TOOLKIT 4

Resolving Corporate Governance Disputes

VOLUME 3 : TRAINING

Global Corporate Governance Forum

IFC International Finance Corporation
World Bank Group

MODULE 1 : What Skills Are Needed for Corporate Governance Dispute Resolution?

Having directors with dispute resolution skills on the board can make a tremendous difference on how corporate governance disputes are handled. With the right dispute resolution skills, the board can establish an effective process for surmounting opposing views and steering the company towards its strategic objectives. Without such skills, board deliberations may deteriorate as factions emerge, antagonism permeates directors' relations, and resentment builds up.

Not everyone is suited to serve as a mediator, peacemaker, or consensus-builder. Some personalities lend themselves better to these roles than others. Yet all directors - especially board leaders should strive to adopt interpersonal skills required for effective dispute resolution.

At times, boards will need to draw on third-party expertise to facilitate difficult conversations and untangle disputes within the boardroom or with external stakeholders. To be effective, third-party experts must have sufficient experience, expertise, and knowledge of corporate governance to deal with the complexity of corporate governance issues. Peacemakers typically listen well to others, are patient, command trust and respect, and have sensitivity both to governance dynamics and the very human and emotional issues that may underlie disputes.

THIS MODULE REVIEWS

- Director's conflict management styles
- Director's dispute resolution skills
- Third-party dispute resolution styles and ethics
- Third-party dispute resolution skills
- Third-party understanding of corporate governance dynamics

MODULE 1
WHAT SKILLS ARE NEEDED FOR CORPORATE GOVERNANCE DISPUTE RESOLUTION?

DIRECTORS DISPUTE RESOLUTION SKILLS

Discourse and debate are at the heart of the board's work and essential in making decisions, guiding the company, and ensuring that shareholders' interests are well-served.

Decisions should result from a process in which directors consider all the information available to them and engage in productive, vigorous, and focused discussions. Directors should be fully involved in these discussions, with procedures established to guard against dominance by one voice, particularly when decisions are being made.

Good board practices, such as clear objectives for meetings and shared norms, help to prevent misunderstandings and facilitate collegiality. The quality of board discussions, too, depends on directors' individual efforts to communicate their information to others and to be good listeners.[1]

Differences of opinion and judgment are inevitable during board deliberations. However, tensions may escalate, immobilizing the board — especially when the stakes are high and the company is making difficult strategic decisions. Directors may support positions based on power politics and personal agendas rather than on an issue's merits. When board relations become dysfunctional, opposing moves by directors tend to be interpreted as additional evidence justifying the impulse to be distrustful. A director may feel that, no matter what they say or do, they will be perceived as being wrong and their efforts will not be appreciated.

A dispute often takes a life of its own. It could be a minor tension that is easily resolved. At the other extreme, it could be an escalating "war" of words and actions that exacts tremendous costs and leaves disputants with emotional, professional, and other "scars" — harming the company in tangible and intangible ways.

TO REVIEW THE CONSEQUENCES AND IMPACT OF CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 1 MODULE 2.

At a dispute's onset, the relations among the parties involved tend to be strained as communications become more difficult. Perceptions of the issues and solutions may differ, based on cultural, personal, political, psychological, and other factors. Different levels of expertise, personal skills, intellect, and commitment also

QUOTE

Difficulties Communicating During Conflict

"As conflict emerges, we stop and take notice that something is not right. The relationship in which the difficulty is arising becomes complicated, not easy and fluid as it once was. We no longer take things at face value, but rather spend greater time and energy to interpret what things mean. As our communication becomes more difficult, we find it harder and harder to express our perceptions and feelings. We also find it more difficult to understand what others are doing and saying, and may develop feelings of uneasiness and anxiety. This is often accompanied by a growing sense of urgency and frustration as the conflict progresses, especially if no end is in sight."

JOHN PAUL LEDERACH
PROFESSOR OF INTERNATIONAL PEACEBUILDING
UNIVERSITY OF NOTRE DAME, INDIANA

SOURCE: John Paul Lederach, "Conflict Transformation." October 2003. Available at: http://www.beyondintractability.org/essay/transformation/?nid=1223.

shape a dispute's dynamics and each party's participation and influence. Emotions may enter into disputants' conduct particularly as self-confidence, the need to dominate and "win," one's sense of one's esteem and "rank," and other psychological issues converge to shape disputants' perceptions and behavior. These emotions add to the substantive disagreements and the actions that disputants pursue. Toleration for hostility, aggressiveness, or disrespect may exacerbate tensions among directors.

For boardroom debates to remain orderly and discussions with external stakeholders to be constructive, directors must understand and apply dispute resolution skills. Although some directors may have a natural talent for ironing out disputes among their peers, other directors will require training to:

- Understand the dynamics of corporate governance disputes
- Evaluate the risks and consequences associated with such disputes
- Become aware of one's personal conflict management style
- Build dispute resolution and interpersonal skills
- Develop sensitivities to cultural issues
- Learn ADR processes and techniques
- Know when to seek third-party help for managing and resolving internal and external governance disputes involving shareholders and/or other stakeholders

TO REVIEW A SAMPLE CORPORATE GOVERNANCE DISPUTE RESOLUTION COURSE FOR DIRECTORS, SEE VOLUME 3 MODULE 2.

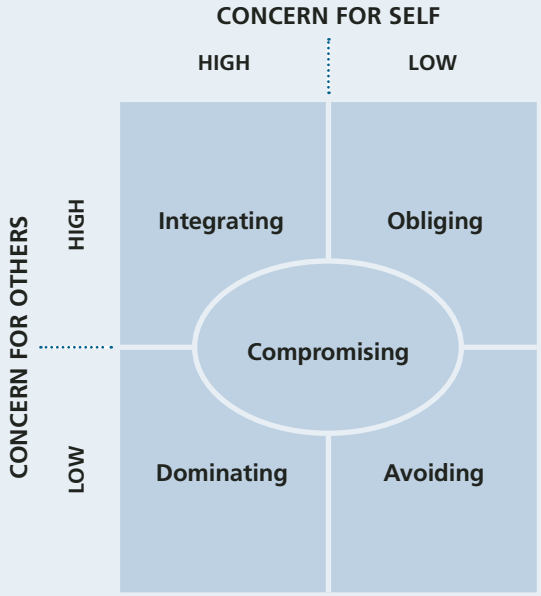
Conflict Management Styles

Conflict management literature provides many guidelines on how interpersonal conflict in organizations can be handled to maximize individual, group, or organizational effectiveness. To effectively and constructively prevent and manage corporate governance disputes, boards and directors must understand their conflict-management styles. In 1979, researchers Afzalur Rahim and Thomas Bonoma[2] differentiated the styles of handling conflict using two basic dimensions: **concern for self** (also referred to as "assertiveness") and **concern for others** (also referred to as "concern for relationship"). The first dimension explains the degree (high or low) to which a person attempts to satisfy his or her own concerns. The second explains the degree (high or low) to which a person attempts to satisfy others' concerns.

The combination of these two dimensions results in five specific styles for handling interpersonal conflict:

- ***Integrating*** (high concern for self and others).This style, also referred to as *collaborating or cooperating,* is associated with problem-solving. This approach involves openness, exchanging information, looking for alternatives, and examining differences to reach an effective solution acceptable to both parties. This style is often described as a "win-win" approach that

STYLES OF HANDLING INTERPERSONAL CONFLICT



SOURCE: M. A. Rahim and T. V. Bonoma, "Managing Organizational Conflict: A Model for Diagnosis and Intervention." Psychological Reports, *1979, 44, 1323-1344.*

satisfies the concerns of both parties and is associated with functional outcomes. A board whose dominating style is *integrating*, which is consistent with corporate governance best practice (namely, board members discuss and debate strategic decisions in a company's best interests).

- ***Obliging*** (low concern for self and high concern for others). This style, also referred to as *accommodating* or *harmonizing*, is associated with efforts to play down the differences and emphasize commonalities to satisfy the other party's concerns. An obliging person neglects his or her own concerns to satisfy others' concerns. This style is often described as a "lose-win" approach that satisfies the other party's concerns and is associated with functional outcomes. This style is typical for family firms' boards, where family members on the board defer to the founder. Interdependent relationships — directors serving on each other's boards — among peers may result in decisions based less on merits and more on nurturing those relationships. Directors, as fiduciaries, may not put personal interests and duties before the duties they owe to the company. Legal liabilities and time commitments may constrain directors' involvement in board discussions and actions, resulting in their being "obliging."

- ***Compromising*** (intermediate in concern for self and others). This style involves "give-and-take;" both parties give up something to forge a mutually acceptable decision. This style reflects board practice in which directors have the best interests of their constituencies at heart but follow well-established decision-making processes.

- ***Dominating*** (high concern for self and low concern for others). This style, also referred to as *"competing"* or *"directing,"* has been identified with win-lose orientation or with forcing behavior to win one's position. A dominating, highly assertive or aggressively competitive person works hard to win his or her objective and, as a result, often ignores other parties' needs and expectations. This approach is associated with dysfunctional outcomes. This style is predominant in boards where a director, but more typically the chairman or the CEO, may dominate the decision-making process and leave little room for debate and discussion. A chairman/CEO "cult" may prevail, resulting in directors' deference and reluctance to challenge "unanimous" decisions. Boards with more than one dominating personality are fertile terrain for disputes.

- ***Avoiding*** (low concern for self and others). This style has been associated with withdrawal or sidestepping situations. An avoiding person fails to satisfy his or her own concerns and those of the other parties. This style is often described as a "lose-lose" approach that does not satisfy either party's concern and is associated with dysfunctional outcomes. This style is predominant in passive or non-active boards where directors mainly rubber-stamp functions.

The literature indicates that the more cooperative conflict management styles, such as *integrating* and *obliging* (in which a meaningful amount of concern is shown for the other party), are likely to produce positive individual and organizational outcomes, while such antagonistic styles as *dominating* and *avoiding* (in which little concern is shown for the other party) frequently result in escalation of conflict and negative outcomes.[3]

In his conflict style inventory, author Ron Kraybill, explains that conflict management styles correspond to an individual's way of responding to conflict with others based on his or her preferences and habits.[4] There is no right and wrong style. Each conflict management style has its own strengths and weaknesses. Board members must be aware of their personal style and those of the other board members. When individuals do not know their preferred style, they run the risk of running on "autopilot" and reacting blindly. Directors who are aware of their own conflict management preferences, as well as those of the board, can make better choices. For example, directors should take time to connect with individuals who have an obliging style before settling down to serious business. When dealing with an individual whose style is avoiding, it is conversely important to give him or her adequate time to review both statements and documents and to take special care in engaging them in board discussions, and thereby benefit from their viewpoints.

