TRANSFORMING BUSINESS THROUGH PROACTIVE DISPUTE MANAGEMENT

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I. INTRODUCTION

We have come a long way from confining dispute resolution to using solely litigation to an age where a myriad of Alternative Dispute Resolution ("ADR")[1] processes are recognized and widely accepted. However, as society evolves, commerce becomes more global, and we develop new technologies, the dispute resolution field needs to adapt to the growing needs and requirements of the business community to expand opportunities, reduce frictional costs, and integrate social responsibility into their models. What does the business community of today need? What are the aspects of a business model that impress investors of the future? Businesses and investors of today are very aware of the high risks and costs attached to litigation. They are also aware of the diverse customer and vendor base requiring a fresh look at who are the dispute resolvers of the future. Having a dispute prevention and resolution mechanism embedded into the business system that meets these needs will not only attract investment, but also profit companies.

It is a time for a revolutionary adjustment in the system, with a focus on embedding dispute prevention and resolution systems into the grassroots of the formation of any business relationship. Businesses already acknowledge the importance and value of dispute prevention, not only as a mode of avoiding disputes, preserving their brands, and incurring minimal damage to their businesses, but also as fostering profit making incentives.

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[1] Alternative dispute resolution (ADR) refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. It is normally thought to encompass mediation, arbitration, and a variety of "hybrid" processes by which a neutral facilitates the resolution of legal disputes without formal adjudication. Robert H. Mnookin, *Paper 232: Alternative Dispute Resolution*, (John M. Olin Ctr. for L., Econ., & Bus., paper 232, 1998).

Proactive businesses today are moving towards a dispute management framework where high importance is given to customized dispute prevention and resolution systems. Dispute prevention is most important in joint ventures, licensing agreements, technology partnerships, integration agreements and, an enduring relationship, including the relationship with competitors and suppliers. The idea of "dispute management" has been a part of discussions and ideas. Unfortunately, not much action has been taken to bring it to life, and to implement it. However, we are looking at a future with more potential for implementation and recognition of dispute prevention and resolution systems in businesses.

The first part of this article deals with "midnight clauses," referring to the low level of importance placed on drafting a dispute resolution clause during the course of structuring a deal. The design of the clause should be multi-dimensional and not focused on a single process. Further, there needs to be a shift in attitude towards the drafting of dispute resolution clauses across the business and not limited to one transaction. This part also highlights the important role played by the lawyer/advisor[2] in the drafting and formulating dispute resolution clauses in agreements in collaboration with their client. Part II of this article deals with dispute prevention and resolution mechanisms that can be embedded into business systems. The discussion starts with the idea of establishing a conflict resolution specialist into the company as an expert guide for ADR processes. We then examine Planned Early Dispute Resolution as a model structure. Then we look at conflict as commerce and the *Monsanto* model as an example of dispute resolution systems that can be adopted into business systems in the industry and the inherent benefits in doing so. In Part III, we look at who the dispute resolvers of today are, who the neutrals of the future should be, and the need for diversity.

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[2] The term lawyer/advisor is used throughout the article to recognize that often times the person filling the role of providing advice about ADR processes may not be a lawyer but someone with expertise in the field.

II. Prioritizing Dispute Resolution Clauses

In 2016, the International Mediation Institute ("IMI")[3] launched the Global Pound Conference ("GPC").[4] Between March 2016 through July 2017, forty events are scheduled in thirty-one countries to determine the future of commercial dispute resolution. Through this initiative, information is being collected about how dispute management and resolution should adapt to meet corporate user needs and requirements. In 2016, IMI also published the results of its International Mediation and ADR Survey[5] ("IMI Survey"). These two instruments add dimension to how clients and lawyer/advisors interact in the ADR sphere.

When asked what processes and tools should be prioritized to improve the future of commercial dispute resolution, the number one response in the GPC events held in 2016 was "pre-dispute and escalation clauses."[6] The results of this question point to the importance of dispute management and resolution clauses to businesses and dispute resolvers. Well-crafted dispute resolution clauses effectively resolve a dispute without incurring unnecessary costs. However, today dispute resolution clauses are the last issue considered in the course of negotiations and dispute management systems are rarely adopted or, if a system is in place, it is relegated solely to one aspect of business. Therefore, the valuable experience of lawyer/advisors, whether transactional or litigation focused, are not tapped sufficiently to aid in the crafting of a clause that anticipates the inevitable dispute or developing integrated dispute management systems.

