



AN INSIDE LOOK INTO THE IN-HOUSE LEGAL COUNSEL'S WORLD

Report: How to Manage Arbitration Disputes In-House

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A report prepared by Jus Mundi



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Introduction

Why We Created This Report?

In times of COVID, there seems to be no end to webinars discussing arbitration practice from the perspective of law firms. However, by no means does it help to unveil the whole story. Here, at Jus Mundi, we got curious and decided to go beyond the familiar discussions to learn from the experiences of the heads of in-house disputes/arbitration departments about the efficiency of the internalization of the management of disputes, notably in a virtual/COVID era.

Jus Mundi hosted a private webinar on the topic with the participation of the following panelists. This report is a result of an exciting conversation and contributions from all speakers.

Over the course of this playbook, you will get a glimpse of possibilities of managing arbitration disputes in house, the tasks that can be internalized, the common pitfalls in the relationship between In house legal counsel and external legal counsel, how to address them, and best practices you can use to manage arbitration disputes with success.



Diana Bowman

Legal Manager at
VINCI Energies



David J. Gonzalez

Head of the Global Energy
Management Legal Department
at **Iberdrola**



Chris Campbell

Senior Counsel at
Baker Hughes



Alison Pearsall

Senior Group Counsel
at **Veolia Environment**



Baptiste Rigau

Associate at **LALIVE**
(Moderator of the event)

Resolve Disputes Early and Cost-Effectively

Conceptually speaking, the goal of any in-house counsel to resolve disputes early in the process efficiently and cost-effectively. Of course, from a practical point of view, not all disputes can be resolved, but the goal of the in-house counsel should be to vigorously defend or pursue the disputes to change the common mantra of being the cost center to being a revenue driver.

Chris Campbell shared four tips to tackle costs.

- **Understand your company's position:** To keep the costs down, first thoroughly understand your company's position in the dispute and the opposing side's position. This includes the commercial and industry impacts of each. Once you have determined your company's position, decide whether to pursue or defend the claims and evaluate if a more commercial route is feasible to the company's internal stakeholders.
- **Hire an external legal counsel:** Once you have determined your position, decide whether you need to partner with an external counsel. Measure if it's cost-effective to do so. For example, some disputes may require a lawyer in the local jurisdiction or a skillset that in house team doesn't have but the law firm has.

- **Automation, technology, and internal resources:** To manage disputes effectively and intelligently means using automation tools, dispute management tools, and arbitration legal research tools (e.g., [Jus Mundi](#), [Westlaw](#), etc.). Invest early in creating internal resources, such as drafting the company's guidelines on dispute resolution methods, policies on hiring external counsel, etc. Coach your product line and business colleagues within the company to prepare them to address matters early and efficiently by creating templates, coaching sessions, and other valuable resources.

- **Get recommendations** on neutrals (arbitrators, mediators) and experts from trusted sources—i.e., other internal colleagues, the legal counsel community, industry organizations, and other in-house counsel.

Act Preemptively From the Initial Contract Negotiation Stage

In sectors like construction and infrastructure, disputes are an inevitable part of the project lifecycle. Diana Bowman highlighted implementing dispute avoidance techniques as early as possible, right from the initial contract negotiation stage.

- **Review and negotiate disputes clauses.** The in-house team should actively review the notorious midnight clauses** such as dispute resolution and applicable law at the negotiation stage to act preemptively.
- **Set priorities in the review process.** Pay special attention to “classic” claim-generating clauses that you know can be problematic later down the track (e.g., liability clauses and caps, liquidated damages, extension of time clauses, etc.).
- **Follow best contract management practices.** Conduct internal trainings and build relationships within the company by always remaining visible, available, and approachable.

What are midnight clauses?

