

TOOLKIT 4

User Guide

RESOLVING CORPORATE GOVERNANCE DISPUTES



4



Global
Corporate
Governance
Forum



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USER GUIDE

RESOLVING CORPORATE GOVERNANCE DISPUTES

FOREWORD

Disputes over the governance of a corporation are inevitable. When disputes erupt into debilitating confrontations or end up as highly publicized court cases, they can harm the company's reputation, handicap its operations, paralyze its board from making critical decisions, and lead to a reduction in share price that potentially hastens the corporation's demise.

Case studies show that alternative dispute resolution (ADR) processes and techniques can help prevent or settle corporate governance-related disputes in ways that are more efficient and effective than the more adversarial process of court litigation. The Global Corporate Governance Forum developed this toolkit to broaden the use of ADR by boards to effectively handle internal and external disputes. The toolkit draws on processes and techniques that help better align "interests" rather than engage in more contentious litigation of incompatible "positions."

This toolkit builds on the Forum's earlier work to build capacity in countries and companies for understanding, developing, and applying good corporate governance principles and practices. Providing the tools that can help institutions build capacity and promote reforms that inform board competencies and best practices is the source of our success and impact.

The guidance and observations in this toolkit draw on discussions and materials provided by a wide range of corporate governance and ADR experts, practitioners, and policymakers. Experience with how best to design, implement, and evaluate corporate governance-related dispute resolution is still at an early stage. There is little empirical data about the use of alternatives to litigation in corporate governance disputes and the role that ADR can play in improving or enforcing corporate governance practices.

The Forum recognizes that there are many valid approaches to using ADR mechanisms. This toolkit

provides users with options. Policymakers, private sector institutions, and board directors are left to choose their own approaches to mitigate disputes in ways that foster responsible business conduct and enhance a healthy, productive investment climate.

To be sure, any policy that favors alternatives to traditional litigation must be guided by the rule of law and the relevant jurisdiction's judicial system.

Many people have contributed to this toolkit, and the Forum is grateful for their work and commitment. Marie-Laurence Guy, a senior projects officer with the Forum, led this effort, building upon the expertise she gained in co-writing our FOCUS publication *Mediating Corporate Governance Conflicts and Disputes*. Her work is inspired by her commitment to finding innovative ways of ensuring the productive capacity of the business environment in countries challenged by an ineffective judicial system.

Others in the core team deserve thanks and appreciation: James Spellman who relentlessly edited and researched this toolkit; Christopher Honeyman; Mary Jo Larson; Jon Masters; Karl Mackie; Anne Molyneux; and, Alan Rudnick. Many experts, practitioners, and the Forum's Private Sector Advisory Group members are also to be commended for their extensive contributions. It is through their participation that the toolkit truly reflects global experiences and innovative thinking. Last but not least, the Forum would like to acknowledge the excellent work Mary Beth Ramsey accomplished in designing and laying out this toolkit.



Philip Armstrong
Head, Global Corporate Governance Forum

What is the purpose of this toolkit?

Although much has been achieved in raising awareness and implementing good corporate governance rules and procedures, disputes affecting the governance of corporations. Little has been done to develop alternative approaches for resolving disputes. Left unresolved, these disputes can paralyze the board, harm the company's performance, and deter investors. Implementing effective dispute resolution processes for preventing and resolving corporate governance disputes is thus essential if the company is to succeed over the long term.

Corporate governance disputes do not always lend themselves to court litigation. Yet even when they do, traditional adjudication is typically not the best way to resolve such disputes. Court proceedings are generally slow and costly, and they antagonize the parties. Moreover, in several developing countries and emerging markets, investors distrust the judiciary system and enforcement remains weak.

This toolkit explores how ADR processes and techniques that have been used successfully in dealing with commercial and labor disputes can help resolve and prevent corporate governance disputes.

Key to understanding this toolkit is the distinction between internal and external corporate governance disputes. Internal governance disputes mainly take place within the boardroom while external governance disputes typically involve shareholders but may also include other stakeholders.



Constructive negotiation, mediation, and, in some cases, arbitration constitute established dispute resolution processes that can be applied usefully to external corporate governance disputes. To prevent and resolve internal disputes, directors may find it more effective and more appropriate to borrow the techniques used in ADR processes before turning to more formal approaches that would require involving a third party.

Applying ADR processes and techniques to corporate governance disputes provides for innovative approaches to implement and enforce good corporate governance practices in the best interests of the company, shareholders, and stakeholders.

Who will find this toolkit useful?

Corporate Governance and ADR institutions and experts

This toolkit is targeted at those organizations and institutions that are helping companies implement good corporate governance practices and/or seeking ways to manage and prevent disputes. The following constituencies will especially find this toolkit useful in helping them to better understand corporate governance disputes and offer training, advisory, and mediation services that can help companies avoid the time, costs, and risks associated with litigation:

- Institutes of directors and corporate governance centers
- Corporate law firms and corporate governance consulting firms
- Mediation and arbitration centers
- Universities, law schools, and research centers

Board members, senior executives, corporate secretaries, and company lawyers

Listed and non-listed companies — including family firms, banks, and state-owned enterprises — are the ultimate beneficiaries of this toolkit. Board members, senior executives, corporate secretaries, and company lawyers are encouraged to consult this toolkit to learn about and then implement new approaches to prevent and resolve corporate governance disputes.