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3 IMI is a not for profit established in 2008 to promote high standards for the practice of mediation globally.

4 The GPC is a series of events organized by The International Mediation Institute. The GPC's goal is to create a conversation about what can be done to improve access to justice and the quality of justice around the world in civil and commercial conflicts. Global Pound Conference, www.golbalpoundconference.org.

5 *See 2016 International Mediation & ADR Survey: Census of Conflict Management Stakeholders and Trends*, Int'l Mediation Inst., https://imimediation.org/imi-2016-biennial-census-survey-results.

6 *Aggregated Data Report*, Global Pound Conference, Session 3, Question 2, http://www.globalpoundconference.org/Documents/Aggregated%20Data%20Report%20GPC_28Dec.pdf?mkt_tok=eyJpIjoiTXpJeFlqQXdPVFJtTkRVMCIsInQiOiJIYzlmOEwxTko0Mk1VK1RKc3RZY1BDd0MrOVBPRXY2WUNIeDBQRkpoR2pUSFZuc0lJWTJxaE5xOFhvRDczSGdRWnFyV2dTV2hDXC9td0hxaUF3RnhYT1BsS2sydmg1ZWdUd3d3MzI4ekNsbkFRMDR4dlA5dXBzNjJzK1o5SGVTdlgifQ%3D%3D.

A. *Midnight Clauses to Morning Clauses*

In the journey from negotiating a business deal to bringing in lawyers to formalize legal agreements, most often than not, discussions about predicting potential business conflicts and looking into a dispute resolution system ends up being one of the least emphasized events leading up to finalizing a business deal.

Corporations have long accepted the value and importance of dispute management to address disputes that arise.[7] However, the dispute resolution clause is the most neglected part of drafting an agreement for future business. Such clauses are often added at the last minute and addressed at the end of contract negotiations with very little thought and consideration given to the consequences and intricacies of the clause, hence earning the name "*midnight*" clause. The excuse for this late consideration by some is fear that negotiations will break down by damaging the optimistic structuring of a deal by introducing the idea that something might go wrong. As a result, dispute resolution clauses are simply recognized as standardized, boilerplate clauses just added into the agreement at the end. Many ADR providers offer ideas for boilerplate dispute resolution agreements that parties can consider.[8] The American Arbitration Association offers a service called "Clause Builder"[9] that helps parties tailor a clause to meet their needs. In fact, many advocates of boilerplate clauses believe that standard clauses benefit parties because their validity has been tested through the courts. However, businesses are realizing that adding standardized boiler-plate dispute resolution clauses into business agreements could actually act *against* the interest of the company by creating unintended consequences when triggered. Therefore, it is time we move away from "*midnight*" clauses and invest time and

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[7] Dan Rafter, *Best Decision May Be to Avoid Court: Many Firms Use Alternative Dispute Resolution to Avoid the Hassle and Expense of Litigation*, CHI. TRIB. (Mar. 17, 2003), http://articles.chicagotribune.com/2003-03-17/business/0303170013_1_mediation-and-arbitration-dispute-resolution-small-business-owners (noting that "large corporations have long known the benefits of settling potential litigation outside the courtroom.").

[8] JAMS INTERNATIONAL CLAUSE WORKBOOK (July 2014), http://www.jamsinternational.com/hubfs/PDFs_resources/JAMS-Clause-Workbook.pdf?hsCtaTracking=fdf341d2-fbb3-4fc3-b329-f0684ef9186e%7C2ea6c217-0ba5-47f4-8715-077a6f826724 (last visited Jan. 5, 2017) (providing sample dispute resolution clauses and for insertion into a contract prior to a dispute arising).

[9] The American Arbitration Association's ("AAA") and the International Centre for Dispute Resolution ("ICDR") ClauseBuilder tool is designed to assist individuals and organizations develop clear and effective arbitration and mediation agreements. CLAUSE BUILDER, https://www.clausebuilder.org/cb/faces/index?_afrLoop=1115761676330445&_afrWindowMode=0&_adf.ctrl-state=fuvpeq9yt_4 (last visited Jan. 5, 2017).

thought into crafting customized dispute resolution clauses and developing the dispute resolution clauses as negotiations proceed, therefore move to "*morning*" clauses.