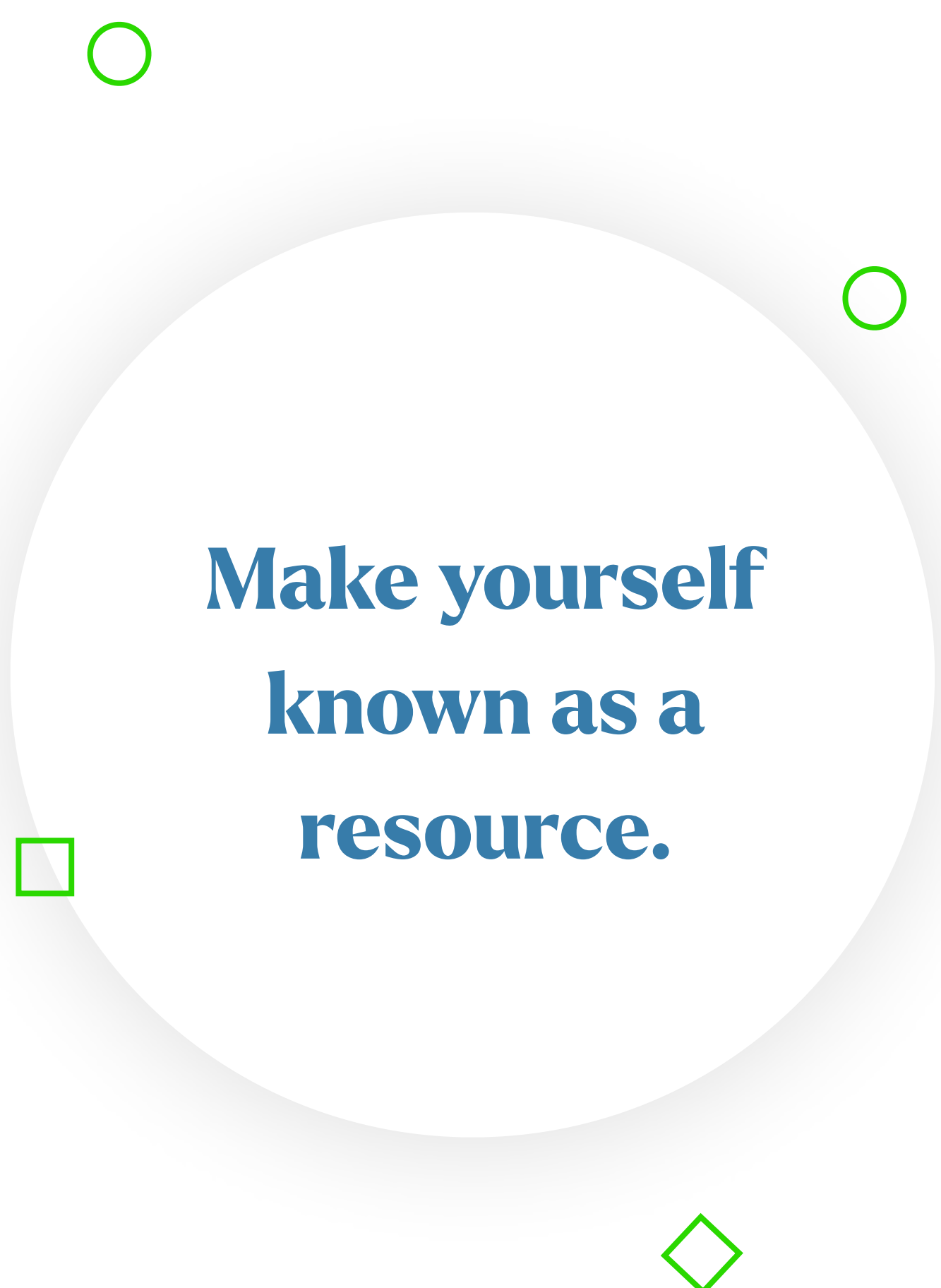
In the contract drafting phase, it's often said that the parties may only turn their attention to certain clauses (such as choice of law and dispute resolution clauses) at the very last minute (e.g. after midnight on the night of the contract signing; that's why these clauses are sometimes referred to as “midnight clauses.” Read more [here](#).

Build Relationships and Internal Awareness

Alison Pearsall highlighted the need to establish or follow already established internal tiered dispute resolution clause policies before arbitration and try to resort to mediation whenever possible. However, some companies may have policies not to use tiered dispute resolution clauses, so review your company's position first.

— **General policy using mediation.** There can be a general policy using mediation as the first recourse when appropriate, especially for large companies. How to promote mediation? In mediation, the decision-makers from the company remain in charge of the procedure. On the other hand, once it goes into arbitration or litigation, the lawyers will lead the procedure limiting the scope of business decision-makers. Use this argument to convince internal decision-makers.