Policymakers, regulators, and judges

This toolkit will interest policymakers who are concerned with enforcing good corporate governance practices and building investor confidence. It will also appeal to those who are designing good governance standards and regulations. Through this toolkit, the judiciary can also learn more about corporate governance dispute resolution and understand the benefits of ADR mechanisms — including formal mediation. This is especially important for jurisdictions where court-referred/annexed mediation has been institutionalized.

Development agencies and technical assistance programs

Although this toolkit has been designed as a self-help tool, the support of development agencies may be required to implement best practices and provide guidance. Therefore, this toolkit should also be used as a knowledge management product through multilateral and bilateral funded corporate governance reform and ADR programs in developing and emerging market countries.

What is in this toolkit?

Consensus-based alternatives to adjudication can help prevent, resolve, and reduce the negative impact of corporate governance disputes.

This toolkit provides practical guidance on how consensus-based alternatives to adjudication can help prevent, resolve, and reduce the negative impact of corporate governance disputes and, consequently, contribute to improving corporate governance practices, strengthening investor confidence, and supporting business continuity.

The toolkit breaks down the common types of governance disputes and provides techniques for effective resolution. It also offers practical suggestions and training resources for corporate governance institutions and dispute resolution experts who wish to offer corporate governance dispute resolution services.

This toolkit is divided into three volumes. The first explores the rationale for applying ADR mechanisms to corporate governance disputes. The second focuses on the implementation and use of corporate governance dispute resolution mechanisms and services. The third reviews the skills required for effectively resolving corporate governance disputes and addresses the training needs of both directors and dispute resolution professionals.



QUOTE

“Countries seeking to create a capital market (and companies seeking to attract local or global capital) must develop a framework that assures investors of two things: first, the assets they provide will be protected and, second, the disputes related to the company’s governance can be addressed effectively.”

CHRISTIAN STRENGER

PSAG DEPUTY CHAIRMAN

MEMBER OF THE GERMAN CORPORATE GOVERNANCE COMMISSION

DIRECTOR, DWS INVESTMENT ADVISORY GROUP

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What tools does this toolkit provide?

This toolkit is user-friendly. It shares worldwide experiences and existing best practices while providing new avenues for better managing corporate governance disputes. The following items will help users navigate the toolkit's contents and tools:



Module Tabs

Each module is introduced by a color tab presenting the rationale and the module's contents.



Examples

The toolkit includes examples and anecdotal evidence worldwide to illustrate the content and impact of corporate governance disputes and possible approaches to resolving such disputes.



Quote Boxes

Users can find quotes from experts and professionals that provide insights into topics.



Focus Boxes

Boxes containing practical and targeted information provide users with a brief overview of studies and state-of-the-art thinking.



Glossary Boxes

Users can consult the section for key terms used throughout the toolkit.



Graphs

Graphics provide users with a snapshot of existing data and visual representations to enhance conceptual understandings of the toolkit's contents.



Further Reading

Volume 1 provides readings that further discuss practical and academic issues.



Cross References

Each module includes cross references to the toolkit's other modules and annexes. Users can easily locate related topics, guidelines, and documentation.



Practice Boxes

The use of ADR processes and techniques to help prevent and resolve corporate governance disputes is still at an early stage. Practice boxes offer users options and actions to consider in dealing better with boardroom and shareholder disputes or any other disputes, involving stakeholders challenging a company's governance.



Role Plays

The toolkit's training volume includes role plays, which can be used by organizations' training directors and/or mediators. Participants are given situational facts and then assume roles of those involved in making a decision about the issue that divides the board. In these exercises, the participants master the content while developing leadership skills, particularly the ability to prevent or defuse potentially damaging conflicts within a corporate board.



Annexes

These are at the end of each volume, providing background documentation and samples that can help users with practical step-by-step approaches to implementing corporate governance dispute resolution services and practices.



PowerPoint

Volume 3 includes two standard Powerpoint Presentations to be used and adapted for training directors and dispute resolution experts.

CONTRIBUTORS

To develop this toolkit and gather the “lessons learned” and best practices from developing, emerging market, and developed countries, the Forum invited representatives from mediation centers, law firms, consultants, institutes of directors, and corporate governance centers worldwide to share their experiences and discuss milestones and challenges in implementing corporate governance ADR.

The Forum would like to thank everyone who actively supported this initiative including the following experts, practitioners, and Private Sector Advisory Group members for providing materials, examples, and extensive comments.

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The Global Corporate Governance Forum is a leading knowledge and capacity-building platform dedicated to corporate governance reform in emerging markets and developing countries. The Forum offers a unique collection of expertise, experiences, and solutions to key corporate governance issues from developed and developing countries.

The Forum’s mandate is to promote the private sector as an engine of growth, reduce the vulnerability of developing and emerging markets to financial crisis, and provide incentives for corporations to invest and perform efficiently in a transparent, sustainable, and socially responsible manner. In doing so, the Forum partners with international, regional, and local institutions, drawing on its network of global private-sector leaders.

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