Outsourcing, both domestic and international, has become a standard business practice. Outsourcing agreements are long term commitments of a services provider and a customer that transfer the operation of, and responsibility for, business functions (for example, information technology, finance and accounting, facilities management, or procurement) to the provider. Disputes almost invariably arise during the term. But, similar to large-scale construction projects, the services must continue even while the parties are attempting to resolve their dispute.

This program will review the types of ADR increasingly being used in the outsourcing field to help the parties govern their relationship by resolving disputes in a predictable and positive manner.

The speakers will identify key ADR techniques which are suited for outsourcing agreements, including Early Neutral Evaluation, use of standing neutrals and dispute resolution boards (DRB), mediation and forms of international arbitration.

AGENDA

2:00 p.m. Welcome and Introduction of Speakers (10 minutes)

2:10 p.m. Benefits of ADR in Outsourcing Relationships (70 minutes)
Outsourcing Relationships
Governance Management
Types of Outsourcing Disputes
Conflict Escalation as a Governance Function
Mediation
Standing Neutral and DRB
Arbitration
International Arbitration

3:20 p.m. Conclusion and Questions (10 minutes)

3:30 p.m. Evaluation (5 minutes)

3:35 p.m. Adjourn
Sherman W. Kahn has more than twenty years of experience with litigation and counseling in matters raising complex technological issues. He has litigated dozens of patent cases as well as other litigation involving technological issues such as computer copyright, trade secret and IT outsourcing disputes. He also has experience litigating “soft-IP” issues such as trademark and copyright.

Sherman’s practice is international. He practiced in Tokyo for five years. During that time he was licensed as a gaiikokuho jimu bengoshi and a member of the Dai-Ni Tokyo Bar Association. Sherman has litigated patent matters involving technologies, such as programmable logic devices, microprocessors and controllers, memory devices, construction equipment, medical devices, supercomputers, LCD & PDP display devices, LED Lighting, various computer software products, and networking technologies.

Sherman advises clients regarding information security and privacy issues for compliance and in privacy-related regulatory proceedings and litigation. He has represented clients in numerous FTC and state attorney general investigations of privacy and information security practices. Sherman acts as an arbitrator and represents clients in international arbitration proceedings presenting complex technical and commercial issues and has arbitrated under the AAA, JCAA, ICC, and other arbitration and dispute resolution rules. The subject matter of these arbitrations has ranged from patent and trademark issues to construction, mining and commercial issues. He provides advice regarding clause drafting and pre-dispute issues in connection with major construction and infrastructure projects. He also provides advice to clients regarding structure of investments with respect to arbitration pursuant to bilateral investment treaties.

Sherman also acts as a mediator and assists counsel and parties with resolving complex technology disputes as well as other commercial issues.

Education
- University of California, Berkeley (B.A., 1989)
- University of California, Berkeley, School of Law (J.D., 1993)

Arbitration and Mediation Panels
- International Centre for Dispute Resolution (ICDR) Panel of Arbitrators
- American Arbitration Association Roster of Commercial Arbitrators
- CPR Distinguished Panel of Neutrals.
- Southern District of New York Panel of Mediators
- New York Supreme Court Commercial Division Panel of Mediators

Professional Activities
- Chair of the New York State Bar Association, Dispute Resolution Section
- Member, International Arbitration Club of New York
- Member, CPR Institute Arbitration Committee.
- Co-Chair Technology Committee, New York International Arbitration Center

Rankings
- Sherman Kahn is recommended as a leading lawyer by Super Lawyers 2009.

