and lawyers;
- Early intervention mechanisms;
- Feedback loops (e.g., after action reviews);
- Prevention and avoidance; and
- Appropriate metrics to measure success.

The right clause for the right agreement can achieve tremendous savings in streamlined processes and effective de-escalation techniques at the contract stage.

Proper clause drafting, the company can adopt a more bespoke approach to dispute resolution clauses. The right clause for the right agreement can achieve tremendous savings in streamlined processes and effective de-escalation techniques at the contract stage.

Having a defined process set out in the contract promptly channels behavior into constructive solutions and reduces the likelihood that the issues will ripen into lawsuits. Court systems have long recognized that mediation settles cases, and the earlier the intervention the better. Of course, by the time courts see the cases, they have already ripened — and the view often is that the filing is more evidence that ADR is needed as soon as possible.

For example, a new mandatory mediation proposal to be implemented in New York is based on this tenet after noting that 90 percent of cases settle and announcing the mandatory mediation program, the “Chief Judge’s Task Force on Commercial Litigation in the 21st Century — Report and Recommendations to the Chief Judge of the State of New York” (June 2012) (available at http://bit.ly/N1JM06), explains:

While mediation can facilitate settlement at all stages of a litigation, both parties and the court system commonly can achieve even greater benefits to the extent that the parties are able to resolve their disputes before engaging in the protracted and expensive disclosure and motion practice that modern business litigation typically entail. Indeed, at times parties feel that they have little disincentive to continue to litigate if they already have incurred substantial legal costs. The Task Force, therefore, proposes that the New York County Pilot Mandatory Mediation Program be structured to provide for mediation before the parties have reached this tipping point, but to provide sufficient time so that limited, cost-effective, settlement-related information exchange can occur — either through formal disclosure or in the course of the mediation itself.

The measure requires the parties’ action on appointing a mediator within 90 days of a case filing where applicable.

The same study examined ADR cases for three elements: “(1) when an ADR intervention was introduced; (2) the average time from the introduction of ADR to the final disposition; and (3) the average time from filing of the case to final disposition.” Id. at 34. “The results,” according to the analysis, “clearly show that when ADR is introduced early in the life of the case, it takes the case less time to reach final disposition.”

That effect holds wherever mediation takes place, including private disputes. Different approaches will be needed for different companies (again, this should not be one-size-fits-all) depending on the size of the company, the nature and variety of the contracts they enter into, and the culture and uniformity of their counterparties. Some companies might want to consider adopting a series of business escalations to encourage managers to work even harder to find innovative solutions before the matter goes the litigation route. For example, when senior-level managers are unable to fix the problem, the contract requires the CEOs or chairmen to meet. This can create tremendous (and beneficial) pressure on lower levels of management to solve the problem by business rather than legal means.

Instead of a simple reflexive clause — negotiate, mediate, litigate — there are many more creative options. Streamlined arbitration with tight time limits; the novel “economical litigation agreement,” which combines the best of arbitration with litigation, using early neutral evaluation; and ombuds or standing neutrals are but a few of the many innovative options available for adapting to the specific industry, business needs and corporate culture.
As conflict manager, the in-house lawyer:

- Appreciates the entire problem, not just the legal issues;
- Understands social science concepts such as face saving, conflict styles and conflict escalation;
- Gets involved at contract drafting stage and designs customized business solutions as part of the dispute resolution clause;
- Demands appropriate early case assessment process;
- Partners with outside counsel on risk sharing; and
- Acts as settlement counsel.

An added bonus is that those who are directly involved in designing a conflict system will buy into concepts that fit their unique business environment. The result is that those same executives will be vested in the means of resolving the problems, and likely more committed to resolving them sooner.

When in-house lawyers are trained in and understand productive conflict management and “focus on substantive issues, open dialogue, flexibility of the parties and consideration of others’ legitimate needs and concerns,” they are better equipped to de-escalate and avoid polarization, and to promote productive conflict resolution.

The effect of early intervention producing earlier resolution has been quantified in employment cases by the US Justice Department. [See Lisa Blomgren Bingham, Tina Nabatchi, Jeffrey M. Senger, and Michael Scott Jackman, “Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes,” 24:2 Ohio State Journal on Dispute Resolution 1 (2009)(available at http://ssrn.com/abstract=1127878).] The study also compared voluntary ADR cases to court-ordered cases, and found that while 60 percent of the Justice Department cases studied reached settlement in ADR, “a statistically significant” higher number settled in voluntary ADR cases than did in court-ordered cases. Id. at 31.