B. *The Role of Lawyer/Advisor*

The importance and use of dispute resolution clauses in business agreements are advanced and promoted through the combined efforts of transactional and litigation lawyers who work and influence the dispute resolution mechanisms in corporations. This is mainly because clients are influenced by the advice and counsel of their attorneys.[10] Many reasons are offered for this premise including the fact that clients continually seek expert advice on risk to supplement their own knowledge base before making decisions. Evidence suggests attorneys are the gatekeepers to ADR.[11] But today there is a divide about who knows most about ADR—the client or the lawyer/advisor?

The GPC and IMI Survey results offer insight in this area. Based on an analysis of the data—it is the client who drives the process, but the advice of the lawyer/advisor is highly weighed. Perceptions between advisors and their clients vary with respect to the level of knowledge possessed about ADR and mediation.[12] Advisors perceive their clients to be markedly less familiar with mediation and conflict management than clients themselves feel about mediation and conflict management. Advisors also have much higher perceptions of their own familiarity of both conflict management and mediation than clients have about their advisors. However, advisors overwhelmingly feel that knowing how best to use mediation is a valuable part of their work.[13]

So, how important is advice from a lawyer/advisor when clients are determining which type of dispute resolution process to use and how to structure a dispute resolution clause? Three factors are identified as most important by responders to the GPC ques-

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10 Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. 199, 205 (2002).

11 Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277, 287 (2007).

12 *See 2016 International Mediation & ADR Survey*, *supra* note 5, at 17.

13 *See id.*

tion.[14] Advice from lawyers/advisors was one of the top three factors. The other two factors are predictability of outcome, and efficiency in terms of cost and time saving.

So, where does this information lead us? Transactional lawyers of today are very aware of the value and function of ADR. One of the goals of transactional lawyers is to promote the business interests of their respective company/clients. To do so they should educate the client about the ADR process and its benefits and most importantly how ADR helps foster and preserve business relationships, and creates a beneficial atmosphere for investors and potential clients.

It is vital that Chief Executive Officers ("CEO") and leaders of businesses understand the importance and value of investing time and resources into drafting an effective dispute resolution clause early and building a dispute prevention system after carefully taking into consideration the culture and practices of the company. Transactional lawyers who develop expertise and training in ADR have the ability to convert midnight clauses into morning clauses as well as influencing clients to develop dispute management systems that are discussed below. However, it is imperative that they have the support of the executives of the company through this process. The value of dispute resolution clauses must be elevated to that of drafting any other important clause in an agreement. This kind of a change is only possible if acknowledged, supported, and promoted by the leaders of businesses.

Transactional lawyers have an opportunity to provide a value-added role in representing their client's interests in the business deal through the dispute resolution clause. To do so effectively, the transactional lawyer should partner with litigation counsel who has experience with dispute resolution clauses that go bad. These pathological clauses lead to unnecessary litigation or results that were not foreseen during drafting. Litigation lawyers often mop up these mistakes so they are in a good position to advise about how to avoid the problems in the initial drafting.

III. PART TWO

Businesses increasingly understand the importance of dispute prevention and resolution systems as part of their organizational

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[14] *See Aggregated Data Report*, *supra* note 6, at Session 1 Question 2.

structure. The most common example is where a business adopts an employment dispute resolution program to address employee disputes or an Ombuds program to resolve customer complaints. Too often, that is where the structure ends and no thought is given to expand the structure into other parts of the business. In addition, the systems implemented are driven by the legal department, which has a narrow view of what areas the program should address. There are more expansive dispute prevention and management ideas that could benefit businesses and lead to investment opportunities. A specialized role in the organization coupled with implementing planned early dispute resolution is such an opportunity.

