

**Technology Negotiations and Dispute Resolution Systems
(MIT Course: ESD.141)**

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Panel Members:

- Chris Albertyn (Canada), Arbitrator (member Ontario Labour-Management Arbitrators Association; National Academy of Arbitrators); Vice-Chair, Ontario Labour Relations Board.
- Anna Booth (Australia), Director of the private workplace change, training & dispute resolution agency CoSolve; Director of Members Equity (the union bank in Australia); mediator, trainer, facilitator
- John Brand (South Africa) Director of the private workplace change, training & dispute resolution agency Conflict Dynamics; Partner of the law firm Bowman, Gilfillan, Johannesburg; mediator, arbitrator, trainer, facilitator
- Charles Nupen (South Africa) Chief Technical Advisor for Southern Africa, International Labour Organisation; mediator, arbitrator, facilitator
- Jonathan Sandler (Australia) Manager of Employee Relations, ANZ Bank; Partner of the law firm Blake Dawson Waldron; mediator, arbitrator, trainer
- Felicity Steadman (United Kingdom) Director of the private workplace change, training & dispute resolution agency Conflict Dynamics; mediator, arbitrator, trainer, facilitator
- Brian Smeenk (Canada), Partner, management law firm of McCarthy Tétrault, Ontario.
- Clive Thompson (Australia) Director of CoSolve, arbitrator of the Workers Compensation Commission, New South Wales, adjunct professor, University of Cape Town Law School; mediator, arbitrator, trainer, facilitator

Session Notes:

- What to do about what I call “evil wicked problems” – problems with many stakeholders and many issues – with visible disputes and some disputes that haven’t even come to the surface and some stakeholders who don’t even know that they are stakeholders? What is the first step?
 - Identify the interests
 - Get all the stakeholders in a room
 - An issue is that you can’t always get them all in a room or it would be too big a group
 - An option is to have a series of focus groups – so that you can engage the interests without everyone being all together
 - Example of South African constitution effort that failed due to a lack of initial attention to the process – it must have equal importance to content
 - In this case, people started having position papers and rotating chairs without sufficient internal process dialogue
 - Once you set the table, there has to be a process of agenda development – to surface the issues that are important
 - Structure the system to achieve credible outcomes, which might involve specialized task forces, focus groups, bringing in particular expertise
 - Sort out who generates proposals and where does the decision making authority reside
 - A common failure is the assumption that there is shared knowledge around the table that is all you need to get to a solution – build in the role of research, evidence
 - Thinking about process upfront is important, but you don’t want to get stalemated on the shape of the table

- In this respect, respected neutrals or facilitators can move the process along without too much pre-negotiations
 - Avoid the conflict of interest where people who have a stake in the substance people have to take responsibility for the process
 - A key is to go slow and not jump to solutions – analyze the problem
 - There are issues around how a decision is made – consensus, weight of opinion, majority opinion – and mechanisms when latent disputes emerge
- Conflict transformation – mediators getting into underlying disputes – some of which have long-held emotional disputes – lessons from that
 - The concept of Relationships by Objective as a method to understand the root cause of disputes – from the Federal Mediation and Conciliation Service in the US
 - Example of the Mercedes-Benz conflict – with black workers coming to work with carved wooden models of AK-47s, while the white workers came with real guns and no cars were being built – the workers just did military maneuvers on the front lawn of the factory
 - A key part was deeper investigation and initial relationship building process, which included the chief executive, representatives from all levels of management, representatives from the union
 - Initial side agreements on not having weapons
 - Follow-up session six months later with new issues that did not emerge initially
- I am sober about resolving deep-seated conflict . . .
 - In the workplace there are rule, but for many identity and faith based conflicts the rules are not clear
 - There was a sustained period of political violence right after the collapse of apartheid – many of the labor-management skills were helpful, but it was not long-term resolution
 - The greatest success was helping people to see a longer time horizon and see more of the common interests
 - The Truth and Reconciliation Commission – a twin notion of telling the truth and getting amnesty – a good process that allowed truths to surface and be confronted, with a confessional component
 - Key point of moving people from a point where they are trapped in their story of the past to a point where they are seeing a different future in which they are not so trapped
 - Also, don't forget the importance of being able to vent and the role of a simple apology
- Interest in public and private partnerships – the role of dispute resolution systems that are either very informal or very formal – such as issues of emergency preparedness and responses
 - You have to think about the objectives of a public-private partnership
 - A key is anticipating that there will be disputes – which is often not anticipated in advance – thinking about what kind of things could go wrong
 - Example of the timber industry in Australia – with disputes around where to log, what is the market value of land and timber and so on – the mediation model was limited around technical aspects of these issues
 - A key involves the decision making models in the various organizations – do representatives have clear mandates?
 - Arbitration provisions are often built into commercial agreements, specifying what topics are covered, but not specifying the structure and process sufficiently
 - Mandatory mediation before getting to courts is something that has grown a great deal
 - Example of South Africa building stadiums for the 2010 World Cup – with a request to ensure that dispute resolution system is build into the consortium bid on the work
 - A key is to understand the overarching strategic objectives as the foundation
 - Build an ombudsman function into the system early on as a key element of a more comprehensive system