Early intervention

In more than 90 percent of the lawsuits filed, the costs, time delay and risk of total loss by adjudication do not outweigh the attractiveness of a settlement. Early case assessment programs provide the best way to evaluate settlement potential and avoid conflict escalation. ECA programs are “among the fastest growing organizational conflict management strategies because they provide significant cost savings and control over disputes.”

There is a natural tension between the need for more information through discovery or disclosure and the value of an early settlement. While it is important to identify “just enough” information to conduct a thorough assessment, it should not be underestimated how much can be done on the basic information and documentation available in the early stages of a potential dispute. At Shell, all members of the global litigation group have been trained in the same approach to ECA. The ECA process is conducted early, usually in the first 30 days of a dispute arising. Such an approach creates the discipline of analyzing what the dispute is really about (which may often not be what it seems at first sight), discovering what the wider ramifications could be, identifying what information is available and what is not, and understanding what will need to be established to achieve the right result. It is a valuable internal “brake” on leaping straight into confrontational mode and ensures the correct resolution strategy is adopted at the earliest possible stage. The CPR Institute provides a free “Toolkit” of information on how to customize a company ECA program to fit each unique business model and litigation portfolio.

Understanding global trends

The creation within Shell of a unified global litigation group that shares their knowledge and understanding in dispute management techniques from around the world means that the company can adopt an ever more sophisticated and nuanced approach to its litigation portfolio worldwide, and ensure that trends in dispute resolution can be tracked, understood and applied. The importance of this is exemplified by brief consideration of trends in two of the more “traditional” forms of ADR.

Mediation trends

Mediation is increasingly taking root in many countries outside the United States, even in civil law jurisdictions. As an example, in 2008, as an initiative of a number of German companies, the “Round Table Mediation & Conflict Management of the German Economy” was formed to promote conflict management and mediation skills among participants. With working groups and regular meetings to exchange experiences, this group considers itself a proponent of mediation as “an important element of a modern conflict management system and — wherever suitable — make use of it regularly and successfully in order
to achieve an interest-oriented and sustainable conflict resolution.11

The quality of training and education on mediation still varies widely, however, and outside lawyers may be part of the problem.13 Lawyers who use standard adversarial practices in mediation and fail to support a “client-centered” view can negatively affect the experiences business managers and in-house lawyers have in mediation.

To counter this and to reflect the globalization of mediation, it is important for in-house lawyers in all jurisdictions to have training in mediation skills so they can:

1. identify the best time for mediation;
2. hire a mediator with the best fit of skills for the matter;
3. prepare the case and the business clients for the mediation process; and
4. control outside counsel’s potential to derail the process through excessive or inappropriate advocacy.

Arbitration trends
For the vast majority of international contracts, arbitration remains the best alternative to the local courts. But concern with arbitration becoming too much like litigation with all the attendant cost and time implications has affected US practices and is beginning to surface in international arbitration as well. In Europe, the Corporate Counsel International Arbitration Group was formed in 2008 to address concerns about the increasing complexity and expense of international arbitration. Arbitration providers worldwide have developed expedited processes and procedural rule changes that force parties and tribunals to reach the core of a matter faster, with the expectation that streamlined processes — for example, limiting discovery or barring ediscovery entirely — will produce speedier results.14

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Some of the fundamentals of arbitration practice, such as party appointment of arbitrators, are also being challenged.15

All of this means that in-house lawyers conducting international arbitrations need to understand all the options available and how to make the most of the process while ensuring that the enforcement of the arbitral award is not jeopardized. Training in-house experts in arbitration law and global practices, as is done at Shell, provides the best way to optimize arbitration benefits in the United States and abroad.

Measurement systems and feedback loops
An essential part of any systemic approach is to define and measure success. Shell has put at the heart of its global disputes group its Litigation Objectives Realization Process (LORP). This process aims to identify and assess litigation objectives and risks at the earliest possible opportunity, and then to develop and execute a comprehensive litigation strategy to manage and resolve disputes successfully in furtherance of targeted business objectives. Simply put, LORP identifies the litigation destination, charts the shortest, most effective route to getting there, and captures...
and communicates the learnings.

In essence, LORP can be considered as a four-stage process: Assess, Select, Execute, Review.

Each of the stages can be summarized as follows:
- **Assess**: Key facts assessed, potential exposure categorized, business objectives and outcomes identified and agreed upon, case management plan established.
- **Select**: Clear strategy designed around achieving the business objectives.
- **Execute**: Resolution of the dispute consistent with the desired business objectives, litigation strategy and agreed upon budget.
- **Review**: Communication of post-closing obligations, learnings for improvement shared with the business client and globally within the group.