— **Building relationships internally.** One of the best ways to transfer knowledge within the company and subsequently promote alternative dispute resolution is via building relationships. As previously mentioned, make yourself known as a resource and act as a point person for corporate lawyers, so they reach out to you to review a dispute clause during the contract negotiation phase.



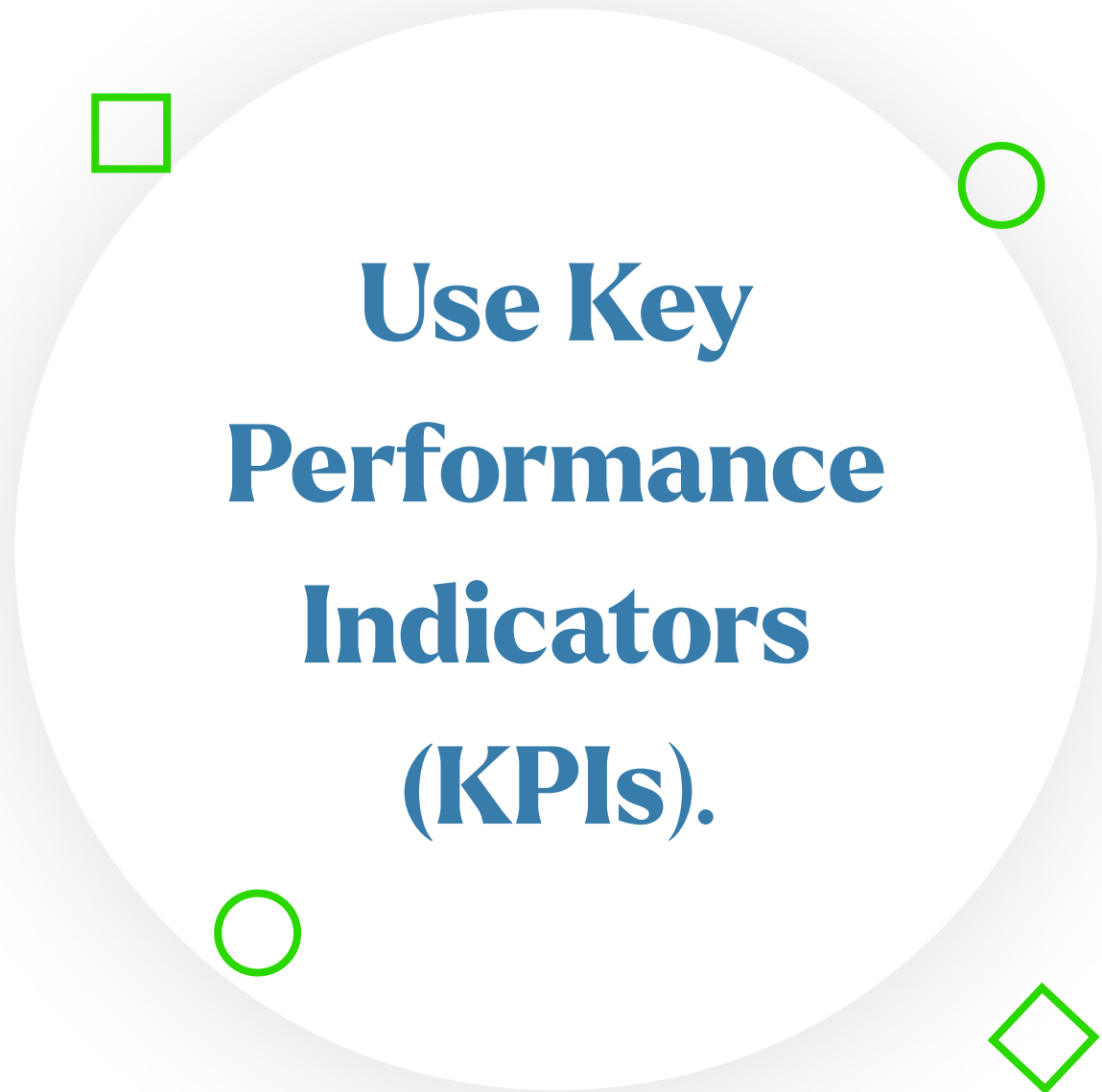
**Make yourself
known as a
resource.**

Change the Perception: Be a Valuable Center and Not a Cost Center

Doing business and practicing law are entirely different. Things they don't teach lawyers in law school or at law firms. However, the in-house legal teams need to think like a business unit and learn about business strategies focusing on driving revenues. It also means speaking the same language as business people and presenting things in their ways.