Selected Publications
- Arbitration at the Supreme Court (2011 to 2012 Term), New York Dispute Resolution Lawyer, Fall 2012
• Balancing Discovery with EU Data Protection in International Arbitration Proceedings, New York Dispute Resolution Lawyer, Vol. 3, No. 1, Spring 2010
• “Manifest Disregard of the Law after Hall Street, a Continued Role for an Extrastatutory Doctrine,” January 1, 2009

Selected Bar Association Reports
• NY State Bar Association Guidelines for the Arbitrator’s Conduct of the Pre-Hearing Phase of International Arbitrations – Co-chair of committee that developed the report, drafted significant portions
• NY State Bar Association Brochure entitled “Choose New York for International Arbitration” – Co-chair of committee that developed the report and significant involvement in its creation
• Final Report on New York State Bar Association’s Task Force in International Matters – Subcommittee chair and Authored substantial section of report

Selected Speaking Engagements
• Faculty – New York State Bar Association, Dispute Resolution Section, 3 Day Commercial Arbitration Training, June 2013, July 2012
• Alternative Dispute Resolution Workshop, 2012 Outsourcing World Summit, Orlando, Florida, February 2012
• Co-Chair – 2012 New York State Bar Association, Dispute Resolution Section Annual Meeting, New York, January 2012
• Faculty – New York State Bar Association, Dispute Resolution Section, 3 Day Commercial Arbitration Training: Comprehensive Training for the Conducting of Commercial Arbitrations Pursuant to Contemporary Best Practices (presenting on arbitration discovery in domestic and international arbitration and e-discovery), June 28-30, 2011
• Panelist – 2010 New York State Bar Association Dispute Resolution Section/International Section Annual Meeting, January 2010 (Managing International Arbitration; Discovery v. Privacy in International Arbitration)
Julian S. Millstein, 
Mediator and Arbitrator

Julian Millstein, an attorney with over 33 years experience, began his career in 1965 as a computer programmer, systems analyst and IT consultant. In 1978, he graduated near the top of his class at Fordham University School of Law, and was trained as a litigator in the New York office of Hughes Hubbard & Reed. In 1982, Mr. Millstein became a name partner of Brown Raysman & Millstein, the first computer law boutique in New York. Over a period of 25 years, under his and his founding partners' leadership, the firm rose from a small boutique to one of the AmLaw 200 with over 250 attorneys. Mr. Millstein has been described as “one of the founders of the whole technology law area in New York” (Chambers Global 2008). From 2006 through 2008, Mr. Millstein was with Thelen LLP, into which his firm had merged. Between 2008 and 2011, he was Senior Counselor at Morrison & Foerster, an international law firm with over 1000 attorneys. Although for over 10 years he has been providing mediation and arbitration services through his law firms, beginning June 2011 his ADR services have been offered through his independent mediation and arbitration practice. Mr. Millstein also maintains his own law practice, and is Special Counsel to the law firm of Moses & Singer LLP, www.mosessinger.com.

Mr. Millstein’s extensive legal career includes both litigation and transactional practice. As a litigator, he represented international accounting and consulting firms, software and IT developers, and large and small-scale users of IT and e-commerce services. Always on the forefront of developments, he represented a party in the first “domain name” arbitration in 1994. As a transactional attorney, Mr. Millstein has led legal and business teams in structuring and negotiating individual outsourcing, systems integration and e-commerce contracts valued to $5 billion. He has led strategic teams in successful workouts and restructuring of troubled outsourcing and similar initiatives.

A frequent lecturer, Mr. Millstein has presented at many state bar CLE programs, as well as business venues such as the Outsourcing World Summit, the Sourcing Interests Group and the Outsourcing Institute. He serves on the Arbitration and Mediation Committees of the Dispute Resolution Section, and is a past chair of the Internet and Technology Law Committee of the Business Law Section, of the New York State Bar Association. He is a member of the Alternative Dispute Resolution Committee of the New York City Bar Association, and the Dispute Resolution and Technology Sections of the American Bar Association. He is past co-chair of the NY Chapter of the International Association of Outsourcing Professionals.