A. *Conflict Resolution Specialist: A Much Needed Position*

Businesses that want to focus on ensuring they have a good dispute management system in place might create a specific role in their organization for a professional dispute resolution specialist. Thomas J. Stipanowich and J. Ryan Lamare note that, "the establishment of an office dedicated to managing a dispute resolution program may serve as a direct proxy for the presence of an integrated conflict management system. For example, such an office is among key criteria for an integrated workplace ADR system."[15] In evaluating data on whether corporations have an office or position for dispute resolution, a study published in 2014 noted that the results appear to confirm the assertion that no more than about one-third of respondent firms in the Fortune 1000 actually have integrated conflict management systems for their workforce.[16] Many companies already have such a position embedded into their system in the form of an employment dispute resolution program. A Conflict Resolution Specialist, however, is a specialized individual working to understand the intricacies of the company, the company's business model, and helps the company build an entire dispute resolution framework crafted for the specific needs of the company. A dispute resolution professional in this capacity could either hand over the roles and responsibilities in maintaining the

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15 *See* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV 1, 59 (2014); DAVID D. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGER AND DISPUTE RESOLUTION PROFESSIONALS 3–22 (2003).

16 *See* Stipanowich & Lamare, *supra* note 15, at 59.

dispute resolution framework after it is developed to specific parts of the company or have a continuing role in ensuring the efficient functioning of the dispute resolution system in place, and be responsible to regularly recommend modifications and improvements to the system based on regular audits of the functioning of the created system.

B. *Creating a Dispute Prevention Framework: The Key to Success*

ADR as an informal dispute resolution mechanism has evolved over the years[17] with more room for innovation and improvement. Businesses have too long spent time and resources reacting to disputes that arise instead of focusing on how to, not only prevent, but effectively address future disputes. John Blankenship argues, "the process should be fashioned to fit the dispute, rather than the dispute to the process."[18] By moving away from a reactionary posture that supports a one-size fits all attitude, we will begin to develop processes that fit the specific needs of a business model. John Lande echoes these concerns when he noted that, "[p]rocedures are inanimate phenomena that should be means to ends, not ends in themselves."[19] It is time for a historical change in the system, with a focus on embedding *dispute prevention* into the fabric of every business relationship.

The idea of dispute prevention is not an unfamiliar concept. Dispute prevention has been around for years under limited programs such as, "mandatory in-house grievance procedures."[20] These early review processes are differentiated from a systematic "Dispute Prevention" system because of its limited scope. Planned Early Dispute Resolution ("PEDR"), introduced by the American Bar Association ("ABA") Dispute Resolution ("DR") Section promotes early dispute resolution as a method of dispute prevention. PEDR is a general approach designed to enable parties and

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17 *See generally* Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 332 (1998).

18 *See generally* John T. Blankenship, *Developing Your ADR Attitude: Med-Arb, a Template for Adaptive ADR*, 42 TENN. B. J. 28 (2006).

19 John Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 210–11 (2005).

20 *See* Michael K. Northrop, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341, 343–44 (1989).

their lawyers to resolve disputes as early as reasonably possible. The DR Section's user guide[21] to PEDR notes that a comprehensive PEDR system includes: (1) general plans for preventing and resolving disputes; (2) early warning systems for issues that may lead to disputes; (3) identification and monitoring of disputes; (4) early case assessments to determine the best way to manage each dispute; and (5) efficient and effective procedures for handling and resolving disputes.

C. *Do Not Let the Conflict Turn Into a Dispute*

PEDR is a form of strategic risk and conflict management thinking that allows clients to flag early issues and layout the process through which any conflict should be addressed. One of the most attractive feature of implementing a PEDR system is that it allows parties to retain control over the dispute management process and take control of early dispute resolution instead of letting minor issues slip into litigation. PEDR promotes handling conflicts before they turn into disputes. PEDR processes include flagging early issues and using mediation, arbitration, or combined processes (med-arb) to resolve conflicts. Combining adjudicative and non-adjudicative processes, for example, arbitration/litigation within mediation/conciliation was ranked as the most effective commercial dispute resolution process in the information collected by the GPC.[22] One of the best advantages of integrating a PEDR system into a business is that it shows clients and investors that the business values preserving business relationships through de-escalating conflict. Although the value of business relationships is measured differently across cultures, there are many cultures that would certainly respect and pay closer attention to preserving business relationships.[23]

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21 John Lande, et al., *User Guide: Planned Early Dispute Resolution*, ABA, http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/PEDR/abadr_pedr_guide.authcheckdam.pdf.

22 *See Aggregated Data Report*, *supra* note 6, at Session 2 Question 5.