For example, Diana Bowman suggests demonstrating the added value of the in-house team in terms of money. Some tips include:

- **Use Key Performance Indicators (KPIs).** While speaking with business people within the company, present them your work using KPIs. Present your progress and achievements from a business perspective.
- **Use Digital Tools.** Tools can help you generate data statistics on disputes, industries, jurisdictions, case status, and how they are being resolved. Ultimately this data can assist in demonstrating your legal team's added value.



Recommended digital tools:

Use digital tools such as [Legal Suite Galaxy](#), [Mirtech TeamConnect](#) or [Thomson Reuters Legal Tracker](#) to generate a global vision of the company's past and ongoing disputes.

Pre-Disputes Phase

What Type of Tasks to Be Managed In-House?

We discussed earlier the importance of acting preemptively, but what are some of the tasks that can be managed internally in the pre-disputes phase?


David J. Gonzalez shared his checklist.

1. Do you have a case? Ensure that there is at least a minimal case at hand before resorting to dispute resolution practices. To achieve that, hire external experts immediately at the early stage when the dispute is already foreseeable. This exercise will help you understand if you have a case. And if yes, is it worth pursuing it?

2. Build a dedicated in-house team internally. Once you have gathered the information with the experts, create a team of lawyers and the relevant colleagues involved in the business side of the company's activity and the controllers within the company.

3. Manage expectations with the business. Expectation management with the business stakeholders should be presumed to be the end goal for in-house dispute management. Prepare an objective report about the case to align with the company's global financial and business objectives.

4. Manage expectations with the counterparty. Besides the relationships with the business colleagues, the in-house and other internal teams should manage relationships with the counterparty. This may help you avoid small proceedings with the counterparty, especially if you do business with them frequently.



At the pre-disputes phase, you want to keep the commercial dialogue open.

When Is the Right Time to Involve the In-House Legal Team?

David J. Gonzalez explained two separate stages for involving the in-house legal team:

1. Getting involved when the business feels the need for the in-house team to get involved.

This stage is rather evident. The relevant involved teams will reach out to the in-house legal team for directions when they need to.

2. Getting involved indirectly.

This stage entails keeping a tab on ongoing pre-disputes emails containing business chats, informal messages, among other materials, with the counterparty without being in the copy of these emails. If you have access to these emails, they are a great source to gather information as they may contain some critical information to identify a potential dispute.

As stated multiple times in this report, the goal of the in-house counsel is to avoid or minimize litigation/arbitration. So, the in-house legal team must know when to step in. It's a judgment call. In some situations, getting involved directly is the right thing to do. For example, appearing as the company's lawyer in business exchanges for early notification clauses that you know can be problematic. The legal team needs to step in to mitigate the situation in these types of scenarios.

— **Access to the information.** Diana Bowman highlighted that access to the information, such as the pre-disputes emails, is critical. This is why it is vital to build relationships internally to win your colleagues' trust to get access.

Pre-Disputes Challenges

Maintaining Confidentiality

During the pre-disputes phase, the main challenge is maintaining confidentiality internally and externally with external lawyers, external advisors such as auditors. For example, an external auditor may also work for the counterparty. In this case, control the information shared with the external auditor.

David J. Gonzalez suggests to:

- Limit information; and
- Limit people with access to this information to manage expectations

Assess the Situation First: Pre-Disputes Due Diligence

In Chris Campbell's view, an important consideration is not to rush to the formal initiation of the dispute straight away.