Mr. Millstein has written over 50 published articles, including “Practical Uses of ADR in Outsourcing Relationships”, published in the Spring 2011 issue of the New York Dispute Resolution Lawyer. He is co-author of Doing Business on the Internet – Forms and Analysis, the first Internet law forms book, published by Law Journal Press in 1997 and updated semi-annually. He has served as an expert witness on matters involving Technology, Software and e-Commerce contracts. For nearly 20 years he was the Editor or Co-Editor in Chief of the Computer Law Strategist, Multimedia Law Strategist and E-Commerce Law & Strategy, and for 15 years he taught Computer Law and Internet Law as Adjunct Professor of Law at Fordham University School of Law.

In addition to his rankings in Chambers, Mr. Millstein has for several years been listed in Best Lawyers in America, Super Lawyers, Who's Who Legal and Legal 500. He has been "AV" rated by Martindale-Hubbard for almost 30 years.

Mr. Millstein has had ADR training through the American Arbitration Association, as well as advanced mediation training with CPR. He has had ADR CLE training with the ABA and New York State Dispute Resolution Sections, as well as with the Mediation Office of the US District Court for the Southern District of New York.
The Benefits of Mediation and Arbitration for Dispute Resolution in Outsourcing Agreements

By Julian Millstein and Sherman Kahn

Benefits of Mediation in Outsourcing Cases

In outsourcing, a business process or technology process is transferred from one organization (the “customer”) to another organization (the “service provider”) so that the customer can focus on its “core competencies.” For example, a company might contract with a service provider to run its IT functions, its data management or its telephone sales activities.

Outsourcing agreements typically establish long-term relationships between the customer and the service provider. Outsourcing agreements          are usually complicated agreements that must be managed by both parties over the long term. Beset by issues that arise from business and technology changes, these long-term agreements are never performed without disagreements over scope, price, adequacy of performance, reasons for delay, and changed requirements. Handling these disputes is an important aspect of the day-to-day governance of outsourcing relationships.

Disputes come in all shapes and sizes in outsourcing relationships. For example, disputes frequently arise during the initial transfer to the provider’s process, often as a result of delay by one or both parties. Disputes over scope and price (“scope creep”) are also typical, with the customer concerned about paying extra for services which it argues should be included in the provider’s services, while the provider argues that such services are extras, and were never intended to be delivered at the initial pricing.

Parties also frequently dispute the cause of performance failures, or indeed whether such failures were correctly measured (i.e., whether there was in fact a failure). Agreements contain various pricing mechanisms which often call for “equitable” price adjustments, “truing up” to revised figures on baseline assets and transaction volumes, and benchmarking to market price, and the parties may not be able to come to mutual agreement about such forward pricing or adjustments. In all of these situations, the parties managing the outsourcing attempt to resolve their differences, and frequently they are able to do so on their own. However, for those occasions when the parties reach an impasse, timely mediation can ensure that disputes over specific issues do not fester and contribute to a broader communication problem, ultimately affecting the viability of the relationship.

Mediation in outsourcing disputes can be used to remind the parties of the positive reasons both chose to enter into the agreement. Because it is usually in the interest of both the customer and the provider to reach a resolution that allows for the ongoing viability of the relationship, it makes sense that the parties should look to a mutually trusted neutral who understands the history and objectives of the venture. It is often useful to select this person in advance, so that the use of mediation is not itself considered a failure of the relationship.

In addition, a knowledgeable mediator may be able to help the parties identify creative ways to resolve disputes. Mediators are trained to look for value which can be traded in such a way that an item that is valued highly by one party, but not by the other, may be traded for a reciprocal item. Often, the mediator can identify these while the parties themselves cannot. For example, a mediator can act as a bridge, receiving confidential information from both sides, and, without disclosing it to the other side, use it to help the parties reach an accord. And the mediator is trained in techniques that encourage the parties to focus on positive solutions, rather than wasting effort in blame and recrimination. Finally, the mediator can help the parties agree to adopt changes in the governance of the relationship that will reduce the chances of future misunderstanding.