**Benefit from a global approach**

Taking a holistic approach (i.e., globally) to dispute management provides a multinational company with the sophisticated skills to address an increasingly complex litigation environment around the world. A global approach provides corporate counsel with the tools they need and the leadership of their outside law firms, and ensures the highest quality results with improved stakeholder relationships. It is simply essential in today’s global economy. **ACC** Simply put, LORP identifies the litigation destination, charts the shortest, most effective route to getting there, and captures and communicates the learnings.

**NOTES**

1. CPR’s 21st Century ADR Corporate Pledge reads: “Our company pledges to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes.” It can be found at: www.cpradr.org.
5. The “Economical Litigation Agreement” is a model contract clause that adopts both arbitration and litigation and allows commercial parties to design the level of discovery they choose. Information can be found at http://bit.ly/11ij9OG.
10. CPR’S “ECA Toolkit” can be found at: http://bit.ly/10vn4aN.
11. German member companies include: E.ON, SAP, Audi, Siemens, Deutsche Bahn, Deutsche Bank, Bombardier Transportation, Areva, the Fraunhofer-Gesellschaft, Deutsche Telekom and E-Pius Group.
15. Prof. Jan Paulsson, “Moral Hazard in International Dispute Resolution,” inaugural lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, (April 29, 2010).
Controller Legal Costs – Corporate Counsel

ECA: Perspectives Of Members Of CPR’s Corporate ECA Commission

The Editor interviews Lawrence Chanen, Senior Vice President, Associate General Counsel in the Litigation Department and Head of the Workout and Bankruptcy Practice Group, JP Morgan Chase, and Duncan MacKay, Deputy General Coun-
sel, Northeast Utilities.

Editor’s Note: As members of CPR’s Corporate Counsel Commission, Messrs. Chanen and MacKay contributed their expertise and insights in connection with the development of CPR’s Early Case Assessment Guidelines (CPR’s ECA Toolkit).

Editor: How extensively do you use early case assessment (ECA)?: Are there types of disputes which are not suitable for ECA?

Chanen: Here at JPMorgan, we encourage all lawyers to make an early assessment of the risks of a case, which is obviously advantageous from a risk management and a cost-saving point of view. We are dedicated to effectively managing risk and ECA provides a structure that helps us do that.

There are types of disputes which are far more suitable for ECA than others, particularly where you have business people on both sides seeking a rational solution to the dispute. And, we do have cases of that nature where we utilize ECA either informally or through our own formal ECA program. However, an important aspect of our bankruptcy litigation for JPMorgan is the early case assessment process, I sometimes encounter situations where one or more of the parties is intent on making irrational demands rather than engage in a realistic risk analysis. ECA, if viewed as a tool early in a case, can be a valuable asset.

MacKay: At Northeast Utilities, we use ECA (both formally and informally) with respect to virtually all commercial (busi-
ness-to-business) disputes, disputes that implicate our core business interests, and on any matters that may generate interest by, or attention from, our external stakeholders. I say that we use ECA “formally and informally” because our in-house lawyers generally always perform an informal (read “unwritten”) assessment of most matters that come in to the Legal Department, as part of our normal evaluation and triage of disputes involving the company.

Where the ECA takes on more formal- ity is with an issue that is more complex and involves disputes involving the company, in which cases the ECA is typically embodied in formal written memoranda. I believe that, with the exception of routine types of matters (i.e., foreclosures, collections, smaller tort matters, etc.), most disputes lend themselves to some form of ECA. Indeed, one of the main reasons we have in-house counselors involved in early case assessment is to bring about an earlier resolution of the dispute. And, we do have cases of that nature where we utilize ECA either formally or through our own formal ECA program. However, an important aspect of our bankruptcy litigation for JPMorgan is the early case assessment process, I sometimes encounter situations where one or more of the parties is intent on making irrational demands rather than engage in a realistic risk analysis. ECA, if viewed as a tool early in a case, can be a valuable asset.

Editor: How extensively do you use early case assessment (ECA)? Are there types of disputes which are not suitable for ECA?

Villarreal: ECA is used in all significant matters for which it's called for in our convergence program. In measuring its success, we take a particular case, we look at costs, timelines and how it has been executed. We also look at a fourth measure, which is more subjective and more qualitative: that is, do the in-house counsel involved feel that the early case assessment has been useful and has fulfilled its function of serving as a kind of projected trajectory for the case.

Editor: What do you like about the CPR’s ECA Toolkit?

Villarreal: CPR has taken best practices and then built them into their program. I applaud CPR’s emphasis on alternative dispute resolution in the resolution process. Optimally, what an ECA program should do is to drive you to explore early resolution possibilities.

Editor: How do you measure the success of an ECA?