- When business colleagues share the dispute with the in-house legal team, the disputes lawyers need to make sure you are ready before jumping into the disputes battle. Indeed, before moving forward, disputes counsel will want to assess the situation first. Ask a ton of questions about the dispute's context—the number of claims, the damages amount, communication with the counterparty, an internal assessment of our liability, what evidence or documentation we have, the impact on the business, etc. Doing this type of early due diligence first and refraining from jumping into a dispute immediately will accrue costs and be difficult to withdraw from.
- Be aware of the time-sensitive nature of the situation in the pre-dispute stage, and the team needs to act efficiently but cautiously.
- How will any actions reflect or impact the commercial operations of the company from a reporting standpoint? Access to supplies or supporting other projects? Do all parties appreciate the financial, time and effort investments required to succeed in a formalized dispute?

Dispute Phase

Tips to Succeed

Alison Pearsall's recommendations:

Performing an initial risk assessment

Follow the document management protocol. Ensure that all relevant documents are present, locate them if necessary. When on the defendant's side, identify any possible counterclaims. If representing the claimant, the main task should be to determine the end goal of the arbitration, sometimes even for the counterparty.

Performing an early case assessment

Deep dive into the substance of the case to re-evaluate the risk assessment and identify the strengths and weaknesses of the case. Use tools such as decision trees to understand the risks and chances of winning.

Choosing external counsel

A uniform process to requesting bids from external counsel is essential to comparative analysis of different bids.

Choosing the arbitrators

If you have a dedicated disputes team, rely on in-house expertise for the choice of arbitrators. Ensure that the shortlisted arbitrators are diverse and inclusive.

Rely on your network based on your previous experience and knowledge of good arbitrators. And expertise in the arbitrator selection process.

Designate subject matter expert(s)

Designate one or several people internally who are subject matter experts in arbitration. These colleagues will serve as a resource within the organization regarding the current appointments to avoid repeat appointments in different countries, centralize the information, and gather feedback.



A uniform process to requesting bids from external counsel is essential.



Tips to Manage the Relationship with External Counsel


David J. Gonzalez:

- External counsel should have access to all information, and the role of in-house counsel is to obtain all information from the business to create that access.
- Treat the external counsel as a strategic partner. Similarly, the external counsel should establish a good relationship with the in-house counsel's team.
- External counsel should be mindful that the in-house counsel is in the driving seat as they oversee the disputes and make strategic decisions that suit the company's goals. Simply put, In-house counsel manages the external counsel, and they report the results to the board of directors, so they are too held accountable for their work.
- External counsel should send clear invoices, clear fees to avoid confusion.

Alison Pearsall:

- Follow the directions requested in the RFPs to make the first best impression.

- Propose an alternative fee arrangement, including the breakdown of fees by stages of the arbitration. This allows companies to optimize their budgets.
- A bonus is a law firm proposing cost incentives aligned with the business's goal (settle/start an arbitration/negotiation, *etc.*). For example, if the goal is to settle early, the law firm can propose a regressive incentive depending on the stage at which the arbitration is settled.
- Propose a diverse team (suggested multiple times in this report).



**Follow the directions
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Diana Bowman:

- Avoid “it depends” style memos. Instead, provide clear answers along with rigorous legal analysis.
- Provide concrete commercial advice.

Chris Campbell:

- In billing statements, provide more description and the results yielded under the billable hours. In approving a bill, internal counsel needs to understand and justify the expense. Opaque statements don't help with that exercise.
- Be clear and specific about what is expected in a proposal and how those proposals will be evaluated. In turn, counsel must follow instructions and show that they have thought through their suggested strategy and are not advising a “one size fits all” approach.
- Establish a regular line of communication so that no one is “out of the loop” and all parties know when and how they expect updates on a matter as it develops.
- Show that you have done your due diligence in recommending experts or neutrals, diversity (in many uses of the word) is a core value for many organizations, and lists from more than a decade ago need to show growth.

External Counsel Perspective

Baptiste Rigaudeau Shared His Perspectives From the Law Firm's Point of View:

Externals should keep in mind that the in-house departments have a better knowledge of their business than most external lawyers. They know about the company's history, governance issues, technical features of the goods or services, the type of contracts they use, pre-disputes negotiation, correspondence, etc.