Often outsourcing relationships give rise to disputes that are essentially technical in nature. It therefore may be useful to appoint a technically savvy mediator to resolve these types of issues as they arise. A number of the leading arbitral institutions administer proceedings in which experts can be brought in to mediate or resolve disputes. If an agreement has a technical component, providing for resolution of particular categories of technical disputes by a neutral expert can go a long way to smoothing the relationship.

The parties’ agreement to devote time and energy to the mediation process is itself an important indicator of the likelihood of success of an outsourcing relationship. The mediator can also act as a guardian of the parties’ relationship, resolving disputes as they arise and, if appointed for the long term, even anticipating and smoothing over disputes before they become a problem. For these reasons, particularly in large outsourcing relationships, judicious use of mediation can considerably enhance the customer/provider relationship.

Benefits of Arbitration in Outsourcing Cases

Arbitration is often used as the final dispute resolution process in outsourcing disputes, especially in international outsourcing relationships. Using arbitration in out-
sourcing relationships can benefit both the outsourcing provider and the customer in a variety of ways. Where, as in outsourcing, the goal is a continued relationship of mutual benefit to both sides, a public dispute in court is usually the last thing that either party wants. Court litigation can even have the effect of ending a relationship over a dispute that otherwise could be resolved. On the other hand, because neither party wants to go to court, the threat of litigation in court can cause both parties to avoid dispute resolution until a point when the parties’ positions are so far opposed that it is no longer possible to salvage the relationship.

Arbitration is beneficial to outsourcing customers because litigation, an expensive and time-consuming last resort in most commercial relationships, cannot usually address the customer’s business risks associated with a failing outsourcing relationship. It becomes a “nuclear option” that, if initiated, ends the relationship at the expense of great business disruption to the customer. Moreover, it is seldom in the interest of the customer to publicize its difficulties with the provider of key services by filing a lawsuit.

The outsourcing provider likewise has reasons to resolve its disputes outside of court. Its business success depends very much on its reputation as a professional, competent supplier of services. Consequently, most service providers prefer to settle disputes without public airing, and will work very hard to retain relationships which were expensive to obtain, and may have required substantial up front investments which cannot be recovered unless the agreement continues for several years.

Finally, many outsourcing relationships involve offshore or nearshore performance. Even after the long and arduous process of obtaining a judgment in court, it is often very difficult to enforce such a judgment in a foreign jurisdiction—and it may be necessary to do just that if the other party resides (or keeps its assets) in that foreign jurisdiction. In the more than 150 jurisdictions that are signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”), arbitration awards can be routinely enforced with very little opportunity for challenge or relitigation even if the award was obtained and confirmed overseas.

Arbitration is an important tool when a dispute must be adjudicated (or enforced) in a court system which has problems in rendering timely decisions. For example, under Indian law, a dispute under an agreement between the Indian affiliates of two contracting companies must be litigated in Indian courts, which are notoriously slow, unless the parties agree to arbitration. Thus a global deal which provides for litigation between the parties could contain an exception providing that disputes between certain local country affiliates will be arbitrated. Similarly, agreements involving parties residing in countries where courts are not reliable or may be unlikely to enforce foreign judgments should include arbitration provisions.

Parties may wish to accept that in these complicated multi-year (and often multi-party) relationships, difficult disputes will be inevitable, and therefore designate arbitration panels which are available on call should an impasse occur. So-called Dispute Resolution Boards are used in the construction industry, where large multi-year projects cannot be put at risk of being side-tracked by disputes between developers, contractors and sub-contractors. The building must go on, just as the process must go on in an outsourcing relationship. A readily available resource to resolve disputes, including arbitration services, mediation services, or both, can go far to make the outsourcing relationship a long and productive one for both parties.