Villarreal: We have our own custom-built template of how we want the early case assessment process applied. Our lawyers train on the job. After they have had experience applying ECA, we award them points. We then become not students but teach-
ers of the process. It becomes a part of what is done during the ECA process. The threat of expensive discovery to the heart of a dispute, particularly if the work done by firm B. An early case assessment process should involve an informational advantage that may help bring about an earlier resolution of the dispute. And, we do have cases of that nature where we utilize ECA either informally or through our own formal ECA program. However, an important aspect of our bankruptcy litigation for JPMorgan is the early case assessment process, I sometimes encounter situations where one or more of the parties is intent on making irrational demands rather than engage in a realistic risk analysis. ECA, if viewed as a tool early in a case, can be a valuable asset.

Editor: What happens if the ECA takes on more formal- ity or in the context of a larger, more complex dispute involving the company, where our lawyers have their hands around an issue in a relatively short period of time?

Villarreal: We get nothing but kudos. One of the things that I have really enjoyed is how the concepts and terminology of ECA have finally gotten baked into the thinking of our executives.

Management feels it’s a very business-like approach. One of the things that both aligns with our business philosophy is that the concept and how the company is perceived by the public. It is the perception that companies are playing a meaningful role in shaping the public’s perception of our industry.

Editor: How do you train your lawyers to use ECA?

Villarreal: We have our own custom-built template of how we want the early case assessment process applied. Our lawyers train on the job. After they have had experience applying ECA, we award them points. We then become not students but teach-
ers of the process. It becomes a part of what is done during the ECA process. The threat of expensive discovery is simply a self-discipline tool to the increased level of scrutiny that they have come to expect. For us, it is a way to better manage risk and control legal expense. I think that’s something that CPR should promote.

Villarreal: CPR should promote the use of ECA by member companies involved in a dispute because it will facilitate a more meaningful engagement by them in dispute resolution. Parties with a well-developed understanding of an effective tool to get to the heart of a dispute, particularly if used as a precursor to mediation. You may have some relatively high costs at the outset, but it can be a way ultimately to manage cost. Encouraging ECA can further inculcate in our corporate culture the idea that it is an effective way to manage legal risk and control legal expense. I think that’s something that CPR should promote.

Editor: How does your ECA program reduce total legal costs or provide a better outcome?

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ers of the process. It becomes a part of what is done during the ECA process. The threat of expensive discovery is simply a self-discipline tool to the increased level of scrutiny that they have come to expect. For us, it is a way to better manage risk and control legal expense. I think that’s something that CPR should promote.

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Editor: What happens if the ECA was not the best choice?

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CPR’s ECA Toolkit – A Great Contribution To Controlling Litigation Costs

Editor: What are your responsibilities?

Villarreal: I am responsible for all company litigation on a global basis except for IP litigation, which is done by our IP group.

Editor: What are the key elements of early case assessment?

Villarreal: Any credible early case assessment program has got to be – let’s not forget the word – early. It has to be instituted and completed within a relatively short time frame after recognition of a controversy. That recognition may be the filing of a lawsuit or the identification within a company of a conflict. However, enough time must be taken to get a reasonably reliable result – be it 60 days, 90 days or even 120 days.

There should be some discipline around the early assessment of a case. The ECA must provide the information that an experienced litigator would want to know about a matter before giving advice to a company about how it should address the matter.

First, I need an assessment of the facts. What happened? What is the story? Secondly, I need an assessment of the the legal framework for evaluating the factual issues.

Then, I need to know about the witnesses and the documents. Because the story ultimately is told through people. I need to know not only what they will be saying, but are they credible? Are they likeable? What is their background?

I need to look at the documents and what is likely to be turned up in e-discovery. If there is a contractual issue, what does the contract say?

And there are other things I need to know as well such as what’s at stake for the company in the controversy and the venue situation.

The thing about lawyers is that by mindset and by training, they will want to collect facts and analyze them forever because every additional piece of information adds to their understanding of the situation and to their assessment of the case.

Early case assessment imposes the discipline of cutting that process short. Experience teaches us that if you conduct a very good early case assessment that looks at the facts and the law and the witnesses and the documents that you will know when you complete your ECA, you will know 80 percent of all you will ever know about this case. Is that perfect knowledge? Well by definition “no,” but it is adequate and sufficient knowledge to what needs to be done but also makes it far easier for management to accept

Editor: Do you feel it is important to have a formal system for early case assessment? Why?

Villarreal: In my experience it is absolutely critical to have a formal, mandatory program in place because it not only imposes discipline with respect to what needs to be done but also makes it process they’ve been through it before.

Editor: Some law firms offer their own ECA process. Do you use theirs or yours?