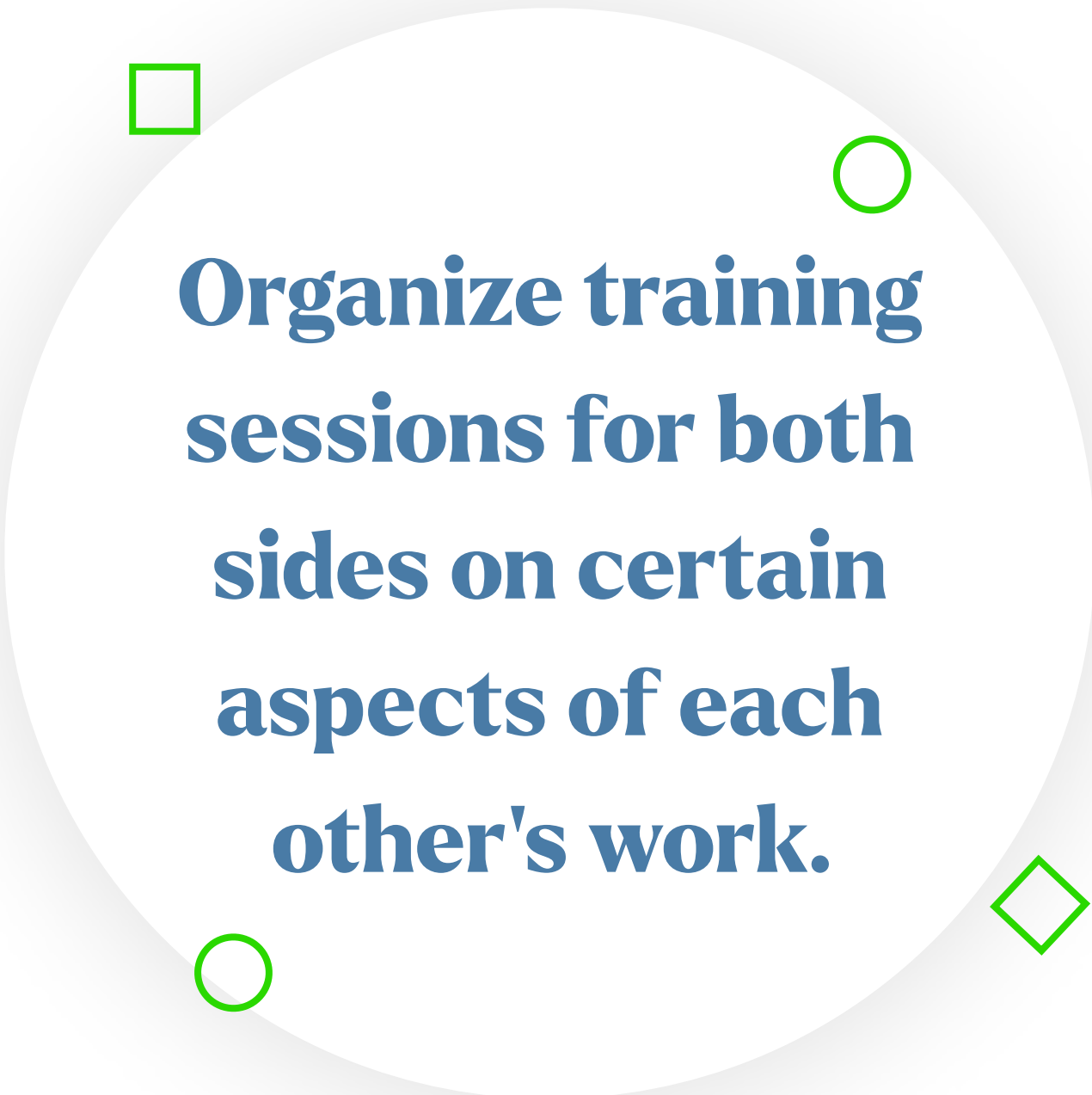
Externals thus can benefit a lot from communicating with in-house lawyers and learning about their industry-specific challenges.