Indeed, it is often useful to try to resolve a given outsourcing dispute through a combination of mediation and arbitration. A mediator can help the parties narrow down a dispute. For example, with the help of a mediator, general displeasure with service performance may be tracked to a root cause. Both parties can settle on an agreed solution, with only the cost of the solution left to be arbitrated. The roles of mediation and arbitration can be pre-arranged in the outsourcing agreement through the use of an appropriate “step-clause” providing for mediation then, if necessary, arbitration or through provisions allocating some types of disputes to mediation and other types of disputes to arbitration. The parties may also decide to use arbitration and/or mediation on an ad hoc basis as disputes arise.

In sum, arbitration protects the outsourcing process by providing an efficient mechanism for resolution of disputes between the outsourcing customer and provider outside of the public eye. Arbitration is also a vital element of outsourcing agreements that cross international borders as it results in awards more easily enforceable internationally. A carefully drafted arbitration clause in the outsourcing agreement can help to ensure a long and profitable partnership between the outsourcing provider and its customer.

Julian Millstein is Senior Counselor at Morrison & Foerster and acts as an arbitrator and mediator in outsourcing, IT and e-commerce cases. Sherman Kahn is of counsel at Morrison & Foerster LLP and co-chair of the NYSBA Dispute Resolution Section Arbitration Committee.
Outsourcing relationships are guaranteed to produce disputes. Often complicated by business and technology change, these long-term agreements are never performed without disagreements over scope, price, adequacy of performance, reasons for delay, and changed requirements. Handling these disputes is one aspect of the day-to-day governance of outsourcing relationships. Therefore, in most cases, outsourcing relationships can benefit from planned use of alternative dispute resolution (ADR).

In outsourcing, a business process or technology process is transferred from one organization (the “customer”) to another organization (the “service provider”) so that the customer can focus on its “core competencies.” But the transfer does not mean the process is unimportant to the customer. In fact the process that has been transferred is often very important to the customer’s continued business success, even its survival. Failure to deliver the services in a timely and accurate manner, and at expected cost savings, can have serious repercussions to the customer’s business.

“[I]n most cases, outsourcing relationships can benefit from planned use of alternative dispute resolution.”

And when problems arise, the customer has good reason to try to resolve the dispute short of litigating. Contractual damage remedies are usually restricted by limitation of liability provisions. Other remedies such as self-help, rights to injunctive relief, and termination, may not ease the customer’s burden all that much. Litigation, an expensive and time-consuming last resort in most commercial relationships, cannot usually address the customer’s business risks associated with a failing outsourcing relationship. Litigation is especially unsuited for resolving problems that are not threatening to the overall outsourcing relationship. Also, by its nature, litigation creates a public record of strong adversarial dispute, and it may not be in the interest of the customer to publicize its difficulties with the provider of key services in such a manner.

The outsourcing provider likewise has reasons to settle its disputes outside of court. Its business success depends very much on its reputation as a professional, competent supplier of services. Consequently, most service providers prefer to settle disputes without public airing, and will work very hard to retain relationships which were expensive to obtain, and may have required substantial up-front investments which cannot be recovered unless the agreement continues for several years.

Disputes come in all shapes and sizes in outsourcing relationships. They frequently arise during the initial transfer to the provider’s process, often as a result of delay by one or both parties. Disputes over scope and price (“scope creep”) are typical, with the customer concerned about paying extra for services it determines should be included in the provider’s services, while the provider determines that such services are extras, and were never intended to be delivered at the initial pricing.

Parties also dispute the cause of performance failures, or indeed whether such failures were correctly measured. Agreements contain various pricing mechanisms which often call for “equitable” price adjustments or benchmarking to market price, and the parties may not be able to come to mutual agreement about such forward pricing. In all of these situations, the parties managing the outsourcing attempt to resolve their differences, and frequently they are able to do so. What should they do when, as often happens, they reach an impasse?