Villarreal: I’ve never had to face that situation; but, I am pretty confident that I know how I would handle it. If I were to hire a firm that said it had its own early case assessment program that allowed them to get an early case assessment done in less time and for less money and that it would uncover the kind of information I needed to know, then I would say, “fine, let’s use yours.” I would applaud them for taking the initiative because for the most part this has been a client-driven initiative rather than a law firm-driven initiative.

Please turn to page 18

Other interviews relating to CPR’s ECA initiative can be found on pages 13 and 18.
Controlling Legal Costs – Corporate Counsel

ECA: Perspectives Of Members Of CPR’s Corporate ECA Commission

The Editor interviews Lawrence Chanen, Senior Vice President, Associate General Counsel in the Litigation Department and Head of the Workout and Bankruptcy Practice Group, JP Morgan Chase, and Duncan MacKay, Deputy General Counsel, Northeast Utilities.

Editor’s Note: As members of CPR’s Corporate ECA Commission, Messrs. Chanen and MacKay contributed their expertise and insights in connection with the development of CPR’s Early Case Assessment Guidelines (CPR’s ECA Toolkit).

Editor: How extensively do you use early case assessment (ECA)? Are there types of disputes which are not suitable for ECA?

Chanen: Here at JPMorgan, we encourage all lawyers to make an early assessment of the risks of a case, which is obviously advantageous from a risk management and cost-saving point of view. We are dedicated to effectively managing risk and ECA provides a structure that helps us do that.

There are types of disputes which are far more suitable for ECA than others, particularly where you have business people on both sides seeking a rational solution to the dispute. And, we do have cases of that nature where we utilize ECA either informally or through our own formal ECA program. As Head of the Workout and Bankruptcy litigation for JPMorgan in the litigation department, I sometimes encounter situations where one or more of the parties is intent on making irrational demands rather than engage in a realistic risk analysis. ECA, if viewed as a path to early case resolution, cannot accomplish that objective in those situations.

MacKay: At Northeast Utilities, we use ECA (both formally and informally) with respect to virtually all commercial (business-to-business) disputes, disputes that implicate our core business interests, and on any matters that may generate interest by, or attention from, our external stakeholders. I say that we use ECA “formally and informally” because our in-house lawyers generally always perform an informal (read “unwritten”) assessment of most matters that come into the Legal Department, as part of our normal evaluation and triage of disputes involving the company.

Where the ECA takes on more formality is with an informal overview of disputes involving the company, in which cases the ECA is typically embodied in formal written memoranda. I believe that, with the exception of routine types of matters (i.e., foreclosures, collections, smaller tort matters, etc.), most disputes lend themselves to some form of ECA. Indeed, one of the main reasons we have in-house counsel is to add value – to be able to relate to the company’s unique understanding of the business context in which a particular dispute has arisen and their ability – using that insight – to quickly and effectively develop a strategy (outside litigation counsel develop) a case management plan that assesses the strengths, weaknesses and business implications of a dispute. Without an ECA and development of a case management plan, the company potentially loses an opportunity to position a dispute for early (and cost-effective) resolution through ADR, and leaves itself largely at the mercy of wherever expensive, time-consuming, and relationship-crushing discovery takes it.

Editor: Have you found that use of ECA reduces litigation costs or improves outcomes? Is management supportive of its use?

Chanen: If you have rational business people on both sides, even if they’re angry at one another, ECA, whether formal or informal, will reduce litigation costs and improve outcomes. If ECA is applied early enough it can result in the dispute being resolved before it renews itself to litigation. The threat of expensive discovery and having to go to court is an important tool in bringing the parties together to seek a solution.

MacKay: ECA does reduce the costs of litigation and provides better opportunities sooner for improved outcomes. Because ECA places an emphasis on a meaningful assessment of the factual and legal issues relevant to a dispute early on, strategies and tactics can be developed more quickly, efficiently and cost-effectively. Additionally, our approach to ECA considers whether ADR may provide an appropriate path for resolving a dispute earlier in a dispute’s life-cycle, with our default assumption being that it does. Accordingly, many disputes can be positioned for early resolution on commercial terms through negotiations and mediation, or arbitration, so saving the costs of discovery and prolonged practice. As we are not in the business of litigation, we are supportive of a process that will result in more predictable, cost-effective and timely resolutions of disputes.

Editor: To what extent should CPR promote the use of ECA by corporations that may be opposing parties? What are the advantages of the use of ECA by each party to a dispute?

Chanen: If you are dealing with rational people, ECA is an effective tool to get to the heart of a dispute, particularly if used as a precursor to mediation. You may have some relatively high costs at the outset, but it can be a way ultimately to manage costs. Encouraging ECA can further inculcate in our corporate culture the idea that it is an effective way to manage legal risk and control legal expense. I think it’s something that CPR should promote.