PRACTICE

Conflict Management Style Questionaire

For each statement below, check the appropriate column, as it applies to your actual behavior on the board.		TRUE *4 POINTS*	SOMEWHAT TRUE *3 POINTS*	SOMEWHAT FALSE *2 POINTS*	FALSE *1 POINT*
1	I look at issues with others to find solutions that meet the company's best interests.				
2	I try to negotiate with board members and adopt a give-and-take approach to contention situations.				
3	I try to meet the expectation of the chairman and committee chairs.				
4	I argue my case and insist on the merits of my views.				
5	When there's disagreement, I ask questions and stay engaged with all board directors.				
6	When I find myself in an argument, I usually say very little and leave as soon as possible.				
7	I try to see conflict from both sides: I reflect on personal and directors' needs.				
8	I prefer to compromise when dealing with contentious issues and move on to the next agenda item.				
9	I find conflicts over strategic issues challenging and stimulating: I enjoy the battle of wits.				
10	Being at odds with other board members makes me feel uncomfortable and anxious.				

For each statement below, check the appropriate column, as it applies to your actual behavior on the board.		TRUE *4 POINTS*	SOMEWHAT TRUE *3 POINTS*	SOMEWHAT FALSE *2 POINTS*	FALSE *1 POINT*
11	I try to accommodate shareholders' wishes and the interests I represent on the board.				
12	I can easily figure out the decisions that need to be taken. I am usually proven right.				
13	To help break deadlocks on important decisions, I am willing to help meet others halfway.				
14	I avoid hard feelings by keeping my disagreements with other directors to myself.				
15	I may not always agree with the decisions taken at board meetings, but it is a small price to pay for keeping the board's peace and harmony.				

In the chart below, add the points for each statement as indicated. The row with the highest score indicates your most preferred conflict management style.

The row with the lowest score indicates your least preferred conflict management style.

Competing	**Total points for statement 4+9+12 =**
Avoiding	**Total points for statement 6+10+15 =**
Compromising	**Total points for statement 2+8+13 =**
Accommodating	**Total points for statement 3+11+14 =**
Collaborating	**Total points for statement 1+5+7 =**

SOURCE: Adapted from Timothy F. Dowty, My Counseling Site. *Available at: http://www.my-counseling-site.com/conflict_resolution_questionnaire.html.*

Board retreats and self-assessment sessions can serve as appropriate venues to discuss directors' conflict-management styles and preferences and to help deal constructively with existing or potential differences. When individuals know and understand each other's style, they are less combative, if not reactive. They are more likely to be patient with each other's responses.

Dispute Resolution Skills and Expertise

In managing the board's business and acting as its facilitator and guide, the chairperson (or lead director) must encourage productive board discussions and manage disputes. While conducting meetings, he or she stimulates debate, builds consensus, and ensures that disagreements are resolved constructively and in the company's (and shareholders') best interests. This creates an environment that encourages the directors to work together. The chairperson maintains control of proceedings without dominating discussions; each director is treated equally. Skillful questioning helps clarify issues and encourages the directors' full participation.

TO REVIEW THE ROLE OF THE BOARD IN PREVENTING AND RESOLVING CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 2 MODULE 1.

QUOTE

The Loquacious Director

"You may have a loquacious director, the fellow who's so articulate he feels he has to expound on every subject, sometimes even on both sides of the subject. I've had to give this kind of feedback: 'Sir, here is what your board is telling you. Your fellow directors love you, but you're so articulate that you intimidate them.'"

WILLIAM HOLSTEIN
COLUMNIST, "ARMCHAIR MBA"

SOURCE: William J. Holstein, "The Problems with Boards." Business Week, *December 27, 2007. Available at: http://www.businessweek.com/managing/content/dec2007/ca20071227_236732.htm.*

Being particularly attuned to board relations, the chairperson (or lead director) is typically expected to mediate between disputing directors. In some cases, a talented board member proactively serves as peacemaker by convincing directors to settle their differences with his or her assistance. Ultimately, all directors should be able to strengthen the board's corporate governance through dispute resolution practices. The board is collectively responsible for managing disputes in a timely, constructive manner. Enhancing the board's dispute resolution skills is a dynamic process, requiring board leadership and the willingness to learn and adapt.

Directors — especially those who have a collaborative conflict-management style — commonly draw on mediation techniques without always being aware of doing so to find common ground. Such peacemakers will ask questions, listen attentively, and encourage parties to resolve differences. They strive to bring clarity, improve communications, and re-focus attention on the company's interests. With the assistance of peacemakers, board directors, but also investors and other stakeholders, search for acceptable solutions to conflicting positions.

QUOTE

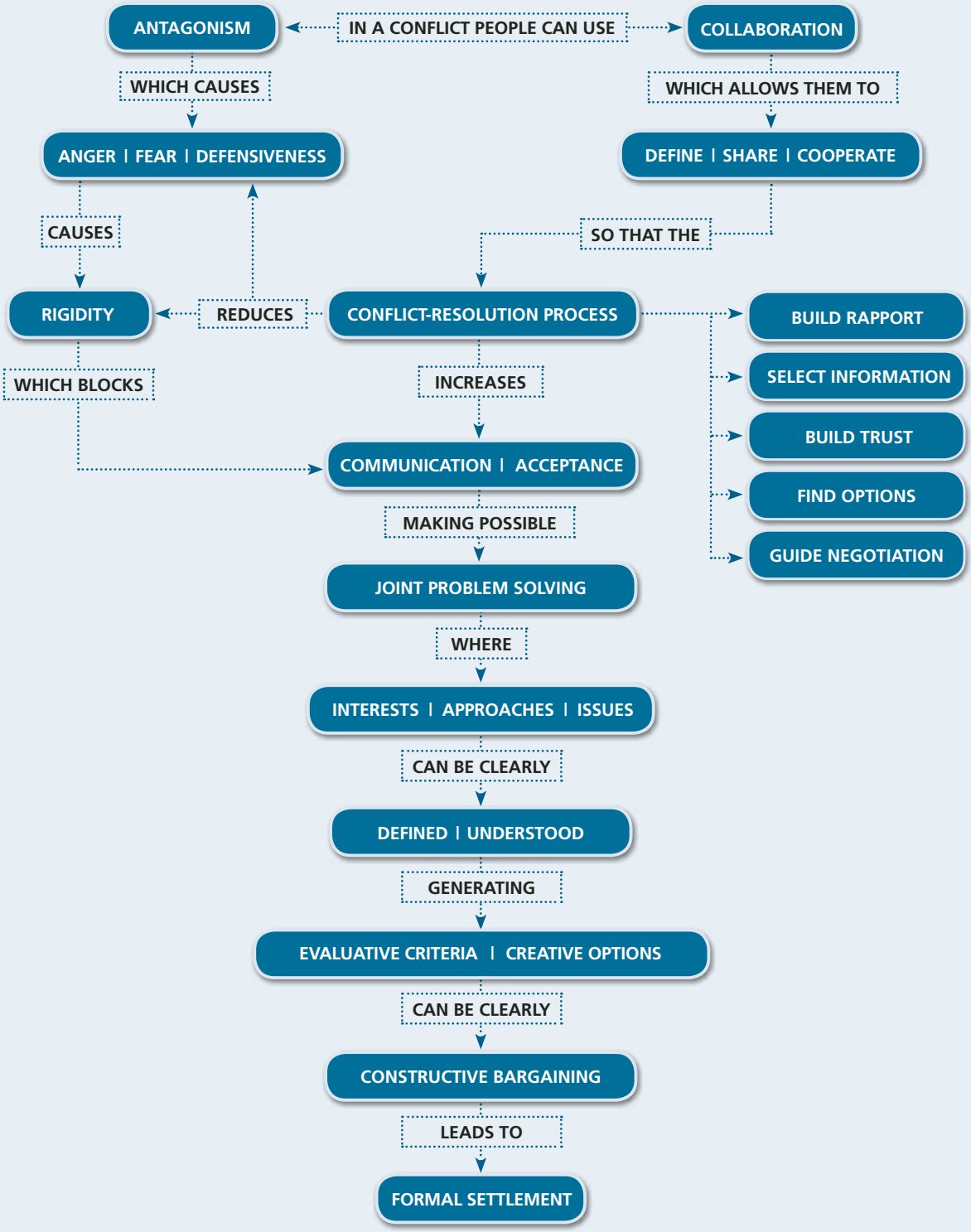
Successful Board Leaders

"It is the interpersonal skills of the diplomat that are paramount for helping directors and management find mutually acceptable solutions to common challenges. And because these skills are so subtle and don't always come with the job description, it is hardly surprising that choosing a lead director can be one of the most difficult decisions a board can make."

THEODORE DYSART
MANAGING PARTNER
HEIDRICK & STRUGGLES

SOURCE: Theodore Dysart, "Becoming a Super Lead Director." Directorship. *October/November 2008. Available at: www.directorship.com/media/2010/09/2010-DIRECTORSHIP-100.pdf.*

DYNAMICS OF DISPUTE RESOLUTION



SOURCE: History 30: Canadian Studies Curriculum Guide — Assessment of Skills /Abilities. *Available at:http://www.sasked.gov.sk.ca/docs/history30/images/conf.gif.*

CONFLICT RESOLUTION SKILLS LADDER

UNSKILLED INDIVIDUAL		SKILLED INDIVIDUAL
	Can negotiate a win-win solution	
▸ Inflexible ▸ Personal needs dominate ▸ Tries to use power to dominate (through aggression) or withdraw to engage sympathy	**6**	▸ Flexible ▸ Open-minded ▸ Assertive to look after personal interests
	Can generate various solutions	
▸ Limited to "fight or flight" options ▸ Focuses exclusively on own interests ▸ Argues for a position (which can be disguised as interests)	**5**	▸ Generates a variety of options ▸ Finds options that include both parties' interests
	Can empathize/take perspective	
▸ Unaware of others' feelings ▸ Cannot read feelings accurately ▸ Cannot "hear" the other person's interests ▸ Sees the other as "bad guy" ▸ Believes empathy means agreement	**4**	▸ Accurately reads others' emotions ▸ Responds sensitively a appropriately ▸ Listens to others' interests ▸ Knows the difference between empathy and agreement
	Can identify and express own interests	
▸ Only expresses their position (advocated solution)	**3**	▸ Knows the difference between positions and interests ▸ Expresses own interests in terms of wants/needs/fears/concerns
	Can verbally express own thoughts and feelings	
▸ Cannot verbalize own thoughts and feelings ▸ Unaware of own thoughts and feelings (blames others)	**2**	▸ Has a large feelings vocabulary ▸ Can identify own thoughts and feelings ▸ Can experience emotion without losing control
	Can contain/manage strong emotions	
▸ Cannot contain/manage emotion ▸ Yells, screams, fights, dissolves into tears, withdraws	**1**	▸ Can experience emotion without losing control
	CONFLICT	

SOURCE: Adapted from: M. Trinder and E. Wertheim, E. (2005). "Training Teachers in Building Empathy and Compassion in Young People" in M. Kostanski (Ed.), Proceedings of the Victorian Branch Australian Psychological Society Annual Conference. *Available at: http://www.latrobe.edu.au/psy/research/eris/.*

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Directors' Interpersonal Conflict Management Skills

Interpersonal skills are all the behaviors and feelings that influence interactions. Directors' job descriptions should include a section on interpersonal skills. These should include:

- Communicating effectively
  - Active listening
  - Assertive expression
- Instilling trust and confidence
- Respecting cultural sensitivities
- Building consensus
- Managing emotions
- Disagreeing constructively
- Learning agility
- Self-motivation

INTERPERSONAL SKILLS

SOURCE: University of Sydney. Available at: http://www.sydney.edu.au.