23 *See* Lisa Brennan, *What Lawyers Like: Mediation*, NAT'L L.J., Nov. 9, 1999 (reporting that half of the outside lawyers and in-house counsel responding to survey that mediation preserves relationships).

D. *Need for a Cultural Shift*

Businesses have already acknowledged the importance and value of dispute prevention, not only as a mode of preventing disputes and incurring minimal damage to their businesses, but also as an established profit making goal. Dispute prevention is most important in joint ventures, licensing agreements, technology partnerships, integration agreements, and an enduring relationship, including the relationship with competitors and suppliers. The idea of "dispute management" has been a part of discussions and ideas. Unfortunately, not much action has been taken to bring it to life, and implement it. However, we are looking at a future with more potential for implementation and recognition of dispute prevention and resolution systems in businesses. A recent study[24] on why some companies use PEDR systems when some companies do not has shown that where dispute management is in the control of legal departments working within a fixed budget, there is little incentive for innovation and change given the need to cut costs and avoid bad results. The study further noted that top executives generally have other priorities and are reluctant to interfere with the operation of legal departments. The study suggested that for PEDR systems to take hold and endure, organizational cultures must shift from instinctive consideration of conflict as a threat, to that of a potential business opportunity, and that the companies that adopted PEDR systems most effectively did so by making them part of a cultural shift in the way they handle disputes.

For PEDR to become more widely accepted, there is a need for a clear and concise understanding of PEDR in the legal industry. However, as it has been proven over time, most lawyers are risk averse and reluctant to innovation or change. Incorporating a PEDR system into the fabric of a company's dispute resolution framework is a big step. However, once business leaders acquaint themselves with precedents and data available that show that establishing this process into the fabric of the company's dispute management system will not just help resolve disputes but will also preserve the company's brand, improve profits, and attract investors to the company. The study also noted that executives can be bought in to the PEDR system after showing that millions of dollars could be saved after implementing the PEDR system.

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24 John Lande & Peter W. Benner, *Why and How Businesses Use Planned Early Dispute Resolution*, 13 UNIV. OF ST. THOMAS L.J (forthcoming 2017).

It is only a matter of time before executives see that PEDR systems reduce cost and time in resolving disputes and lead to improved company financial performance. Companies should assign the role of research and development of a PEDR system to one individual person who will be completely responsible to design a system and continue following up to improve the system after its implementation. Thought should be given to reporting responsibilities of this initiative. The role might report to the Chief Financial Officer or Audit Committee instead of having the function report to the General Counsel or Chief Legal Officer. Such direction would emphasize the importance of the role to the organization and its financial impact.

PEDR systems, just like ADR clauses, are to be designed after taking into consideration each individual company's culture, practices, and independent needs in relation to the company's existing and future clients. Companies can refer and adapt from various existing referral guides such as The User Guide of the ABA's PEDR Task Force or International Institute for Conflict Prevention and Resolution's ("CPR") Early Case Assessment Toolkit or use it as a reference point in eventually building their own Early Case Assessment Toolkit. Additionally, Organizations such as CPR, the Association of Corporate Counsel, the ABA, the American Arbitration Association, the IMI, and JAMS create ongoing committees to assist those who want to develop PEDR systems for their companies.

E. *Facing the Challenges of Implementing PEDR*

There has always been some level of reluctance in adopting new and innovative methods of dispute resolution.[25] There are undoubtedly many challenges to the adaption of the PEDR system. In recognizing the difficulties in the implementation of such a system, Lande and Benner note that companies that are open to innovation and whose leaders are not tied to a traditional "default to litigation" approach will be more receptive to adopting PEDR systems and that these companies are more likely to invest the time and effort needed to make the systems successful.[26]

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[25] *See* Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 357 (2013).

[26] Lande & Benner, *supra* note 24.

For PEDR systems to operate efficiently, it is imperative to have the support of the executives of companies. CEO's must direct and mandate that the functions of their in-house counsel should include and also focus on spending sufficient time to develop PEDR systems and make it a point to review their PEDR systems on a regular basis, just like they handle litigation cases. These practices must become a built-in culture within every company's legal system. PEDR programs must be consistent with each company's core values.

Although dispute prevention has been a part of discussions on effective dispute management, unfortunately not much action has been taken to bring it to life. However, looking to the future there is more potential for recognition of the benefits of such systems and their subsequent implementation.