Creative use of Alternative Dispute Resolution is one answer. ADR is a continuum of techniques and processes used to help parties resolve disputes without resorting to public litigation. It is considered more efficient and effective than litigation, although this is not always the case. At the low end of the spectrum, ADR can refer to conflict escalation to different levels within the disputing entities, perhaps involving executives from other business units who have no “skin in the game” (so-called “distant executives”) regarding the issues in dispute, and eventually to the CEO level. A second type of ADR is the use of mediation, where a neutral third party is called upon to facilitate, but has no authority to impose, an agreed-upon resolution. Technical disputes can be resolved by a neutral technician appointed by the parties. Finally, on the far end of the spectrum, binding arbitration by a single arbitrator or a panel of arbitrators can be used in lieu of litigation.

Indeed, providing for arbitration can be essential when the outsourcing relationship crosses international borders. Even after the long and arduous process of obtaining a judgment in court, it is often very difficult to enforce such a judgment in a foreign jurisdiction—and it may be necessary to do just that if the other party resides (or keeps its assets) in that foreign jurisdiction. Many countries’ courts are not hospitable to foreigners, some are corrupt, and many have arduous and time-consuming procedures that make real relief untenable. International arbitration can solve this problem. In the more than 150 jurisdictions that are signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”), arbitration awards can be routinely enforced with very little opportunity for
challenge or relitigation even if the award was obtained and confirmed overseas. Arbitration, a private procedure, also avoids corruption issues, and allows for efficient resolution of disputes in jurisdictions with slow or procedure-laden court systems.

This brings us to our first principle:

A. ADR Should Be Used Routinely in the Ongoing and Regular Management of Outsourcing Relationships

Disputes get in the way of good relationships. But disputes that are not resolved and fester are much, much worse than disputes that are quickly resolved, however painfully. Outsourcing relationships are complicated and most are long-term. Books have been written about their governance. However, human beings almost always shrink from tackling disputes if there is a way to sweep them under the rug, primarily because they believe that if they do not acknowledge a dispute, their bosses will think they are doing a better job. But disputes swept under the rug grow virulent—they need to see the light of day.

To improve outsourcing relationships, the parties should follow contractual dispute escalation processes to the letter. Project management office (“PMO”) minutes should maintain a tickler of unresolved disputes and track their escalation toward top executives. Those top executives should not see the existence of disputes as the fault of their employees, but should look at the dispute as suggesting issues in the relationship that can be improved upon.

For example, often a dispute arises because the parties have not really reached agreement on a matter of scope, performance or price. In those cases, the dispute may just mean it is time to nail that issue down. A dispute may arise because one party has not disclosed to the other an important cost or risk or weakness that affects its performance. Resolution puts this issue to bed. Active management of disputes, therefore, leads to more, not less, success.

Now, our second principle:

B. Use a Neutral Third Party Facilitator to Resolve Disputes Which Cannot Be Resolved Internally

Mediation can help cut through communication difficulties about who said what to whom, and help focus the parties’ attention to getting real issues resolved. Mediation in this regard is similar to marriage counseling. Because it is usually in the interest of both the customer and the provider to reach a resolution that allows for the ongoing viability of the relationship, they can borrow from the playbook used by parties to joint ventures—business ventures where disputes must be settled between the co-venturers if the venture is to continue. Such ventures often resort to mediation by a mutually trusted person who understands the history and objectives of the venture. It is often useful to select this person in advance, so that the use of mediation is not itself considered a failure of the relationship.

A knowledgeable third party may be able to identify creative ways to resolve disputes, in a manner that the parties cannot. Mediators are trained to look for value which can be traded in such a way that an item that is valued highly by one party, but not by the other, may be traded for a reciprocal item. Often, the mediator can identify these while the parties themselves cannot. For example, a mediator can act as a bridge, receiving confidential information from both sides, and, without disclosing it to the other side, use it to help the parties reach an accord.