MacKay: CPR should promote the use of ECA by member companies involved in a dispute because it will facilitate a more meaningful engagement by them in dispute resolution. Parties with a well-developed understanding of an effective tool to get to the heart of a dispute will be more likely to see in this next generation, that objectively and incorporating a commensurate increase in the level of scrutiny that they are likely to see in the next generation, which translates into increased legal costs. But, legal costs are simply a symptom of a much bigger phenomenon.
Case Study:

by Phillip M. Armstrong

An aggressive use of alternative dispute resolution (ADR) can save a company endless hours of time and millions of dollars in expenses. Georgia-Pacific Corporation has revamped its litigation management accordingly, and the strategy is paying off. In 1996 the company mediated, arbitrated, or settled through early case evaluation nearly 50 cases with an estimated savings of at least $1.5 million. In 1997 the number of such cases increased to 74 with an estimated $6.5 million in savings. These numbers certainly have ensured management's continued support for the program.

Like much of corporate America, Georgia-Pacific has learned to handle litigation differently. For years, lawsuits brought against the company took an all too familiar path. After service of process, the case was assigned to a member of the legal department.

Georgia-Pacific’s Aggressive Use of Early Case Evaluation and ADR

often someone who had little or no training in handling litigation. Typically, the in-house attorney conducted a preliminary factual investigation, then hired outside counsel to defend the suit. The outside counsel would file an answer, initiate discovery, and represent the company until the case was resolved. In almost every instance, 18 to 36 months later, following an expenditure of thousands of dollars in legal fees and related costs, the case settled. Georgia-Pacific’s experience reflects that of the majority of American corporations. The fact is, most cases settle.

A shift began, however, when James F. Kelley took over as Georgia-Pacific’s senior vice president and general counsel in December of 1993. Analyzing the company’s caseload, he realized that Georgia-Pacific entered into settlements for amounts that could have been reasonably estimated much earlier in the process, even before any significant discovery had been undertaken. He deemed it more sensible to settle for that amount (or perhaps even less) early in the process to save the legal fees and costs (including the time of company employees) that would otherwise be incurred in defending the suit.

As part of an ongoing, corporate-wide cost-cutting effort, Kelley incorporated his thinking about early case evaluation into an overhaul of the legal department. Rather than the standard pyramid, Kelley’s philosophy was to flatten out his staff and move away from a department in which lawyers manage other lawyers. Attorneys were required to be practitioners, to do more in-house and to become less reliant on outside

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Georgia-Pacific’s Model ADR Contract Clauses

A TWO-STEP DISPUTE RESOLUTION CLAUSE

Mediation- Arbitration or Litigation

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement by mediation in accordance with the [Center for Public Resources (American Arbitration Association)] (other named organization) model procedures for mediation of business/commercial disputes.

If the matter has not been resolved pursuant to the aforesaid mediation procedure within _______ days of the commencement of such procedure, or if either party will not participate in a mediation,

[Select one of the following alternatives.]

(i) the controversy shall be settled by arbitration in accordance with the [Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes (American Arbitration Association)]. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be _______.

The arbitrator(s) are not empowered to award damages in excess of actual damages, including punitive damages.

(ii) either party may initiate litigation upon ______ days’ written notice to the other party.

All deadlines specified in this Article may be extended by mutual agreement.

The procedures specified in this Article shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Agreement; provided, however, that a party may seek a preliminary injunction or other preliminary judicial relief if in its judgment such action is necessary to avoid irreparable damage. Despite such action the parties will continue to participate in good faith in the procedures specified in this Article. All applicable statutes of limitation shall be tolled while the procedures specified in this Article are pending. The parties will take such action, if any, required to effectuate such tolling.

THREE-STEP DISPUTE RESOLUTION CLAUSE

Negotiation-Mediation-Arbitration

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement promptly by negotiations between senior executives of the parties who have authority to settle the controversy (and who do not have direct responsibility for administration of this Agreement).

The disputing party shall give the other party written notice of the dispute. Within twenty days after receipt of said notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of each party’s position and a summary of the evidence and arguments supporting its position, and (b) the name and title of the senior executive who will represent that party. The senior executives shall meet for negotiations at a mutually agreed time and place within thirty days of the date of the disputing party’s notice and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute.

If the matter has not been resolved within sixty days of the disputing party’s notice, or if the party receiving said notice will not meet within thirty days, the parties will attempt in good faith to resolve the controversy or claim by mediation in accordance with the [Center for Public Resources (American Arbitration Association)] (other named organization) model procedures for mediation of business/commercial disputes.

If the matter has not been resolved pursuant to the aforesaid mediation procedure within _______ days of the commencement of such procedure, or if either party will not participate in a mediation,

[Select one of the following alternatives.]