Companies are increasingly embedding risk and compliance functions into their business units. Corporations are identifying potential conflicts and working towards getting ahead of them. Why not expand these efforts to include dispute management? Is dispute management not part and parcel of risk management?

F. *Conflict as Commerce*

Noting the high cost of litigation, in an attempt to avoid the high risks involved in trial, businesses will soon realize the need for alternative dispute resolution.[27] Businesses are motivated to avoid incurring significant costs of preparation, discovery, and other incidental costs attached to litigation that eventually result into becoming twice the settlement amount.[28] We need to move towards an approach where we view dispute prevention as a process that is not merely a dispute resolution mechanism, but is one that is proven to be commercially beneficial.

CPR[29] was created in 1979 with an objective to emphasize the importance of actively managing disputes including a "pledge" to

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27 *See generally* Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65 (1996).

28 David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998).

29 INT'L INST. FOR CONFLICT PREVENTION, www.cpradr.org. CPR is an independent nonprofit organization that, for more than 35 years, has helped global businesses prevent and resolve commercial disputes effectively and efficiently.

resolve disputes through processes alternative to the courts.[30] CPR recently honored *Monsanto* and Scott Partridge, Vice President of Global Strategy, for utilizing CPR processes to create an industry-wide dispute management system.[31] The award recognizes *Monsanto's* development and implementation of a unique, business-led dispute resolution process creating a proactive industry-wide dispute identification and resolution program.

Based on the premise that solid relationships are the key to success, the *Monsanto* model focuses on CEOs and executives' involvement in the process to build a framework for potential problems. Involvement of CEOs and executives is seen as highly crucial in the *Monsanto* approach. With *Monsanto*, dispute prevention is widely accepted. Dispute prevention is seen not only as a resolution mechanism but also as a benefit to business. It is only a matter of time before business executives and investors make dispute prevention mechanisms a requirement embedded into the business in the initial stages along with negotiations on all other areas of the business agreement. Businesses who spot potential disputes, and have a readily available resolution framework in place will be saving millions of dollars spent in litigation and attorney fees.

Parties in the midst of negotiations and deal-making often do not invest time into looking at the possible conflicts that could potentially arise in the future. However, investing time and developing a dispute management system like the *Monsanto* model can help avoid high costs of litigation, and more importantly, help preserve relationships. Parties who acknowledge and identify potential conflicts will thus be at a competitive advantage in the industry. The rewards of adopting dispute prevention are now obvious, and avoiding the usage of dispute prevention is a risk that can now be avoided.

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[30] More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation. More 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. *ADR Pledges*, INT'L INST. FOR CONFLICT PREVENTION & RES., https://www.cpradr.org/resource-center/adr-pledges.

[31] *CPR to Present Inaugural "Inspiring Innovation Award" Honoring Monsanto and VP of Global Strategy Scott Partridge*, INT'L INST. FOR CONFLICT PREVENTION & RES. (Jan. 25, 2016), https://www.cpradr.org/news-publications/press-releases/2016-01-25-cpr-to-present-inaugural-inspiring-innovation-award-honoring-monsanto-and-vp-of-global-strategy-scott-partridge.

IV. PART THREE

Today, we are a diverse, multi-cultural society not only domestically, but internationally. With a growing increase in cross-border transactions and international investments, companies are no longer confined by national and cultural borders. Companies have adopted sustainability programs that cover social responsibility including programs to protect the environment and create an open and diverse workforce. The demographics of businesses' employees, customers, vendors, and others with whom they do business are diverse, so why not the dispute resolvers? It is imperative that dispute resolvers move away from the predominantly white male composition to one that is more inclusive, but how do we do that? Also, how do we raise the dispute resolution field to the level of a profession where trust is embedded into the fabric of the field? Here we describe the status of the field today and what can be done through certification or regulation to create a true profession.