- What about dispute resolution systems where the culture keeps people from using the system?
 - The traditional response is that this is a change process and the initial message must come from the leadership – this is true, but not sufficient
 - There also has to be a grass roots process in which understanding emerges
 - From a traditional union case, the issues can be a mobilizing force
 - In a university environment there can be the other extreme with lots of whistle blowers everywhere – things get so formalized that people want all steps and all levels of appeal – without as much attention to the informal resolution
 - A focus on dispute prevention – beyond dispute resolution
 - Role of cultural audits – getting at whether the lack of visible problems may hide problems under the surface
 - VPs of HR do quite a bit of work around employee engagement – attitude surveys that are mined by companies to learn
 - Interested in the disconnect between what looks like world class systems that don't have the confidence and participation on the part of the employees
 - It is about the degree of involvement that the people have had in developing the system
 - I would rather have a flawed system that people felt they had participated in building from a world class system that people felt alienated from
 - South Africa requires corporations to build diversity, which is approached from the point of view of compliance – but what they don't get is that diversity is to be celebrated on the basis of a strong business case – it is a strength
 - In a commercial bank we don't think very much about dispute resolution, we focus on employee engagement as part of a high performing culture to be an employer of choice
 - Our organization is 10% above the market in the levels of employee engagement and their connection to the organization
 - Look to engagement as the primary measure and then look at stress related claims, absenteeism, use of outside tribunals
 - Employees never do nothing – it shows up somewhere

- Focus on systems implications of problems
 - 35 years ago president of MIT asked that no problem came back twice – empowered to find root causes and address them
 - A focus on looking for surprises – which surfaced issues such as sexual harassment, AIDS, staking, ergonomics and others long before they were widely recognized in society

- Example of introduction of dispute resolution systems across Southern Africa
 - First question is the deepening of democracy and the legitimacy of the government – but that can't be legislated
 - So there were no technocrats writing new dispute resolution laws behind closed doors or even focus groups – we began with a multi-stakeholder task force diagnosing the problems, exploring and debating the options – so what came out and was built into the law was something that they had a real hand in shaping – it was their architecture
 - A connection to some of the work of Larry Susskind

- Advice in establishing a Massachusetts Work/Family Council – beyond initiatives in separate workplaces – with many stakeholders involved and a supporting law – how to surface deep cultural assumptions in a multi-stakeholder process (people might agree on the issues, but the underlying cultural assumptions are more complicated – such as the common assumption that family matters are a private concern)
 - We have had experience in transformation charters – associated with racial and gender initiatives

- In talking about assumptions – give thought to the ground rules to make it safe for the people participating – ensuring people are non-judgmental, confidentiality, etc.

Concluding Comments – A Final Word of Advice:

- These concepts do apply to technology disputes – but it is important to recognize the role of substantive knowledge as well in these disputes – marry superior substantive knowledge with deep knowledge of dispute resolution systems
- This is a domain where there has not been a lot of thought on dispute resolution systems – so write down what you are learning – document the cases
- Keep it simple – if you apply fundamentals they will apply across a broad ranges of situations – problem analysis before jumping to solutions, focusing on interests before rights and rights before power
- Be fluid – be ready to shift from arbitration to mediation to other processes – able to mix and match as appropriate to the situation
- Move things up the food chain from dispute resolution to dispute prevention to changing the culture – keep it informal
- Push the envelope – be prepared to experiment in design and application – the sacred cows of yesterday are the buried carcasses of today
- Issues are easier to resolve than addressing underlying relationships
- Be as close as possible to the front end users of technology – to build prevention into the systems early on – hear from them and ensure that their use of technology is incorporated into the objectives of contracts or agreements