Throughout a dispute cycle, certain interpersonal skills and expertise can help board directors engage and manage tensions. These typically include:

Communicating Effectively

Effective communications among directors, with senior management and external constituencies, is essential for productive board work. Effective communications facilitates dialogue, engagement, and reduces obstacles toward solutions. Further, it helps prevent misunderstanding and narrows the disagreement's confines. "The leader must be able to share knowledge and ideas to transmit a sense of urgency and enthusiasm to others," said Gilert Amelio, President and CEO of National Semiconductor Corporation. "If a leader can't get a message across clearly and motivate others to act on it, then having a message doesn't even matter."

Communicating well starts with active listening. Good communicators are good listeners; being attentive and receptive to others' views helps to ensure collaborative, two-way communications. Active listening helps directors collect facts and information, assess situations accurately, and feel that they are being heard. Active listening involves rephrasing statements in a constructive manner and requires reading non-verbal cues, such as eye contact, voice tone, and facial expressions to understand intentions. Such skills as active listening and open-ended questioning (versus closed yes/no questions) may seem easy. In fact, the appropriate application of these skills requires careful observation, good judgment, and excellent timing. Re-phrasing statements in a constructive manner is not just using the right words or phrases but also includes engaging others to determine a common vision.

Communicating well also involves assertive expression. Directors need to clearly articulate their views so that all parties understand their points and are unlikely to misconstrue statements and opinions. This requires a good vocabulary that enhances one's diplomacy in articulating thoughts and debating with those holding contrary views.

Communicating well, furthermore, includes being aware of tone and body language and what it may communicate

to others. According to a study conducted by Albert Mehrabian in 1971,[5] face-to-face communications can be broken down to three elements: nonverbal, tone, and words. Words only make up for 7% of the communication while nonverbal cues 55% and tone 38%. This suggests that what an individual says is only a small fraction of what people hear. In the context of the boardroom, the root of most misunderstandings and continuing disagreements is based on the following four fatal assumptions:[6]

- Participants understand what has been communicated
- Participants agree with what has been communicated
- Participants care about what has been communicated
- Constituents know how to act according to what has been communicated

One of the biggest mistakes in executive communications is to take for granted how others receive what is being communicated. People exposed to the same information can end up with completely different ideas and understandings. This is why the process of perception — how individuals receive, organize, interpret, and retain information transmitted to them from another person — can be a key obstacle. The communications process is also complicated by the tendency of people to fill in the gaps — the process of closure — where information is missing with information consistent with what they already know, even if that information is neither relevant nor correct.

Instilling Trust and Confidence

It is common for people that work together, such as board members, to have a degree of trust and a degree of distrust about each other, simultaneously. Impartial board practices, such as ensuring that directors have fair

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Blocks to Effective Communications

The following attitudes constitute obstacles to effective communications. They can divert meetings from their objectives, create frustration, fuel resentment, and lead to open, unconstructive disagreement. These include:

- Interrupting
- Arguing
- Being condescending
- Lecturing
- Being moralistic
- Preaching
- Being judgmental
- Outdoing others
- Monopolizing conversations

GLOSSARY

Communications Frames

Choosing the right words is imperative to be an effective communicator. Words are deeply imbedded with images, emotions, and associations accumulated from individual and collective life experiences, creating "frames." Through these frames, people sift and process information, make judgments, and draw inferences about the world around them. Frames shape how we understand, interpret, and communicate.

Mastering the right lexicon based on words' unique frames can turn unpersuasive messages into persuasive ones, deepen engagement with key stakeholders, and strengthen trust in the process. Knowing how people 'hear' what we 'say' helps to ensure that messages are more clearly conveyed while narrowing the potential for misunderstanding, argues communications expert Frank Lunz. This demands that messages are credible, simple, brief, consistent, visual, and inspirational.

SOURCE: Frank Luntz, Words that Work: It's Not What You Say, It's What People Hear. *New York: Hyperion Press, 2007.*

opportunities to present their views, are most effective in developing trust and ultimately, consensus. Regardless of their position on the board, directors engaged in managing and resolving disputes must instill trust and confidence and be perceived as fair and impartial in the dispute resolution process — no matter how informal that process may be. Part of that trust, one lead director explains is "the confidence on the part of the other board members, and management that the message delivered won't be filtered by the messenger's biases." As the journalist Edward R. Murrow wrote: "To be persuasive, we must be believable; to be believable, we must be credible; to be credible, we must be truthful."

This set of skills requires knowing how to relate to others, to read people, and to find the basis for mutual respect, camaraderie, and, when needed, team-building.

Respecting Cultural Sensitivities

Culture is a set of learned beliefs and behaviors that shape the ways in which individuals and groups view and experience the world. Historical-political factors rooted in conflicts outside the boardroom can lead to stubbornness, blame, and rigidity in discussions.

Each person — including directors — brings to their social encounters unique worldviews, local perspectives, and behaviors shaped by the culture of their origin, which are learned in childhood and evolve through various affiliations (e.g., religion, ethnicity, class, and voluntary and professional organizations).

When the board's composition includes talented directors with varied technical, ethnical, social, and cultural backgrounds, the board is more likely to question assumptions and to weigh various consequences, leading ultimately to more far-sighted decisions. Diversity on the board is an asset. Indicators of the board's diversity remind individuals that differences of opinion are likely, and this expectation increases innovative thinking and the capacity to handle conflict. As a consequence, corporate governance disputes may be deepened by cultural differences.

Whether dealing with internal or external disputes, cultural skills are heavily dependent on observation skills and sensitivity to colleagues' perceptions of respect. During board meetings, for example, some directors may be time-conscious, efficient, and task-oriented. For them, time-management is a feature of professional practice. Other directors may place higher value on board hospitality and relationships.[7] From this perspective, strong emphasis on board tasks and efficiency is uncultured and disrespectful.

The most difficult problems to overcome are not about behaviors, such as whether to shake hands, but, instead, about those cultural issues related to shared and enduring values and beliefs associated with a particular group or community. Board directors should be cognizant that cultural differences may become obstacles to agreement when one party fears that the other will seek to impose values or beliefs as a form of domination. A minority

QUOTE

Culture Frames

"Culture is inextricably linked to the way people communicate because communication is largely dependent on perception. Our culture forms our frame of reference through which we interpret events, feelings, thoughts, and information. Hence our interpretation of reality is determined by the way we view the world, our beliefs and values. Culture forms the backdrop… of any interaction between people."

SHARANYA RAO
ASSOCIATE DIRECTOR OF PROGRAMS, ENVISION EMI INC.

SOURCE: Sharanya Rao, "The Cultural Vacuum in Online Dispute Resolution." Available at: http://www.odr.info/unforum2004/rao.htm.

person often fears dominance by a high-status group, and any sign of cultural superiority (or disrespect for minority values) is a potential threat.[8]

Building Consensus

Chairmen and lead directors especially need to facilitate discussions to encourage directors to "sign on" to standards of excellence in board practice and abide by their common agreement. Boardroom debate is essential but not an end itself. The chairman must ensure that issues get resolved and decisions are reached to allow the company to act. Decision-making should occur through consensus, a voluntary agreement following the deliberation and synthesis of different propositions. Generally, consensual decisions are less divisive than voting, which require directors to take opposing "yes" or "no" positions. However, the process tends to take a longer time than voting.

Consensus-building should not be confused with "groupthink," where directors follow the general trend of thought without questioning decisions. Consensus-building is about helping directors who hold opposing positions at the outset to come to a mutually beneficial and sometimes innovative agreement. As the poet Ralph Waldo Emerson once wrote: "Do not go where the path may lead; go instead where there is no path and leave a trail."

Skills contributing to consensus-building include:

- Open-ended questioning
- Respectful, effective communications
- Active listening
- Bringing issues to the surface
- Analyzing to deepen understanding and find patterns for organizing the information
- Describing common concerns
- Generating alternative solutions
- Prioritizing options using a cost/benefit assessment
- Agreements that monitor results, with contingencies

Consensus-building can occur outside board meetings in retreats and executive sessions. The chairman, lead director, or board member who acts as a peacemaker, may need to work behind the scenes and organize private meetings to find common ground. This requires time and commitment. Helping all parties converge towards a solution demands effective leadership, exerting one's formal and informal authority.

Managing Emotions

Emotions are intrinsic to conflict although not readily apparent — especially in the boardroom. In conflict, emotions are frequently translated into something more acceptable, such as making judgmental statements ("you are mistaken"), attributing intentions to others ("you refused to disclose this information to me"), or serving up solutions ("this is what needs to be done"). Directors need to be aware of any biases. Strong analytical skills and the ability to isolate emotional issues from substantive ones are essential in any business role, but are particularly critical in resolving disputes. Directors with strong interpersonal skills will find it easier to uncover sources of internal or external disputes, particularly when related to others' behavior. One should separate personal issues, personality traits, and emotions from corporate governance issues.

Yet, in many cases, the solution to a conflict will be difficult without acknowledgement of the feelings in play. This doesn't mean that directors should be "emotional" but that solutions to disputes require communicating feelings professionally before refocusing disputants on their fiduciary responsibility to act in the best interests of the corporation and its shareholders. R. Fisher and D. Shapiro share the following five tips for positively influencing the emotional climate during a conflict:[9]

- ***Show appreciation for all parties.*** This can be done by demonstrating an understanding for others' positions, recognizing the value of what they think, feel, or do. This does not mean that we have to agree with their position.

PRACTICE

Managing Conflict through De-escalation Techniques

De-escalating Disagreements:

- Listen attentively, show interest, and use open-ended questions.
- Manage time with balanced opportunities for opposing parties to express views.
- Minimize interruptions, blocking.
- Avoid the polarization of opinions. Elicit diverse perspectives from impartial directors.

De-escalating Avoidance:

- Ensure that all board members have opportunities to communicate concerns within the board meeting.
- Ask open-ended ("What are your thoughts about…?") questions of directors that act concerned yet seem reluctant to participate.