A. *Who Are the Dispute Resolvers of Today?*

Among the various key aspects that go into the ADR process, the neutral chosen to work on resolving a conflict certainly holds one of the most important and significant roles in determining the success of the process. A third party neutral usually has some form of training, certification, or experience in ADR. As of today, there is no established career path for one who wants to pursue a role as a third party neutral. The IMI Survey data reveals that more than half of IMI respondents earned less than 50K annual as a neutral[32] and most neutrals have a second source of income.[33] As a result, most neutrals come to the position as a secondary profession after being trained and practiced in another field.[34]

B. *Need for Diversity*

In looking at who are the neutrals of today, the results from multiple statistics available reveal that neutrals of today are

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[32] *See 2016 International Mediation & ADR Survey*, *supra* note 5, at at 31.

[33] *See id.* at 30.

[34] *ADR as First Career*, http://adras1stcareer.blogspot.com/ (providing a video blog featuring stories of individuals who started out their professional careers in the ADR field).

predominantly white males[35] with an upsettingly low representation of women[36] and minorities.[37] We now have a mass of literature pointing to the fact that the legal industry, and the ADR profession in particular, lacks diversity. This is a huge issue in the sense that a lack of diversity inherently impairs progress.

Authors have noted the need for diversity, highlighting that, "we live in an age where minorities are the majority of the United States and that we live in a time when growing diversity of our society combined with the dismantling of legal barriers has led to women and minorities filling positions and offices that would once have been virtually unimaginable: President, Secretary of State, Federal Reserve Chairperson, Senator, Homeland Security Secretary, Supreme Court Justice, and Attorney General."[38]

There have been many initiatives by various bar associations to recognize and increase diversity including initiatives by the New York State Bar,[39] New York City Bar Association, The ABA Dispute Resolution Section,[40] CPR's Diversity Commitment,[41] the AAA Higginbotham Fellows Program,[42] Freshfield's Women in

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35 F. Peter Phillips, *Diversity in ADR: More Difficult to Accomplish than First Thought*, DISP. RESOL. MAG., Spring 2009, at 14 (noting that "corporate counsel lament that they are being given the same short lists of the same arbitrators and the same mediators (presumably older white men) from whom to choose.").

36 Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, COLUM. FDI PERSPECTIVES NO. 59 (Feb. 6, 2012), http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf (showing that of 249 known investment treaty arbitrations, only 6.5% of all appointments were of women); Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 363 (2014) (identifying that only roughly fifteen percent of a sample of international arbitrators are women).

37 Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, 14 AM. REV. INT'L ARB. 461, 465 (2004) (noting that U.S minorities have made slow progress in international commercial arbitration).

38 Beth Trent et al., *The Dismal State of Diversity*: *Mapping a Chart for Change*, 21 DISP. RESOL. MAG. 21 (2014).

39 *See DRS Diversity Scholarship*, NYSBA, http://www.nysba.org/DRSDiversityScholarships/.

40 *See Women in Dispute Resolution (WIDR) Committee*, ABA, http://apps.americanbar.org/dch/committee.cfm?com=DR589300.

41 *The Diversity Commitment!*, INT'L INST. FOR CONFLICT PREVENTION AND RESOL., http://www.cpradr.org/PracticeAreas/NationalTaskForceonDiversityinADR/SigntheDiversityCommitment.aspx.

42 *See AAA Higginbotham Fellows Program*, AM. ARB. ASS'N, https://www.adr.org/aaa/faces/s/about/diversityInitiatives/AAAHigginbothamFellowsProgram?_afrLoop=1157306044238541&_afrWindowMode=0&_afrWindowId=17fmumt4eb_52#%40%3F_afrWindowId%3D17fmumt4eb_52%26_afrLoop%3D1157306044238541%26_afrWindowMode%3D0%26_adf.ctrl-state%3D17fmumt4eb_76.

Diversity Pledge,[43] ABA Model Diversity and Inclusion Plan for ABA Entities and Increased efforts by US Federal District Courts to focus on Diversity. Another example is of the Eastern District of New York ("EDNY"). The EDNY has a diverse group of litigants, and a diverse group of Judges and is working towards having the same amount of diversity and representation in their mediation and arbitration panels so that the panels reflect the diversity of those that the court serves.

Every industry sees the need for diversity. This is even more so important for dispute resolution professionals given that they work closely with the parties, and have a direct impact on the relationship between parties. As stated by Lande, "Mediation and other forms of dispute resolution are a paradigm that can lead to a peaceful and evolutionary revolution in the way people act and think in general."[44] It is very crucial for the progress of society as a whole that women and minorities are a part of this peaceful yet powerful evolutionary progressive process.