Often outsourcing relationships give rise to disputes that are essentially technical in nature. It is often useful to appoint a technically savvy mediator to resolve these types of issues as they arise. A number of the leading arbitral institutions administer proceedings in which experts can be brought in to mediate or resolve disputes. If an agreement has a technical component, providing for dispute resolution by a neutral expert can go a long way to smoothing the relationship.

Marriage counseling has saved many a marriage, and the same holds true for commercial relationships. The parties’ agreement to devote time and energy to the mediation process is itself an important indicator of the likelihood of success.

The third principle:

C. Use Binding Arbitration, Rather Than Litigation, to Resolve Other Disputes

Binding arbitration may or may not be more efficient than litigation, but it will be kept private. Also, arbitration awards are more easily enforced internationally than court judgments. These are advantages for both parties. On the other hand, one potential downside of arbitration is that the arbitral award may be appealed only on narrow grounds, generally the bias of the arbitrator. Arbitration clauses must therefore be carefully crafted to deliver a fair and enforceable process, especially for agreements that are trans-border. Use of a panel of three arbitrators, although more costly, is preferable for high-stakes disputes, since the use of a single arbitrator without appeal has more risk of a surprising result which then cannot be remedied. It is often useful to provide for a single arbitrator for smaller, more routine, disputes and three arbitrators for more significant disputes.

Often, it is useful to try to resolve a dispute through a combination of mediation and arbitration. A mediator can help the parties narrow down a dispute. For example, with the help of a mediator, general displeasure with service performance may be tracked to a root cause. Both parties can settle on an agreed solution, with only the cost of the solution left to be arbitrated.
Finally, even if your company believes litigation is best handled in court, arbitration is an important tool when a dispute must be adjudicated (or enforced) in a court system which has problems in rendering timely decisions. For example, under Indian law, a dispute under an agreement between the Indian affiliates of two contracting companies must be litigated in Indian courts, which are notoriously slow, unless the parties agree to arbitration. Thus a global deal which provides for litigation between the parties should at a minimum contain an exception providing that disputes between certain local country affiliates will be arbitrated. Similarly, agreements involving parties residing in countries where courts are not reliable or may be unlikely to enforce foreign judgments should include arbitration provisions.

Parties may wish to accept that in these complicated multi-year (and often multi-party) relationships, difficult disputes will be inevitable, and therefore designate arbitration panels which are available on call should an impasse occur. So-called Dispute Resolution Boards are used in the construction industry, where large multi-year projects cannot be put at risk of being sidetracked by disputes between developers, contractors and sub-contractors. The building must go on, just as the process must go on in an outsourcing.

The fourth principle:

D. **ADR Is Most Effective When a Well Thought Out Dispute Resolution Process Appropriate to the Particular Situation Is Included in the Original Outsourcing Agreement**

No one wants to think about disputes when they are working on building a relationship. However, a carefully thought through dispute resolution process incorporated in the outsourcing agreement can be a powerful tool to resolve issues before they expand to damage the relationship.

By developing a procedure set forth in the agreement for the resolution of disputes, parties can avoid spending inordinate time determining “the shape of the table.” Clear and unambiguous dispute resolution procedures will also help both the provider and the customer document and resolve issues, thereby reducing the possibility that either party will have unreasonable expectations.

If the agreement includes a step-clause (*e.g.*, negotiation, mediation, arbitration), ensure that the clause is clear as to how each step is initiated and how each step must be completed. Be sure to place time limits on all preliminary stages. If the agreement provides for specialized proceedings for certain kinds of disputes, be careful to carefully define the applicability of disputes to those proceedings.

If the agreement provides for arbitration, make sure that the agreement provides for a choice of substantive law, a place of arbitration, a specific set of arbitration rules and, if applicable, an administering organization. Be sure to specify that arbitration awards will be final and binding. If the parties to the agreement are from different countries, choose a language of the arbitration.

Finally, ensure that the arbitration clause is sufficiently broad and consult with local counsel, if necessary, in the place you choose for arbitration, the place providing the substantive law of the agreement, and the primary places of business of all the parties. Some jurisdictions have special language that must be included in an arbitration agreement to make a clause enforceable.