De-escalating Contentious Behavior:

- Stay calm, and be aware of body language and tone.
- State clearly practical and strategic objectives. Re-focus the discussion on constructive ideas and practical suggestions.
- Inventory document concerns. Request fact-finding questions.
- Take a break, or re-schedule discussions.
- Agree to disagree, or to address more difficult topics with the help of a respected third-party expert at a later date.

De-escalating Accusations:

- Stop personal attacks. Re-focus deliberations on the company's best interests and corporate governance procedures.
- Help reformulate ideas or statements. (Speak on behalf of self, using "I" statements. Identify concerns. Recognize uncertainty.)
- Take a break, or re-schedule discussion, as necessary.
- Determine an appropriate time and place to enforce board procedures and practices.

De-escalating Bullying:

- Review board norms and practices at the meeting's beginning.
- Determine an appropriate time and place to approach the aggressive party separately. Take appropriate action to prevent a repeat of aggressive behavior.

- ***Create a bond.*** This can be done by sharing information about common interests, asking about personal aspects.

- ***Respect the parties' autonomy.*** People like to make independent decisions. Give others the space to express their views. People who talk too much, for example, can threaten the others' autonomy.

- ***Acknowledge the other party's status.*** Status helps clarify one's position vis-à-vis the others.

- ***Highlight the other party's role.*** Board directors each play an important role. Each role must have substance, and the directors must be respected for their roles.

Disagreeing Constructively

At times, a board director has a serious concern about a board decision or the standards upon which the decision was made. Constructive dissent is the ability to challenge the majority view in a useful way. This skill can help prevent or limit "groupthink," the excessive group cohesion that precludes dissent and sound decision-making. The risk to an individual who challenges "groupthink" is that the majority will be critical and try to silence or pressure the "outlier" to cooperate. Disagreeing constructively requires courage and effective assertion. Various methods are used to pressure someone into agreement, including discounting expertise or using statements such as, "be a team player." Directors sometimes compromise their values and professional standards to maintain friendly, cohesive relations within the dominant group. The easiest response is to fall silent, hoping that another director will take a leadership role in addressing the issue.

A clear understanding of corporate governance responsibilities (and liabilities) will strengthen a director's resolve in challenging the board's majority opinion. The company secretary's documentation of dissent during board meetings provides procedural support for directors who dissent, as there is a record of the topic, the risks identified, and the board's responses.

Constructive dissent is most effective when proposed with careful preparation. A director is more likely to gain serious attention when presenting information with confidence using facts, examples, comparisons, and risk assessments. The company secretary is a vital resource for guidance regarding procedural matters, regulations, and precedents. Skills required to challenge a majority view include:

- Offer a concise statement of concern and proposal

- Offer factual support

- Provide clear examples

- Demonstrate active listening

- Respond with constructive feedback

Preparations may also include talking with the chairman in advance of the meeting to avoid surprises. If the board does not respond to the informed concern, with evidence of risk, a director may lobby others after the meeting, ask for an expert informant's assistance, seek a mediator, or, if warranted, resign from the board.

To properly and usefully apply interpersonal skills, directors must have:

- The appropriate industry or technical skills and understand their roles and responsibilities. A mastery of the issues facilitates disputants' ability to avoid obstacles resulting from poor preparation and confusion over terminology and other substantive matters.

- The willingness to devote enough time to planning and follow-up meetings outside the boardroom, to address those issues that may threaten board relations. Studies show that the amount of time directors devote to board matters is on the rise. One study shows that the time directors dedicate on average to their directorship in the United States went from 156 hours in 2001 to more than 200 hours in 2007.[10] This number considerably increases during crises and disputes.

Directors should also be aware of the obstacles that may prevent effective dispute management and resolution. "Disputants may stick to unrealistic reference points, may be subject to 'anchoring effects,' self-serving biases,

FOCUS

Assessing the Board's Interpersonal Skills

Board retreats provide opportunities to assess individual and collective interpersonal skills and expertise that improve governance practices and help manage disputes. The set of questions below can be used as a guideline to assess those skills:

- Are the board directors effective communicators?
- What are their respective strengths and weaknesses?
- Are board discussions focused yet sufficiently open to allow a broad range of viewpoints?
- Are there opportunities for individual board members to make presentations and lead discussions, particularly those relevant to their committee responsibilities and areas of expertise?
- Does the chairman balance the extroverts and introverts to ensure open participation in board deliberations?
- Do board directors relate well to one another and senior management?
- If not, what are the problems and their sources?
- Are there social, cultural, political, economic, or personal reasons creating tensions among board members and senior management?
- Have tensions among directors obstructed the board's ability to function? If so, why? What steps has the board taken to defuse personal animosities among board directors?
- Does the process that the chairman or lead director use to consider issues provide opportunities for reflection, analysis, debate, and consensus-building?

and 'reactive devaluation.'"[11] Some of the most common obstacles include:

- ***Anchoring effects.*** This common human tendency refers to a reliance on an "anchor," one trait or piece of information when making decisions. Placing too much importance on an "anchor" tends to cause errors in accurately predicting the utility of a future outcome. "Knowledgeable people are less susceptible to basic anchoring effects; anchoring appears to operate unintentionally and unconsciously."[12]

- ***Self-serving biases.*** There is a human tendency to make systematic errors in judgment, knowledge, and reasoning, biases that result partly from information-processing shortcuts. Self-serving biases, or illusory superiority, refer to tendencies to claim more responsibility for successes than failures and to evaluate ambiguous information in a way beneficial to personal interests.

- ***Reactive devaluation.*** Reactive devaluation happens when individuals try to create a mutually beneficial deal but find reasons to devalue the other party's offer once the negotiation begins. The devaluation of seemingly reasonable offers creates a barrier to further negotiation and settlement. "Research on reactive devaluation has consistently and convincingly shown that negotiators devalue objectively identical offers when they are made by the other party rather than by one's own party."[13]

THIRD-PARTY DISPUTE RESOLUTION SKILLS

Third parties may act as consultants, helping one side or both sides analyze the dispute and plan an effective response. Alternatively, they may act as facilitators, arranging the forum, setting agendas, and guiding productive discussions. More active roles for third parties may be either mediation or arbitration.

There are many cases when the board should rely on third-party experts to help resolve corporate governance disputes. These include when:

- Disputes can no longer be managed within the boardroom
- Tensions rise with dissident shareholders
- Local advocacy groups threaten the company's strategic development
- Former senior executives sue the directors

"When impartial third parties intervene in a conflict situation, new relational structures and possibilities for moderating the conflict are created," writes Paul Wehr, a professor at the Conflict Research Consortium, of the University of Colorado. "Introduction of a mediator, for example, changes both the physical and social structure of a conflict. New groups and sets of transactions appear with the third party. The presence of an observer tends to put contenders on better if not their best behavior. More accurate communication is facilitated by intermediaries. The issues, interests, and needs of the contenders become clearer with the help of such third parties. There may even be someone besides one's adversary to blame, as intermediaries sometimes divert blame toward themselves as a technique for transforming stalemate into resolution. Most importantly, third parties bring additional minds and skills for problem-solving to the conflict. The contenders are no longer on their own."[14]

Seeking third-party help can be especially effective in preventing disputes and managing difficult corporate changes, such as mergers and acquisitions, which are a

EXAMPLE

Lawsuits Increase Cost of Mergers and Acquisitions
United States: Securities Class Action Services

"The mergers-and-acquisitions market is heating up again," the *Wall Street Journal* reports in January 2011, "but a new raft of lawsuits claiming shareholders are being shortchanged threatens to complicate and increase the cost of the transactions." Studies show that investors are filing an ever-increasing number of lawsuits against corporations embarking on deals. According to Maryland-based Securities Class Action Services, the number of lawsuits filed in state and federal courts has increased from 36 in 2008 to 191 in 2009 to 216 in the first 10 months of 2010. The *Journal* notes that these so-called "strike" suits "rarely, if ever, scuttle deals. They occasionally lead to benefits for shareholders." Legal analysts say they have increased in recent years partly because the practice has proven to be lucrative for plaintiffs' lawyers who are able to zero in on which companies are eager to be rid of litigation and settle quickly.

COMMENT
Investors are holding boards more accountable for their actions through class action lawsuits. Lucrative compensation for plaintiffs' attorneys also explains the surge in these cases. Boards must become more skilled at resolving these disputes outside the courtrooms. The tensions these cases create for directors also underscores the need for boards to have effective dispute resolution procedures.

SOURCE: Searcey Jones, "First, the Merger; Then the Lawsuit." Wall Street Journal, *January 10, 2011. Available at: http://www..wsj.com.*

fertile terrain for disputes. Studies show that the number of shareholder-led lawsuits is on the rise, increasing merger and acquisition costs and causing deals to start on the wrong foot.

The ability to draw on a third party when necessary demonstrates the board's maturity and understanding of the dynamics of disputes. Various institutions, firms, and consultants can offer dispute resolution services. A third party can help facilitate strategic discussions, advise on ADR processes, or find effective solutions through mediation and arbitration.

TO REVIEW CORPORATE GOVERNANCE DISPUTE RESOLUTION SERVICE PROVIDERS, SEE VOLUME 2 MODULE 3.

FOCUS

Selecting Mediators: Process Versus Content

Two kinds of mediator's expertise were compared, which might affect disputants' judgment of mediators and their recommendations — process expertise and content expertise:

The mediator's particular content expertise about the details of the dispute appeared to be irrelevant if the mediator was considered to be an expert in the process of conflict resolution. When mediators were seen as process experts, disputants viewed them as more credible and were more favorably disposed toward engaging their services. These judgments extended to the mediators' recommendations. Those recommendations offered by process expert mediators were viewed as higher quality and were judged more favorably.

When the mediator was perceived as lacking process expertise, disputants' perceptions of how well the mediator understood the particular details of the dispute increased their evaluations of the mediator and the mediator's recommendation.

J. A. ARNOLD
PROFESSOR CALIFORNIA STATE UNIVERSITY

SOURCE: J. A. Arnold, "Influence of Third Party Expertise on Disputants' Reactions to Mediation." Psychological Reports, *October 2007, 101(2):407-18.*

When selecting third-party expertise to help manage corporate governance disputes, boards need to review individual experts based on their needs and a set of commonly agreed criteria including:

- Dispute resolution processes and styles
- Ethics, credibility, and trustworthiness
- Dispute resolution expertise and skills
- Corporate governance knowledge and exposure to directors and senior executives

Mediation qualifications, experience, and background — while some jurisdictions prescribe no generalized qualifications for mediators, in some specific contexts mediators require qualifications prescribed by legislation.