C. *Neutrals of the Future*

The non-existence of a defined career path is directly linked to the lack of regulation of the dispute resolution industry. There have been many attempts to regulate the industry in the past. An argument can be made that regulation will give the profession credibility.[45] In fact, the IMI Survey indicates that dispute resolution resolvers seek certification to increase the level of trust for the clients who engage them.[46] Once the profession is seen to be more credible, women and minorities would also have better opportunities to explore career paths in the industry and help make the industry more diverse. Regulation will enable Dispute Resolution as a field to move away from being a subsidiary of other fields and

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[43] *See Latest News on the Pledge*, EQUAL REP. IN ARB., http://www.freshfields.com/en/global/thepledge/further_info/.

[44] John Lande, *Mediation Paradigms and Professional Identities*, 4 MEDIATION Q. 19, 19 (1984).

[45] ACR/ABA Mediator Certification Feasibility Study at 3 (2005). In a survey conducted by the ACR and the Dispute Resolution Section of the ABA as part of a study on the feasibility of mediator certification, most mediators opined that certification would enhance the public image of mediators.

[46] *See 2016 International Mediation & ADR Survey*, *supra* note 5, at 33.

becoming an independent profession,[47] thereby moving towards a better income range for neutrals and making such careers economically feasible. There has certainly been more progress and acceptance of careers in dispute resolution. For example, the Equal Employment Opportunity Commission's adoption of a mediation program acts as a role model for businesses to develop more programs like it to resolve employee disputes,[48] and could help the neutrals of the future have a better foundation and career path.

In addition to regulation, open access to neutrals and their profiles would make parties more comfortable in using dispute resolution as a method to resolve their conflicts. Neutrals should proactively ensure that their profiles are readily available online at the fingertips of potential clients. The IMI's online directory is one example. The freely available directory has detailed information about the styles and performance of IMI certified neutrals.[49] The information is gathered from actual users of their services. Additionally, in choosing a neutral, parties should demand that women and minorities are included in their list for consideration and they should make a conscious effort not to reject a neutral based on gender or race. These proactive measures will change attitudes and help diversify the field.

D. *Certification Incentives*

There is no rigid set of qualifications or requirements for the position of a neutral. IMI promotes high quality standards for the practice of mediation globally and credits certification with enhancing trust in the mediator.[50] Most mediation trainers agree that for the best results, mediation training should have a mix of lecture, skills practice, and reflection.[51] Neutrals should make use of certification and affiliations available to them. Professional affiliation credentials are qualifications established by an organization to

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47 Nancy Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RES. MAG., Spring 2005, at 13, 13–14.

48 Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC's Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 31–35 (2008).

49 *IMI Certified Mediators*, INT'L MEDIATION INST., https://imimediation.org/certified–mediator– search.

50 *See 10 Good Reasons to Be IMI Certified and Featured on the IMI Global Search Engine*, IMI MEDIATION, https://imimediation.org/private/downloads/qQqE0t4vlq7pIJ3GpWUf9X4e6QM/10_good_reasons_to_be_IMI_Certified.pdf.

51 KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 435–36 (3d ed. 2004).

which a mediator belongs.[52] Court annexed programs were developed[53] with a goal to legitimize mediation, with specific guidelines and regulations of minimal requirements for training. Most bar associations now provide certification incentives. These incentives are a few tools that promote career aspirants to take on dispute resolution as a career.

V. Conclusion

This article argues the case for businesses to establish comprehensive dispute management systems. The systems should permeate the entire organization, have the support of senior managers, and foster collaboration between the business and its lawyers/advisors. The systems should include a philosophy to plan early dispute resolution starting with raising the importance of the dispute resolution clause early in the negotiation of every new deal. Strategically planning early dispute resolution will reduce frictional costs, enhance the brand, and lead to investor interest. For businesses to compete in today's environment, they also need to promote diversity of their dispute resolvers and support the professionalism of the field to promote trust and integrity.

The tools are there to implement these ideas. All that is needed is commitment and resolve.

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52 Michael L. Moffitt & Andrea Kupfer Schneider, Dispute Resolution: Examples & Explanations 65 (2008).

53 Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 Penn. St. L. Rev. 43, 45–53 (2003).