(iii) the controversy shall be settled by arbitration in accordance with the [Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes (American Arbitration Association)]. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be _______.

The arbitrator(s) are not empowered to award damages in excess of actual damages, including punitive damages.

(iv) either party may initiate litigation upon ______ days’ written notice to the other party.

All deadlines specified in this Article may be extended by mutual agreement.
The procedures specified in this Article shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Agreement; provided, however, that a party may seek a preliminary injunction or other preliminary judicial relief if in its judgment such action is necessary to avoid irreparable damage. Despite such action the parties will continue to participate in good faith in the procedures specified in this Article. All applicable statutes of limitation shall be toiled while the procedures specified in this Article are pending. The parties will take such action, if any, required to effectuate such tolling.

FOUR-STEP DISPUTE RESOLUTION CLAUSE

Two Stage Negotiation-Mediation-Arbitration or Litigation

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement promptly by negotiations between representatives and senior executives of the parties who have authority to settle the controversy. If a controversy or claim should arise, _______________ of Owner (O-P or other) and

____________________ [Contractor or other], or their respective successors in the positions they now hold (herein called the "project managers"), will meet at least once and will attempt to resolve the matter. Either project manager may request the other to meet within fourteen days, at a mutually agreed time and place.

If the matter has not been resolved within twenty days of their first meeting, the project managers shall refer the matter to senior executives, who do not have direct responsibility for administration of this Agreement (herein called "the senior executives"). Thereupon, the project managers shall promptly prepare and exchange memoranda stating (a) the issues in dispute and their respective position, summarizing the evidence and arguments supporting their position, and the negotiations which have taken place, and attaching relevant documents, and (b) the name and title of the senior executive who will represent that party. The senior executives shall meet for negotiations at a mutually agreed time and place within fourteen days of the end of the twenty-day period referred to above, and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute.

If the matter has not been resolved within thirty days of the meeting of the senior executives, or if either party will not meet within thirty days of the end of the twenty-day period referred to in the preceding paragraph, the parties will attempt in good faith to resolve the controversy or claim by mediation in accordance with the [Center for Public Resources] [American Arbitration Association] [other named organization] model procedures for mediation of business/commercial disputes.

If the matter has not been resolved pursuant to the aforesaid mediation procedure within _________ days of the commencement of such procedure, or if either party will not participate in a mediation,

[Select one of the following alternatives:]

(i) the controversy shall be settled by arbitration in accordance with the [Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes] [Commercial Arbitration Rules of the American Arbitration Association]. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be ____________________________ .

The arbitrator(s) are not empowered to award damages in excess of actual damages, including punitive damages.

(ii) either party may initiate litigation (upon ________ days' written notice to the other party)

All deadlines specified in this Article may be extended by mutual agreement.

The procedures specified in this Article shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Agreement; provided, however, that a party may seek a preliminary injunction or other preliminary judicial relief if in its judgment such action is necessary to avoid irreparable damage. Despite such action the parties will continue to participate in good faith in the procedures specified in this Article. All applicable statutes of limitation shall be toiled while the procedures specified in this Article are pending. The parties will take such action, if any, required to effectuate such tolling.
How can other companies learn from the Georgia-Pacific experience? What can they do to institutionalize early case evaluation/ADR? The following steps are recommended.

1. Get top management buy-in. The executives in the company must be shown the economic benefits of early case resolution versus a winning-at-all-costs philosophy.
2. Start training. Although most lawyers today are at least familiar with ADR, few have had formal training. An interactive training session, complete with role play, is money well spent.
3. Start small. Don’t try to change the corporate culture too quickly. Begin, perhaps, with a category of cases, such as product liability claims, and then expand.
4. Incorporate the practice. Require ADR clauses to be routinely incorporated into your commercial agreements. This provides a mutual, face-saving method of forcing the parties to use alternative means to resolve disputes before the battle lines are drawn.
5. Grant authority. Assign someone full-time responsibility for promotion and use of ADR. In-house expertise is essential to any successful program.
6. Begin immediately. When the existence of a dispute becomes known, promptly investigate the facts, objectively evaluate the case, and, when appropriate, initiate negotiation or ADR.
7. Build a resource library. Treatises and periodicals on alternative dispute resolution are both extensive and readily available.
8. Fully litigate cases if necessary. An aggressive program does not mean every case is suitable for ADR. One should screen every case, however, to determine its suitability for early settlement or ADR.
9. Measure the results. This can be somewhat tricky because one must necessarily estimate the cost of litigation. Yet most litigators have a sense for what a case will cost and, with some exceptions, can reasonably estimate the outcome. It’s not a science, but the ability to properly evaluate a claim in its early stages is key to a successful program.
10. Be patient. It takes time to build a successful program and not every ADR experience will be positive. Over time the results will speak for themselves.