PRACTICE

Selecting a Mediator

When selecting a mediator to help manage corporate governance disputes, boards need to review the following:

- Mediation style or model offered, and whether it suits the case
- Professional affiliation, certification, and its value
- Training and education
- Professional background
- Experience practicing mediation
- Experience in the substantive area of dispute
- Conflict of interest
- Willingness to allow, and possibly encourage, mediation participants to seek creative solutions
- Availability and fees

PRACTICE

Evaluating Mediation Skills

MANAGE THE START-UP	
Excellent	Evidence of pre-planning was strong. First remarks (or formal opening statement were thorough, clear, concise, and set a tone encouraging collaboration.
Adequate	Some evidence of forethought and preparation. Opening remarks were adequate but could have been more thorough, clear, or concise.
Deficient	Mediator did not appear to have prepared in advance for the encounter. No opening statement or the explanations were cursory or inaccurate.
GATHER AND COMPREHEND FACTS	
Excellent	Asked neutral, open-ended questions. Summarized and paraphrased parties' statements. Succeeded in generating information about the most sensitive issues.
Adequate	Asked the obvious questions. Generally appeared to discover the facts, though not with great depth or precision. Understood obvious aspects of the facts and reasons with both sides.
Deficient	Asked few, mostly irrelevant, or overly directive questions. Appeared at a loss as to what to ask in follow-up questions. Disorganized or haphazard questioning, filled with gaps and untimely changes in direction. Was easily overwhelmed with new, complex information or confused by data. Missed important aspects of facts or reasons of one side or the other.
UNDERSTAND UNDERLYING POSITIONS AND INTERESTS	
Excellent	Encouraged disputants to focus on concerns and interests. Demonstrated an in-depth understanding of the scope, intensity, and contentiousness of the situation, and of the problems and interests not explicitly stated by parties. Clarified and reframed the issues and assisted parties in identifying priorities.
Adequate	Listened to disputants describe concerns and interests. Understood obvious aspects of the underlying reasons or interests of both sides. Some success at clarifying and reframing the issues.
Deficient	Avoided discussion of underlying concerns and interests. Missed important aspects of reasons or interests of one side or the other.
EXPRESS EMPATHY VERBALLY	
Excellent	Conveyed interest and respect to the parties. Questions were neutral and open-ended; listened respectfully. Helped parties improve their understanding of each other's concerns. Conveyed conspicuous sensitivity to cultural and other misunderstandings and addressed them effectively.
Adequate	Listened to others and did not antagonize them. Conveyed some appreciation of parties' priorities. Conveyed some sensitivity to cultural and other misunderstandings.
Deficient	Came into the discussion abruptly to challenge others. Dismissed others' warnings. Saw others' problems as of their own making and did not want to be bothered. Displayed insensitivity to cultural and other misunderstandings.

EXPRESS EMPATHY NONVERBALLY	
Excellent	Manner conveyed interest and respect to the parties. Non-verbal communication (gestures, body language, voice/tone, eye contact) was appropriate throughout. Manner conveyed conspicuous sensitivity to cultural misunderstandings and addressed them effectively.
Adequate	Manner conveyed some appreciation of parties' priorities. Non-verbal communication (gestures, body language, voice/tone, eye contact) was generally appropriate, but not consistent. Manner conveyed some sensitivity to cultural misunderstandings.
Deficient	Appeared to see others' problems as of their own making and did not want to be bothered. Non-verbal communication (gestures, body language, voice/tone, eye contact) was inappropriate. Manner displayed insensitivity to cultural misunderstandings.
CONVEY IMPARTIALITY	
Excellent	Manner of introductions and initial explanations showed equal respect for all disputants. Listened to both sides. Asked objective questions, conveyed neutral atmosphere. Demonstrated that he or she was keeping an open mind. Verbal and non-verbal communication did not favor either party.
Adequate	Generally showed respect for all disputants but questions and non-verbal communication sometimes showed he or she was more comfortable with one party than the other. Maintained a balance, but showed a better understanding of one party's goals and beliefs than the others.
Deficient	Asked misleading, loaded, or unfair questions exhibiting bias. Engaged in oppressive questioning to the disadvantage of one of the parties.
MANAGE THE PERSONALITIES	
Excellent	Had effective techniques for redirecting parties' focus away from sullen or otherwise unproductive colloquies. If humor was used, the use was appropriate to both the situation and parties' cultural and other perceptions. Managed all client/representative relationships effectively. Used effective techniques to deal with manipulative, domineering, and/or destructive behavior.
Adequate	Generally recognized signs that discussion had turned sour and took action to try to redirect it. Not always effective at lightening the atmosphere. Did not allow bullying by clients or representatives.
Deficient	Made little or no effort to provide perspective on the parties' problems or to engineer lighter moments. Allowed clients or representatives to control process in ways counterproductive to resolution. Use of humor was culturally or otherwise inappropriate.
ASSIST PARTIES IN GENERATING OPTIONS	
Excellent	Assisted the parties in developing their own options and evaluating alternative solutions for themselves. Demonstrated commitment to allowing full play to parties' own values. Vigorously pursued avenues of collaboration between the parties.
Adequate	Made some attempt to get parties to think about their dispute on a deeper level. Showed parties how some of their proposals and compromises interrelated with ideas of other parties. Allowed collaborative problem solving, but did not stimulate it.
Deficient	Made little effort to let parties have control over their fate. Ideas on collaboration-building were ineffective and unworkable. Blocked efforts at seeking collaborative solutions.

Evaluating Mediation Skills *(continued)*

GENERATE OPTIONS	
Excellent	If and when the mediator generated options directly, those options responsive to parties' concerns, timely, and put forth only after making strong efforts to focus on and stimulate the parties' collaborative problem-solving. An option was never presented with such force that parties would be likely to interpret it as the only one.
Adequate	If options were generated directly by the mediator, this was only after allowing for collaborative problem-solving, and options put forth were responsive to parties' most obvious concerns. Showed parties how some proposals and compromises interrelated with ideas of other party.
Deficient	Tried to come up with solutions individually, without letting parties have control over their fate. Ideas on substance were ineffective and unworkable. Prematurely tried to come up with solutions, pushing parties toward compromises prior to establishing essential facts.
ASSIST PARTIES IN GENERATING AGREEMENTS	
Excellent	Emphasized areas of agreement. Clarified and framed points of agreement. Assisted parties in evaluating alternative solutions. Showed tenacity throughout mediation. Packaged and linked issues to illustrate mutual gains from agreements. Clearly conveyed limitations to possible agreement and consequences of non-agreement for each party.
Adequate	Choices of what to present and manner of presentation did not compromise goals of resolution. May not have effectively helped parties get at some tough issues, thus sidestepping putting self and others in difficult situations at the cost of missing possible opportunities for joint gains.
Deficient	Failed to allow full opportunity for parties to find their own solutions prior to indicating any evaluation of the case. Presentations not well related to goals of resolution. Was difficult to understand or unclear in expression. Appeared flustered and uncomfortable most of the time; little or no confidence expressed.
GENERATE AGREEMENTS	
Excellent	Asked questions to highlight unacceptable and unworkable positions. Consistent use of reality testing. Effectively helped parties to move past apparent impasses. If substantive suggestions by the mediator were necessary, the suggestions demonstrated.
Adequate	Choice of when to press for action did not compromise primary goal of party self-determination. Generally demonstrated understanding of information the parties offered. Avoided advising parties on some tough issues even when no reasonable hope remained that the parties could achieve results without this help. Had significant difficulty moving the parties past apparent impasses.
Deficient	Did not initiate suggestions even when no grounds remained for believing that (within a reasonable time in the context of the case) parties could yet make mutually acceptable suggestions without direct intervention. Suggestions were premature or questionable (factually or legally). Readily withdrew when challenged or questioned. Little or no confidence expressed.

MOVE THE PARTIES TOWARD AN IMPROVED RELATIONSHIP	
Excellent	Encouraged and facilitated constructive interactions directly between the parties. Established atmosphere in which anger and tension were expressed constructively. Emphasized areas of improved mutual understanding. Progress of discussion demonstrated that mediator had helped improve the way the parties viewed each other. Helped the parties to understand the limitations of possible immediate agreements and consequences of a superficial approach for each party.
Adequate	Provided some opportunity for parties to interact constructively. Choices of what to present and manner of presentation did not compromise goals of relationship-building. Avoided asking some significant questions, thus sidestepping putting self and others in difficult situations at the cost of missing possible opportunities for improved understanding between the parties.
Deficient	Failed to lead parties toward greater mutual understanding. Did not initiate help; was inert rather than actively listening. Presentations not well-related to goals of relationship-building. Little or no confidence in the parties' ability to interact constructively, or to improve their future relationship, expressed.
MANAGE THE INTERACTION AND CONCLUSION	
Excellent	Made all decisions about managing the meeting, including caucusing, order of presentation, etc., consistent with rationale for progress toward resolution. Concluding statement accurately conveyed necessary information regarding compliance and follow-up in language appropriate to parties' culture and education.
Adequate	Controlled process, but decisions did not reflect a strategy for resolution. Did not dominate, but was not overwhelmed by factual or legal complexities. Concluding statement was adequately expressed and did not contain obvious gaps or inaccuracies.
Deficient	Encouraged discussion of issues or proposals with little relevance to potential agreements. Decisions on procedure and presentation were unjustified. Was confused or overwhelmed by factual or legal complexities.

SOURCE: Adapted from Christopher Honeyman, et al., Performance-Based Assessment: a Methodology, for Use in Selecting, Training and Evaluating Mediators. *Washington DC.: National Institute for Dispute Resolution,1995. Available at: http://www.convenor.com/madison/quality.htm.*

Qualifications usually revolve around knowledge of the theory and practice of conflict, negotiation and mediation, mediations skills, and attitudes appropriate for mediation. There are three factors of relevance: experience in practice of mediation, experience in the substantive area of the dispute, and personal life experiences.

It is not always the case that a dispute resolution expert can personally be identified or agreed upon in advance. This is especially true when mediation procedures are derived from standard dispute resolution clauses embedded in such contracts as shareholder agreements. Typically these clauses stipulate the choice of mediator in advance rather than allow the parties themselves to choose a mediator previously known to them. There is a qualitative difference between clauses that give the appointing body the right to impose the mediator as it may choose and clauses that permit an appointing body to suggest a mediator for the parties to accept or reject. Standard form contracts may choose either approach. In shareholder agreements, the parties' willingness to mediate at all may depend on the confidence invested in the nominating body, specifically whether that body is a professional organization that effectively guarantees that the mediator is a practicing professional operating under that body's ethical standards.

Mediation Processes and Styles

Based on their objectives, needs, and the issues to be resolved, boards can select various ADR processes, which range from simple facilitation of retreats to formal arbitration of cross-border shareholder disputes. To choose the best approach suited to them, directors should be aware of all the processes available to them and third-party experts should provide guidance on selecting the right approach.