**E. Practice Tips**

Alternative Dispute Resolution is the best way to manage most disputes in outsourcing arrangements, particularly international outsourcing arrangements. The following practice tips should be helpful:

1. Provide for timely escalation of disputes. Escalation provisions should be strictly drafted and followed. Disputes should be tracked through the governance process. All billing disagreements should be memorialized in writing and a procedure for such memorialization is often best included in the outsourcing agreement.

2. Draft a change control process that the parties can actually follow. Often, the outsourcing agreement has a template for a change control process that does not conform to how the parties actually govern change. In negotiating the agreement, make sure that the agreed-upon change process will be consistent with the governance structure, and that both are adopted operationally.

3. Contractually identify specific areas which could be resolved by mediation, and the process to be used. For example, parties often know in advance that certain pricing, scope or performance issues will arise because solutions are not complete or change is expected. The resolution or filling of these “holes” could be supported by mediation, if necessary.

4. Consider employing an “expert” proceeding to resolve routine technical disputes that may arise during the course of performance.

5. Consider using arbitration when litigation resolutions will not be easily enforceable or where litigation will not yield fruitful and timely results for either party.

6. Certain disputes are good candidates for resolution through so-called “baseball” arbitration, where both sides suggest a resolution and the arbitrator must select one or the other, but may not interpolate. The process of preparing a proposal for this type of arbitration requires both sides to “seek the middle” and tends to narrow the dispute.
7. Be specific in the dispute resolution clause. Address whether you wish arbitrations to be administered by an organization (e.g., the American Arbitration Association (“AAA”), the International Chamber of Commerce (“ICC”), JAMS) or whether you would prefer an ad hoc or non-administered procedure. Also consider which rules will apply to mediation or arbitration, identify a place of arbitration, the language of arbitration and a method or choosing the arbitrator(s). Most administering organizations have several sets of rules for different types of arbitrations. Be specific as to which rules should apply. Other rules can be used for non-administered arbitrations (e.g., UNCITRAL, CPR, etc.).

8. In developing dispute resolution clauses, try to avoid complicated or ambiguous procedures. Consider providing for expedited or simplified procedures to speed up the process where disputes may be routine and/or where early resolution is important to the ongoing transaction. Consider how much discovery should be exchanged in the arbitration. If there are specific needs for providing or limiting discovery, to the extent they can be itemized up front in the Agreement, there will be less opportunity for problems to arise later. Often these concerns can be addressed through the choice of administering organization and/or arbitration/mediation rules.

Julian S. Millstein, JMillstein@mofo.com, a mediator and arbitrator, is Senior Counselor at Morrison & Foerster LLP. He has over 30 years of experience negotiating and litigating complex outsourcing, e-commerce, and technology-related matters, across a wide range of industries and is ranked as a “Senior Statesman” in Chambers USA 2010. He is co-author of “Doing Business on the Internet – Forms and Analysis” and served as Adjunct Professor of Law at Fordham University School of Law for many years.

Sherman Kahn is of-counsel with the New York office of Morrison & Foerster LLP and co-chair of the Arbitration Committee of the Dispute Resolution Section of the New York State Bar Association. He can be reached at skahn@mofo.com.

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The New York State Bar Association Lawyer Referral and Information Service (LRIS) has been in existence since 1981. Our service provides referrals to attorneys like you in 41 counties (check our Web site for a list of the eligible counties). Lawyers who are members of LRIS pay an annual fee of $75 ($125 for non-NYSBA members). Proof of malpractice insurance in the minimum amount of $100,000 is required of all participants. If you are retained by a referred client, you are required to pay LRIS a referral fee of 10% for any case fee of $500 or more. For additional information, visit www.nysba.org/joinlr.

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> Benefit from our marketing strategies
> Increase your bottom line

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