Communication during the dispute:

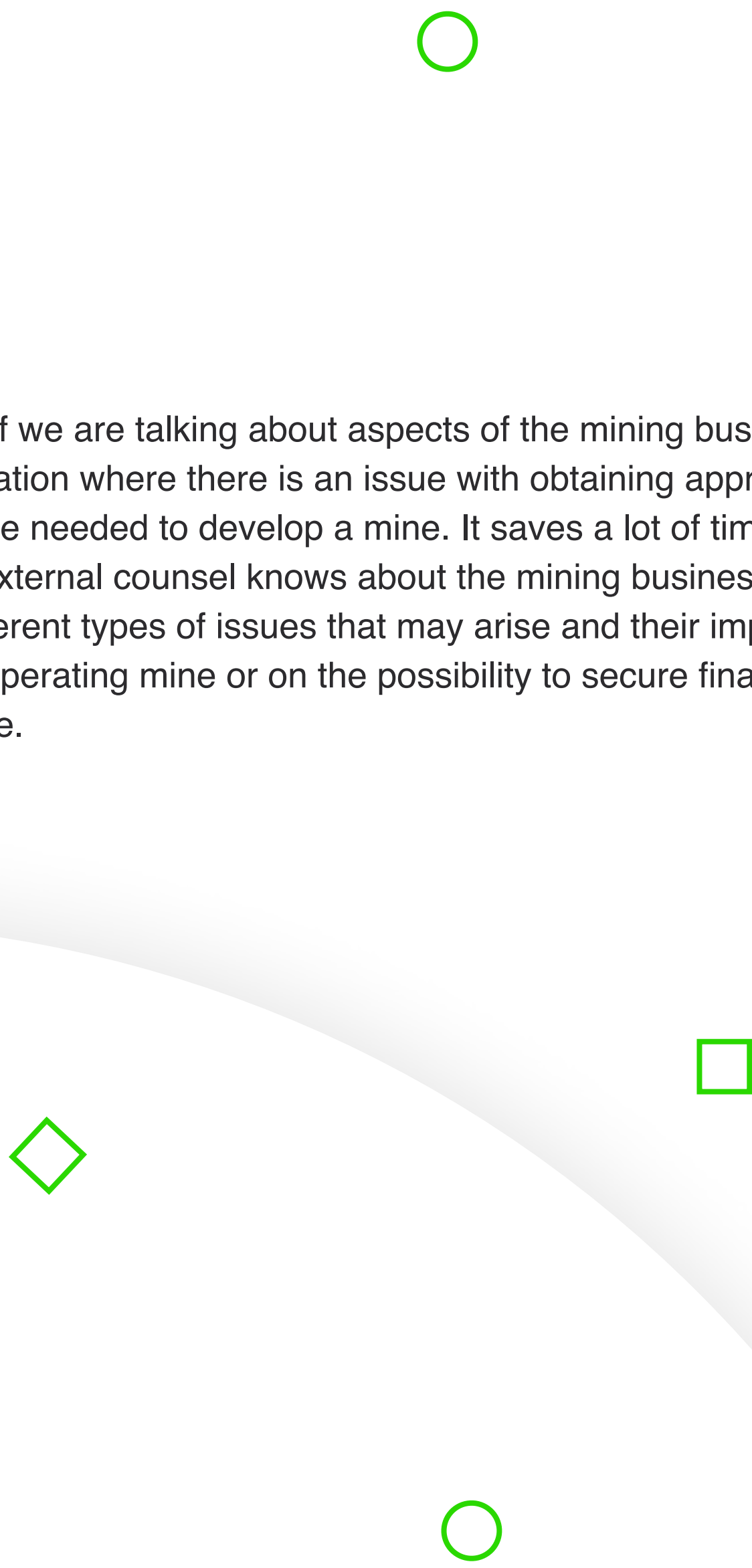
- Communication between the two sides of the teams is key. It must be dynamic and straightforward.
- In practice, depending on each client, it may entail regular meetings or status reports to check in on the progress of specific submissions. Don't be afraid to pick up the phone or jump on a Zoom meeting to flush out any issues that are arising.
- Knowing about each other's work procedures and ensuring that whenever there is a need for clarification coming from either side, there is a communication channel in place that is easy to use.

Active communication even in the absence of any dispute:

- Organize training sessions for both sides on certain aspects of each other's work. These trainings or education interactions will save a lot of time and money down the road because they might reduce the need for external lawyers to learn the business and its contractual practices from scratch. In addition, it might reduce the need to google every technical term in a contract or in correspondence to understand the case.



Organize training sessions for both sides on certain aspects of each other's work.