TO REVIEW STANDARD ALTERNATIVE DISPUTE RESOLUTION PROCESSES AND THEIR RESPECTIVE BENEFITS, SEE VOLUME 1 MODULE 3.

Mediation is the most common and most flexible process for resolving corporate governance disputes and does not preclude the use of other processes, such as arbitration or court litigation.

FOCUS

What Does a Mediator Do?

- Bring parties together
- Establish communication and set an atmosphere for negotiation
- Help negotiate agendas and clarify issues to be addressed
- Help parties obtain data they need to make decisions
- Facilitate joint sessions and call caucuses
- Clarify interests, priorities and alternatives to an agreement
- Help parties explore ideas for creative solutions
- Identify overlapping interests or areas of potential agreement
- Help parties agree on criteria to evaluate solutions
- Record agreements as they develop
- Facilitates communication in the mediation process
- Encourages the exchange of information
- Helps the parties to understand each other's views
- Promotes venting or emotional expression in a safe environment
- Shifts the focus from the past to the future
- Sometimes, suggests proposed solutions (evaluative style)

SOURCE: John Barkai, "Using Alternative Dispute Resolution Techniques In Construction Disputes." Papers from the 3rd International Symposium on Infrastructure Management and Financing, *Kyoto University, Kyoto Japan.August 31, 2003. Available at: http://ssrn.com/abstract=1435381.*

As discussed by author Christine Leick[15] there are different mediation styles to choose from:

- ***"Facilitative" mediation.*** *Webster's Dictionary* defines "facilitation" as "to make easier," and it is certainly the desire of every mediator to make the process easier for the parties. Facilitative mediation may be defined as a forum in which a neutral third party facilitates communications between parties to promote settlement. A mediator may not impose his or her own judgment of the parties' issues. The "facilitative" mediator typically exercises a strong influence over the mediation process, but does not attempt to control the outcome. He or she focuses on priorities and agendas, factual information, discussion of needs and options, and typically produces written reports.

- ***"Directive" mediation.*** An extremely facilitative mediator may not intervene between the parties much at all. Thus the word "directive" can be used to describe a type of facilitative mediation in which the mediator is more involved in giving legal information (but not advice) and directing the process. A directive mediator may appear less concerned about the parties' relationships and more concerned about making progress toward settlement. The directive mediator focuses the parties on reaching agreement much more quickly than the typical facilitative mediator. Mediators are likely to be more directive when they are mediating under a deadline, such as an upcoming trial date.

- ***"Evaluative" Mediation.*** *Webster's Dictionary* defines the word "evaluate" as follows: "to determine or fix the value of, to determine the significance or worth of, usually by careful appraisal and study." A mediator should recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the parties' abilities to reach a voluntary, un-coerced agreement. This approach permits the mediator to evaluate and assess both the facts and the law and then provide not only an evaluation, but also settlement suggestions. The mediator may provide information about the process, raise issues, offer opinions about the case's strengths and weaknesses, draft proposals, and help parties explore options. The mediator helps find a voluntary resolution of a dispute. Parties should be given the opportunity to consider all proposed options. It is acceptable for the mediator to suggest options in response to parties' requests, but not to coerce the parties to accept any particular option. The parties have the primary responsibility for the resolution of a dispute and the shaping of a settlement agreement. A mediator shall not require a party to stay in mediation against the party's will.

  The purely "evaluative" mediator typically responds to the case's facts and the parties' discussions and/or arguments by suggesting how he or she believes that one or more matters could be resolved.

- ***"Transformative" Mediation.*** *Webster's Dictionary* defines "transformative" as "to change in character or condition." Transformative mediation typically involves the least amount of intervention by the mediator. In fact, practitioners of this approach, created by Baruch Bush and Joe Folger, would not describe transformative mediation as a style. Rather, they refer to it as a framework. If the above styles are laid out on a continuum from the least amount of intervention to the most intervention, the transformative style would precede the facilitative style. Whereas other forms of mediation are based upon traditional conflict theories, such as competing rights or meeting needs with limited resources, transformative mediation is grounded in relational theory that views conflict as a crisis in human interaction. The goal of the purely "transformative" mediator is to help people change the quality of their conflict interaction. He or she listens to the parties' conversations, looking for opportunities to empower each party to move from weakness to strength. In addition, he or she focuses on the movement from full self-absorption toward responsiveness to the others' needs. The parties control the process and the outcome. Thus, the transformative mediator is much less active than the "facilitative" or "evaluative" mediator.

While the control over process and outcome, afforded to the parties by a purely facilitative mediator, may be very attractive to certain clients, others may feel that they

are not receiving enough assistance from their mediator. Facilitative mediation will not meet all the parties' needs unless it also includes transformative and evaluative techniques.

Transformative mediation may be the most spiritual form of mediation, and the truest generator of client self-determination. But facilitative skills are needed to keep the parties on track, organize information, and memorialize agreements.

Evaluation and suggestion can often lead to settlement. However, these techniques should be used only if all else fails. If they are used early in the process, or to the exclusion of other techniques, the parties are deprived of the opportunity to discuss their needs, explore settlement options, and reach agreement without the mediator's judgment. In addition, if an evaluative style must be adopted, it will be more effective after the parties have become comfortable with the mediator and are confident in the mediator's impartiality. It is best used when the parties' lawyers are present, since they can assist their clients in "evaluating" the mediator's analysis, effectively responding to the mediator's recommendations, and achieving final agreement. An evaluative mediation session is more like a settlement conference (with the neutral third party acting as a private "judge") than it is like true facilitative mediation.

QUOTE

Approaches to Mediation

"There is no one single approach that is appropriate or effective for a mediator to use all of the time in every case. Many conflicts require various different interventions over the course of the mediation of a dispute. Effective mediators must use different styles of intervention based on the needs of the parties, as disputants often need more than process assistance from a mediator. They frequently need understanding, engagement, creativity, strength, wisdom, strategic thinking, confrontation, patience, encouragement, humor, courage and a host of other qualities that are not simply about process, including advice about substance.

"Our approach depends on the case and the format requested by the parties, but generally we are merits-based mediators. When requested, and where the parties and the process would be best served, we will assist on a more evaluative level. We believe that persistence, a not-too-large ego, and good humor are all good characteristics of a facilitator/mediator of complex, multi-interest disputes. In complex cases such as we generally mediate, parties expect the mediator to be familiar with the issues under discussion and for the mediator to be actively engaged in negotiations."

PRESS, POTER & DOZIER, LLC

SOURCE: http://www.presspotterlaw.com/Analytical-Mediation.shtml.

A generation of ADR professionals has been trained largely in an approach that emphasizes problem-solving and self-determination. Often referred to by mediation teachers among themselves as the "American model," this approach may be potentially inappropriate, for example, in a collectivist culture.

In thinking about the skills and qualities of directors and a dispute resolution professional, the disputants' cultures within the wider corporate environment should be considered. In some cultures, disputants expect a third party to serve as a source of wisdom and be assertive in directing them toward a solution. This expectation may be derived from a combination of age, social, or professional status, or such other factors as the level of responsibility within a religion. If a third party is not acceptable to the board or other parties involved, an alternative would be to identify a mediator who demonstrates appropriate intercultural expertise or or has received special training in intercultural disputes. Such training is now offered by an increasing variety of institutions.

If such an evaluative mediator is not acceptable to all parties involved, an alternative is to insist on a mediator who can demonstrate that he or she has received and absorbed special training in intercultural disputes. In this case, the qualities of the ADR professional and the ADR process in relation to a national culture should be considered, as well as the professional, ethnic, industrial, and other cultures in which the dispute arises. There is an

increasing need for mediators to be culturally adaptable, since the "culture of the corporate boardroom" may be sharply different from the professional, indigenous, local, regional, or national culture of one or more parties with whom the board finds itself in a dispute. Corporate governance issues can include issues in which key stakeholders in the company's future share few cultural assumptions with the company's management; any mediator who hopes to be helpful in that situation must be sensitive to both cultures.

In corporate governance cases, the type of mediation to be sought will depend on the:

- Board and the parties' conflict management style
- Issues involved
- Cultural setting
- Personalities involved

If the settlement is likely to be something like "party A will pay party B 10-million Euros," evaluative mediation may be required. However, if the settlement is likely to involve continuing relationships which need to move into a new phase, or an apology, a facilitative mediator's style is more likely to help the parties make progress.

If the mediator is expected to serve as an evaluator, both corporate professional gravitas and substantive knowledge can be extremely helpful. The proof of this is the prevalence of former high-level corporate officers and former civil or appellate court judges among the mediator rosters of firms that are known for evaluative mediation. But often, a more facilitative mediation style is warranted, perhaps because the most advantageous settlement of the dispute cannot be essentially expressed in a number. For the reasons described above, a mediator having every desirable quality is no more likely to be found than is a perfect human being. So trade-offs are necessary. When the trade-off in a facilitative mediator for additional substantive knowledge, or for experience serving at a high level in a corporation, is some compromise on the level of empathy, investigative skill, or one of the other qualities described above, the company is likely to find it ultimately to be a bad bargain.

"Transformative" mediators are less frequently used in a high-level corporate setting, at least under that name. Paradoxically, however, a mediator with transformative skills can be extraordinarily helpful as the "internal board conflict specialist" because this, among all kinds of mediators, is most appropriate to helping others develop constructive long-term relationships that are critically important within the board itself. This suggests that, as

PRACTICE

Inviting an Opening Statement from Each Party: Styles and Approaches

The approach selected by the mediator to invite parties to each make an opening statement can influence the tone and style of the discussions that follow. Options include:

- Fact-based approach: "Tell me the history and facts in this case as you see them."
- Positional approach: "Tell me what you are here for, what would you like to achieve in the mediation."
- Narrative approach: "Tell me what happened and what effect it had on you."
- Problem-solving approach: "Tell me what decisions need to be made today."'
- Procedural approach: "Tell me first how you thinking we should go about resolving the problems that we are dealing with."
- Interest-based approach: "Tell me what your concerns are today."

SOURCE: http://www.mediate.com/articles/bryson.cfm.

these principles become better known, the relatively rare person who has both the self-effacing qualities of a true transformative mediator and extensive corporate board or high-level management experience should be in great demand.

Ethics, Credibility, and Trustworthiness

ADR professionals must be able to command the disputants' trust and confidence. They must be considered by all the parties involved as independent and impartial. A reputation for strong ethics and an empathetic manner helps the ADR professional in creating the right environment to support ADR.