Notes
1. Forms for use in drafting ADR clauses are available from CPR, AAA, and a variety of other sources. For a good article on arbitration clauses, see Robert R. Salman & Suzanne A. Salmon, Points to Ponder for Arbitration Agreements, 43 Pac. L.J. 30 (1997).
3. One of the better ADR screens available is published by Debevoise & Plimpton, Evaluating Cases for ADR, 12 Alternatives to the High Costs of Litigation 151 (1994).

IN SHORT, INSTEAD OF IMMEDIATELY SENDING LAWSUITS TO OUTSIDE COUNSEL, GEORGIA-PACIFIC’S LEGAL STAFF BEGAN TO REVIEW EVERY FILE WITH AN EYE TOWARD EARLY SETTLEMENT OR ADR. TODAY, WITH FEW EXCEPTIONS, GEORGIA-PACIFIC TRIES TO RESOLVE A MATTER IN THE FIRST 60 TO 90 DAYS, WELL BEFORE DISCOVERY IS UNDERWAY.

counsel. Additionally, he required his staff to become actively involved in each case, as opposed to just monitoring the performance of outside counsel, and set up a separate litigation group to manage all the company’s lawsuits. Early case evaluation, emphasizing ADR, was mandated for virtually every suit filed against the company. An attorney was added to the litigation group to pro-

mote and employ ADR, with special emphasis on early disposition of cases. Additionally, lawyers were required to attend an interactive, two-day training session on ADR. In short, instead of immediately sending lawsuits to outside counsel, Georgia-Pacific’s legal staff began to review every file with an eye toward early settlement or ADR. Today, with few exceptions, Georgia-Pacific tries to resolve a matter in the first 60 to 90 days, well before discovery is underway.

Georgia-Pacific is quick to point out that not every case is suitable for early settlement or ADR. Sometimes an important precedent is at stake. Other times the claim is totally without merit, in which case Georgia-Pacific defends on principle alone. Kelley is willing to go scoured earth when the circumstances call for it, but many suits against the company contain a legitimate claim or involve a business relationship worth preserving.

The company’s willingness to enter ADR is not a refusal to litigate. “In the old days,” Kelley says, “we might have spent $100,000 [in legal fees and other costs] and taken two or three years to settle a case that probably could have been resolved for
as kelley says, "we are constantly reviewing our litigation strategy, but early case evaluation and ADR seem to be working. if you properly evaluate a case early in the process and can arrive at a settlement that is consistent with that evaluation, it's hard to argue with the results."

half that amount shortly after the suit was filed. We might have felt justified in defending the case, but after it was clear the other side had some legitimate claims, the economics made no sense at all." Like all large corporations, Georgia-Pacific still defends lawsuits and fights grossly inflated or meritless claims. Increasingly, however, it employs early case evaluation, mediation, arbitration, and other ADR techniques with improving results. Kelley doesn't fear that this will open the flood gates to frivolous litigation, particularly if the public perceives a settlement mentality at Georgia-Pacific. He asserts, "We still look very closely at every case. We know which cases are ripe for settlement and which ones are bogus."

It's a new day at Georgia-Pacific with a novel approach to managing litigation. Cases get settled, business relationships are preserved, management spends less time responding to discovery (or otherwise providing factual support for the case), and the company saves money — sometimes big. Georgia-Pacific is not the first company to recognize the advantages of early settlement or to make extensive use of ADR. But it is among the first Fortune 500 companies to make that philosophy a focal point of its approach to litigation. As Kelley says, "We are constantly reviewing our litigation strategy, but early case evaluation and ADR seem to be working. If you properly evaluate a case early in the process and can arrive at a settle-

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Notes

1. The Center for Public Resources Institute for Conflict Resolution (CPR) estimates that 95 percent of all lawsuits settle outside of court.

2. At Georgia-Pacific, early case evaluation leading to a negotiated settlement is treated as if it were a form of ADR, that is, a method of resolving the case short of litigation.

3. In the recent Cornell University study of 1000 of the largest U.S. corporations, nearly 100 percent of those responding to the survey reported using ADR some of the time. (David b. lipsky & ronald l. stieber, a joint initiative of Cornell University, The Foundation for the Prevention and Early Resolution of Conflict, and Price Waterhouse LLP, THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN U.S. CORPORATIONS 1997.)

available on ACCA Online are copies of ACCA's ADR InfoPAK® (www.acca.com/infpaks/index.html) and sample forms and policies (www.acca.com/legres/index.html), including Georgia-Pacific's ADR agreement.