For example, if we are talking about aspects of the mining business, imagine a situation where there is an issue with obtaining approvals or permits that are needed to develop a mine. It saves a lot of time and money if the external counsel knows about the mining business and knows the different types of issues that may arise and their impact on the activity of an operating mine or on the possibility to secure financing to develop a mine.

- Sharing of knowledge may also come from the external lawyers concerning the specifics of the arbitration procedure.

For example, one of the important steps is the constitution of the tribunal and choosing your arbitrator. Both in-house department and external law firms have insights about specific candidates (either for co-arbitrator or chair), so communication must be as candid as possible. Then, when it is time to decide to appoint an arbitrator or to agree on the appointment of a president, we have the complete picture about a particular candidate (including live experiences about them that may not come up when looking up strictly at their cv – procedural preferences, tendencies, etc.)

The same also applies to the choice of industry experts for a case. For example, an economics expert in a specific region in a gas pricing arbitration or the best delay experts for construction arbitration.

New Issues That Were Not On the Radar Five Years Ago


Promotion of Diversity

All panelists emphasized the need to promote diversity and sustainable development goals within the counsel and arbitrator selection process. It is becoming more and more essential for us to be conscious of social issues like gender and racial equality and LGBTQ and disability-inclusive. Have a broad spectrum of choices for counsel and arbitrators or neutral.

Possible solutions:

- Avoid submitting non-diverse arbitrator/counsel team lists to prevent being perceived as an insensitive firm for social issues.
- Implement tangible metrics to measure compliance with diversity and sustainable development requirements so that they won't remain on paper only.
- Be aware of the social issues and social climate worldwide (movements like Black Lives Matter or George Floyd's death etc.).
- Propose a team of lawyers that is diverse and inclusive. For example, in France, most of the in-house counsel or jurists are women. Therefore they will be likely to notice if the shortlist doesn't include any women.

- Adopt the local business culture while providing external counsel services. For example, visit the company's offices to understand the working and infrastructure culture.



**Avoid submitting
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Be Environmentally Friendly:

- Companies nowadays have environmental sustainability goals and publish annual environmental sustainability reports. The external counsel should try to align with these goals. For example, RFP can show the steps you are willing to undertake to reduce the environmental impact (reducing carbon print, reducing travel, going digital and printing less, etc.)

Navigating Through the Pandemic and Other Force Majeure Events:

- Fostering a relationship or keeping the same level of communication during the pandemic has been challenging. Make sure to undertake the necessary steps to ensure the communication continues virtually or any other appropriate means.
- Be open to online dispute resolution mechanisms. Online arbitrations and virtual hearings are more common now than before, thanks to the Covid-19 pandemic. If both parties agree, it can be a solution that is cost-effective and time-efficient.

Deciding on Suitable Dispute Resolution Mechanisms

The last discussion topic with the panel touched upon the decision-making with different types of dispute resolution mechanisms. Several of these points were mentioned multiple times throughout this report, so here is a recap:


- The choice of dispute resolution mechanism would depend on the complexity, the amount involved, the applicable law, jurisdiction, and internal resources.
- As mentioned previously, promote mediation to control things before they get contentious, especially for business people.
- External counsel is not always necessary for a mediation. If you choose to involve external counsel in mediation it is important to ensure that their incentives are aligned with the business goals in the mediation. The in-house team can show their added value by managing the mediation internally.
- When it comes to arbitration and litigation, understand the complementary nature of the in-house and external lawyers. Concentrate on working proactively to bring value to the dispute management process.



Conclusion

The types and nature of disputes are evolving faster than ever before. And so are the ways to manage them. More and more in-house legal teams are establishing internal disputes teams, but this also does not mean that there will not be any work for the external counsel. Working together to foster long-term relationships and become more conscious of current social issues will help both sides.

We hope that this guide can shed some light on the intricacies of managing arbitration disputes and building concrete relationships with both in-house and external counsel. Of course, every organization has different goals. Still, by following this core framework, you can make significant strides toward fostering collaborative teams that share in others' successes and are fully vested in driving revenues.





If you would like more reports and insights like this or to continue the conversation, we'd love to hear from you.

Send your feedback at care@jusmundi.com