One of the toughest issues to consider is the concept of fairness, the fulcrum on which a successful ADR outcome rests. As Lord Nicholls of Birkenhead opined: "Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder." The disputants' perceptions of fairness are influenced by the way in which the board engages an ADR expert. These perceptions also result from "the impact on clients of mediators' informal decision-making and the informal qualities of treatment they receive are critical factors in establishing whether or not the process is perceived as fair by those participating in mediation. Fairness must be seen in order to qualify as such."

ADR professionals routinely describe themselves as "professional neutrals." The word "neutral" is heavily advertised by the field as one of its practitioners' key characteristics. Yet, neutrality is an approximation. With the best of intentions, ADR professionals, and all humans, are vulnerable to biases, not all of which they are fully aware:

- ***Personal biases.*** Biases in favor of or against a particular point of view or party are called personal biases. They are the most obvious type. The paradox arises from the fact that virtually all ADR professionals pride themselves on avoiding personal biases.

  It is common, however, for a party to perceive a bias, based on a mediator's questions or other actions that the mediator is unaware convey bias. The principal problem with a perceived bias is that parties find it difficult to have an open, straightforward discussion with a mediator whom they suspect is biased; they may "shut down," thus preventing the mediator from correcting what may be a mistaken impression.

  If bias is suspected, directors should discuss it with other board directors, and consider raising the concern straightforwardly but respectfully with the mediator. The air can be cleared more easily than seems apparent at first.

QUOTE

Building Trust and Confidence

"Gaining the trust and confidence of the parties is the most important element in mediator success. The mediator's skills are also important, but less often cited as reasons for mediator success than the mediator's confidence-building attributes. Finally, and of considerable importance, there is no single model of the successful mediator. Different mediators succeeded on the basis of different combinations of attributes and skills."

STEPHEN B. GOLDBERG
MEDIATOR AND PROFESSOR OF LAW AT NORTHWESTERN UNIVERSITY

MARGARET L. SHAW
MEDIATOR WITH JAMS AND TEACHER AT NEW YORK UNIVERSITY LAW SCHOOL

SOURCE: Stephen B. Goldberg and Margaret L. Shaw, "The Secrets of Successful (and Unsuccessful) Mediators." Dispute Resolution Alert. *Winter 2008. Available at: http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2008-Winter.pdf.*

- ***Situational Bias.*** Less obviously, mediators and other ADR professionals are vulnerable to what has been called "situational" bias.[16] Situational biases arise from a mediator's connections to and possible obligations towards persons or parties not directly involved in the dispute. For example, the obligation not to embarrass the corporation may be keenly felt by a mediator appointed by the board, especially if the ADR professional is a "repeat player" with strong links to the CEO or another corporate professional. Parties certainly need to consider these limitations in selecting an ADR professional and discussing confidential matters. ADR professionals should be willing to discuss any potential limitations that they have. A refusal to take such concerns seriously can be considered a warning sign.

EXAMPLE

Avoiding Conflicts of Interest
USA: AAA

"No person shall serve as an evaluator in any dispute in which that person has any financial or personal interest in the result of the early neutral evaluation, except by the written consent of all parties. Prior to accepting an appointment, the prospective evaluator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties."

SOURCE: AAA, Early Neutral Evaluation. Getting An Expert's Assessment: Practical Guidelines and Steps for Getting Started. 2*005. Available at: http://www.aaauonline.org/upload/223188376_Early%20Neutral%20Evaluation.pdf.*

FOCUS

Codes of Conduct

Mediators typically abide by a professional code of conduct that mirrors the underlying principles of mediation. The most common aspects of this code include:

- A commitment that requires participants to be informed about the mediation process.
- The need to adopt a neutral stance is provided to all parties to the mediation, revealing any potential conflicts of interest.
- The requirement for a mediator to conduct the mediation in an impartial manner.
- Within the bounds of the legal framework under which the mediation is undertaken, any information gained by the mediators should be treated as confidential.
- Mediators should be mindful of the psychological and physical well-being of all the mediations participants.
- Mediators should not offer legal advice; rather, they should direct participants to appropriate sources for the provision of any advice they might need.
- Mediators should seek to maintain their skills by engaging in ongoing training in the mediation process.
- Mediators should practice only in those fields in which they have expertise gained by their own experience or training.

SOURCE: Wikipedia, Mediator Codes of Conduct. *Available at: http://en.wikipedia.org/wiki/Mediation#Choice_of_mediator.*

- ***Structural Bias.*** Most obscure is a class of biases that has been described as structural.[17] Ideally, both parties can expect to be treated equally. But in practice, if there are sharp differences in power among parties, the more powerful party may find itself constrained (to a degree) by the need to defend its ideas and proposals in the face of a mediator's questioning, thus playing more within the weaker party's frame of reference.

A vulnerable party may distrust the mediator and find the entire process biased against the group's interests. Seeking agreement among contending parties, inevitably, leads the mediator to look for accommodations that are workable for both sides, and such accommodations are more likely to appeal to the moderates than to those on the extremes.

These situational and structural biases must be seen in perspective. Other problems and, in many cases, even worse biases become attached to litigation and other dispute resolution methods. Experienced, sophisticated parties take into account the inherent limitations of all. ADR processes the personal limitations of even the best professional, and then designs strategies to fit the particular situation.

Dispute Resolution Skills and Expertise

Boards must make sure that a mediator under consideration is not completely lacking in any of the requisite skills. Third parties called on to resolve corporate governance disputes need many of the broad professional negotiation and mediation skills, but with different emphases, plus additional capabilities unique to dealing with corporate governance issues. Their training, acquired skills, and expertise must meet the multi-faceted demands of a process requiring "reconciliation of differences, apology, and forgiveness of past harm, and the establishment of a cooperative relationship between groups, replacing the adversarial or competitive relationship that used to exist."[18] Experts should nevertheless be cognizant that the stakes in corporate governance disputes are often higher and involve strong, well-rounded personalities. Resolving corporate governance disputes typically involves smoothing over tensions. These tensions are rooted in three areas: between creating and distributing value, between empathy and assertiveness, and between the interests of principals and agents.[19]

To succeed in handling the procedural, psychological, substantive, and interpersonal demands of these tensions and the inherent dynamics of dispute resolution, Creighton University Professor Bernard Mayer writes that a third party must have "a way of thinking, a set of values, an array of analytical and interpersonal skills, and a clear focus."[20] Corporate governance adds its own complexities to the process.

Third parties handling dispute resolution must be skillful communicators to establish trust among the disputants,

FOCUS

Preserving and Augmenting "Face"

A natural question — never far from the mind of a CEO or chairman when faced with a dispute within or involving the board — is how to "save face," and perhaps, too, how to help other board directors do so. One's dignity and reputation, however, may not only need to be saved, but can also be augmented by adroit handling of conflict. In this context, the CEO and/or chairman must conspicuously maintain operating control.

Given the unpredictable environment often surrounding an emerging dispute, the best single action that a CEO can take is to persuade the board to adopt appropriate standing principles in advance, at a time when no immediate dispute threatens to inflame passions and distort judgment.

Making it clear to all concerned that the conflict specialist is acting on the CEO's behalf goes a long way toward ensuring cooperation elsewhere in the organization, while preserving the CEO's right to amend or reject any conclusions or recommendations that the conflict specialist may make. Whether the conflict specialist has direct access to the board is also at the CEO's discretion. Describing the conflict specialist's role as one that is delegated by the CEO also makes clear that the conflict specialist is not there to undermine the CEO's authority, but to execute it.

maintain a position of neutrality, and effectively negotiate a solution, all the while explaining complex issues and the ADR process in ways that all parties understand. "There are two important skills in effective communication: assertive behavior, i.e., clearly expressing what you feel and saying what you want; and active listening, i.e., listening in an understanding, non-judgmental and supportive way."[21] These skills are essential in conducting the "three conversations" typical in the dispute resolution process: "the 'What happened?' Conversation, the Feelings Conversation, and the Identity Conversation."[22]

In the 1990s, the Hewlett Foundation and the National Institute for Dispute Resolution produced *Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators.*[23] The report proposed general measures of competence for mediators and a methodology for performance-based assessments as predictors of success. The qualities listed below are those the report considered "likely to be needed most to perform the most common and essential tasks of a mediator." Although dated, these qualities are relevant for third parties involved in corporate governance disputes.

- ***Investigation.*** Effectiveness in identifying and seeking out pertinent information
- ***Empathy.*** Conspicuous awareness and consideration of others' needs
- ***Impartiality.*** Effectively maintaining a neutral stance between the parties and avoiding undisclosed conflicts of interest or bias
- ***Generating options.*** Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties
- ***Generating agreements.*** Effectiveness in moving parties toward finality and in "closing" agreement

PRACTICE

Framing the Issues

When trying to frame an issue with accuracy as people see it and without bias, several attempts are made until parties agree with the description. Here are some guidelines for effective framing:

- Always frame using neutral language. Use objective and blame-free language. For example, "We are here discussing the failure of party A to pay their membership" (blaming). "Let us begin our discussions about non-payment of membership dues" (neutral and factual).
- Move participants from positions to interests.
- Defuse hostilities.
- Try to clarify the issue from a neutral, third-party perspective.
- Deal with one issue at a time.
- Get agreement that both parties want to resolve the issue.
- Be short and concise.
- Frame, don't solve.

Once the issue has been framed to both parties' satisfaction in a clear, and neutral manner, resolution becomes much easier. As discussion progresses and both opinions and positions change, it is appropriate to reframe the issue to ensure everyone continues to focus on the same points.

SOURCE: International Federation of University Women. Workshop on Conflict Resolution: Participant Workbook. *Geneva, Switzerland: IFUW, 2001. Available at: http://www.ifuw.org/training/pdf/conflict-participant-2001.pdf.*

Mediator's Core Skills

Alertness	Mediators need to concentrate on developing the parties' trust and confidence, especially in the initial phase of mediation when introductions are made and they need to hear the parties' statements carefully. He or she needs to be alert to statements during the mediation. The mediator must also respond periodically to parties' concerns; he or she can only achieve this by being alert and listening carefully.
Patience and Tact	Mediation is focused on achieving a win-win solution for disputants. A mediator should be patient and deal tactfully with each party. The mediation proceedings should focus on an outcome acceptable to both parties. Confrontations between the parties should be avoided. Mediation is a process which may take a long time and, therefore, may terminate with an inconclusive ending. Joint and separate sessions may take longer than expected; therefore, mediation should not be rushed to achieve a successful outcome but rather work with parties to help them resolve a dispute. A mediator is expected to entertain parties' concerns equally and should not convey the impression that he or she has any interest beyond their role as the mediator.
Credibility	A mediator should have impeccable professional integrity and good reputation. His or her professional reputation is their most valuable asset. The mediator's credibility will be determined not only by his or her competency in the art of mediation, but also by their neutrality and ability to understand parties' concerns and help them further their ability to maneuver through challenging aspects, such as ethical issues.
Objectivity and Self-Control	He or she should be objective and willing to determine material facts surrounding a dispute, which requires patience and self-discipline.
Adaptability and Demeanor	The mediation process is focused on evolving consensus between parties on how to best resolve a dispute — rather than being adversarial (e.g., litigation) or competitive (e.g., arbitration). A mediator has to adapt his or her demeanor to suit the role. He or she should be understanding, trustworthy, and have a conciliatory approach.
Initiative	The mediator should be able to help parties understand their positions better and prepare them for trade-offs when necessary. Mediators have to provide options or work with parties to present their options to each other. The negotiation part of mediation can only lead parties to amicable settlement if the mediator takes suitable initiatives to help parties bridge their gap.
Subject Matter Expertise	In general, mediators are generalists and do not work full-time as mediators (this is true for mediators in jurisdictions where mediation is not a full-time profession). Having a subject matter expertise can be problematic as mediators may focus on issues that are not relevant to mediation or restrict parties in resolving a dispute. However, his or her understanding of the rights and duties of a company's stakeholders, and the nature of corporate governance related disputes can be helpful in resolving such disputes. Having boardroom experience is an additional qualification that can help him or her better understand board dynamics in resolving disputes involving board members and senior managers.

SOURCE: IFC Advisory Services. Pakistan ADR and Corporate Governance Projects. 2010

FOCUS

Desired Characteristics in a Corporate Governance Mediator

Experience

- Board experience as a director or as an advisor, counselor, or corporate official who has regularly attended board and committee meetings
- Knowledge of corporate governance legal requirements and best practices, as well as implementation of governance practices
- Knowledge and skill in the use of negotiation and "peacemaker" techniques, including mediation techniques
- Ability to understand and analyze complex business issues

Personal traits

- Listens well
- Asks questions in a way that elicits the desired information and does not put the respondent on the defensive
- Is not judgmental in dealing with people and situations
- Is patient
- Relates well with other people without regard to status, background or culture
- Gains trust quickly and easily
- Is a consensus builder
- Communicates clearly and thoughtfully
- Is diplomatic and tactful

- ***Managing the interaction.*** Effectiveness in developing strategy, managing the process, and coping with conflicts between clients and representatives
- ***Substantive knowledge.*** Adequate competence in the issues and type of dispute to facilitate communication, help parties develop options, and alert parties to relevant legal information

Corporate Governance Knowledge and Exposure

It can be extremely valuable to have significant substantive knowledge as to the underlying problems in a dispute. ADR experts should understand how boards operate and other corporate governance matters so that they can be sensitive to the issues and quickly understand the parties' positions. For example, if the CEO foresees that some board members are likely to resist a strategy or particular tactics (or concessions) which the negotiation

FOCUS

Substantive Knowledge Required of Mediators

Substantive knowledge can be specified at several levels. There is a distinction between the degree of knowledge expected of an "expert" and that which can be reasonably required of a mediator. A mediator needs enough knowledge about the parties and the dispute to:

- Facilitate communication
- Help the parties develop options
- Empathize
- Alert parties to the existence of legal information relevant to their decision to settle
- Explain what options are open to the parties for resolving the dispute if no agreement is reached

SOURCE: National Institute for Dispute Resolution, Performance-Based Assessment:A Methodology, for Use in Selecting, Training, and Evaluating Mediators. *Washington, D.C.: National Institute for Dispute Resolution, 1995. Available at: http://www.convenor.com/madison/method.pdf.*

will probably call for, choosing a third-party expert who has high-level management and/or board experience can add reputational weight to discussions.

ADR professionals must understand corporate governance laws, regulations, codes, and rules governing a board's actions and behavior. Disputes on the board must always be resolved in accordance with directors' fiduciary duties. While knowledge of corporate law and the legal system is important, it is not absolutely essential for ADR professionals to be legal experts. They should nevertheless understand the legal aspects of a case as presented by the parties.

Understanding the Board's Role

ADR professionals must understand the processes unique to a board and its directors and how those will influence dispute resolution approaches. They must also understand the laws, regulations, and best practices that shape board decision-making.

Understanding corporate governance requires understanding the concept of "stewardship" of capital assets and the "stewards' " roles, specifically those of board directors and shareholders. At the core is the separation of ownership and control. Directors are fiduciaries, entrusted by the owners of capital to manage the assets in the shareholders' best interests. Shareholders actively influence boards to deliver performance and increase share value.

QUOTE

Striving First for Understanding

"Before we strive for settlement; before we strive for solutions; before we strive for empowerment, recognition, or transformation; before any of these, we would be well served to strive first for understanding."

J. ANDERSON LITTLE
SUPERIOR COURT MEDIATOR

SOURCE: J. Anderson Little, Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes. *New York: American Bar Association, 2007.*

This arrangement creates its own tensions and conflicts. Add to that the inevitable problems that arise between the management (running the business) and governance (ensuring that the business is well run) functions, and a complex array of aligned and competing interests and agendas emerges, ones with crosscurrents that fluctuate relentlessly given economic, social, and political dynamics. Under stress, directors may behave very differently than when their company is performing well and shareholders are highly supportive. The challenge for corporate governance is "to channel the self-interest of managers, directors, and the advisers upon whom [the board] relies into alignment with the corporate, shareholder, and public interest."[24] Hence, governance is conducted as a social process of group interchange and influence.

TO REVIEW SITUATIONS LEADING TO INTERNAL OR EXTERNAL CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 1 MODULE 1.

Addressing and defusing these tensions demands patterns of interaction and decision-making among directors and between the board and both management and stakeholders. ADR professionals engaged to resolve a corporate governance dispute must ascertain these patterns and include them in their approaches to forge resolutions. These disputes could be red flags signaling deeper problems, including the extent to which the board is dysfunctional. Attempts to impose new ways of discussion, debate, and interaction may obstruct dispute resolution given the power of inertia ("old habits die hard") in how the board operates collectively and its directors individually.

Corporate governance best practice stresses that board decision-making be consensual, with all the directors feeling that each can participate equally in discussions and decisions (strategic, tactical, and operational). Decisions emerge from a convergence of different perspectives informed by each director's specialized skills, expertise, insights, attitude, and experience.

James Surowiecki, author of *The Wisdom of Crowds,* outlines the conditions necessary for establishing a "wise" group. These conditions include: diverse opinion, independent opinion, the ability of group members to develop and use task-specific individual knowledge in

contributing to decision making, and the ability of the group to aggregate individual knowledge and judgment into a group decision.[25] These criteria should be among those that the ADR professionals assesses in examining the strengths and weaknesses of board deliberations to determine which ADR approaches are most promising. A SWOT analysis is one tool for structuring this assessment.

ADR professionals' efforts must ensure that all directors feel engaged and have ownership of the dispute(s) and its (their) successful resolution. Equally, they need to project confidence, mastery of knowledge, and authority to be perceived as an "equal" with the directors, command attention and respect, and engender trust and confidence in their ideas and actions.

As with any group, boards can be dominated by the chairman and/or other directors who are loathe to dissent or independent thinking. A director may argue solely for the goal of having the board agree with their decision, breeding acquiesce and disinterest from other directors ("social loafing"). The director's topics and his/her language may be disrespectful and personal. Some

FOCUS

Articles of Association

The provisions vary from country to country, but usually address:

- Maximum authorized share capital
- Shareowners' rights
- Share transfers
- Alteration of capital
- General assemblies
- Shareowner votes
- Borrowing powers
- Appointment/powers/duties of directors and the CEO
- Disqualification of directors
- Board proceedings
- Appointment/powers/duties of the corporate secretary
- Issuance of dividends and company reserves
- Dispute resolution
- Accounts and audits
- Special provisions associated with winding up

SOURCE: Forum, Corporate Governance Board Leadership Training Resources Kit. *Washington, DC: IFC, 2008.*

FOCUS

Board Charter

A board charter's purpose is to:

- Improve and systemize the board's role and powers
- Enhance the transparency of its governance
- Demonstrate the company's commitment to good corporate governance practices.

A charter typically includes:

- Board responsibilities
- Board composition
- Director selection
- Board leadership
- Director remuneration
- Board meeting procedures
- Board performance
- Committees
- Board relationships
- Dispute resolution

SOURCE: Forum, Corporate Governance Board Leadership Training Resources Kit. *Washington, DC: IFC, 2008.*

directors may be disinterested and rubber-stamp the chairman's requests. Deliberations may be mechanistic rituals deeply engrained in a groupthink process. Relationships outside the boardroom may compromise the way directors look at issues, throwing support behind one view in hopes that this will lead to or expand business ties. Numerous studies of human traits suggest that individuals have a tendency to overestimate their talents, be excessively optimistic by discounting risks, and be biased in how they process information, tending to find more merit in data that supports their viewpoint. These are all considerations for the ADR professional in their analysis to determine how they extract the facts of a dispute and work with the disputants to reach agreement.

Core Concepts of Corporate Governance

ADR professionals need to master the core concepts of corporate governance and have a basis through observance of boardrooms for how they work with directors in handling disputes.

The foundation of trust among shareowners, directors, and managers consists of four corporate governance pillars:

- ***Transparency.*** Directors should clarify to shareowners and other key stakeholders why every material decision has been made.
- ***Accountability.*** Directors should be held accountable for their decisions and actions to shareowners, and, in certain cases, key stakeholders, submitting themselves to rigorous scrutiny.
- ***Fairness.*** All shareowners should receive equal, just, and unbiased consideration by the directors and management.
- ***Responsibility.*** Directors should carry out their duties with honestly, probity, and integrity.

These pillars provide the foundation for the *Principles of Corporate Governance* developed by the Organization of Economic Co-operation and Development. ADR professionals should be well-versed in the OECD's *Principles.*

Laws, regulations, codes, and best practices determine how corporate governance may be conducted by a board. An ADR professional should familiarize themselves with the board's specific corporate governance process, reviewing such relevant documents as the articles of association (the company's constitution), the board charter, the code of ethics, and policies and procedures. Particularly relevant is the section in any of these documents that speaks to corporate governance dispute resolution. Increasingly, stock exchanges, institutional investors, and others are requiring boards to have ADR provisions.

Finding experts with the appropriate set of skills and experience to handle the complexity of corporate governance issues and disputes may nevertheless prove difficult in some markets. Corporate governance consultants or experts may lack the appropriate dispute resolution skills while dispute resolution experts or mediators may have little understanding of corporate governance matters and exposure to directors and senior executives.

To be better prepared to mediate corporate governance cases, dispute resolution experts should seek training to strengthen their skills and understanding of corporate governance issues. This includes:

- Understanding the corporate governance framework and best practices
- Understanding the board's role
- Being familiar with corporate governance disputes
- Having experience dealing with directors and senior executives
- Dealing with the pressure of high profile cases

TO REVIEW A SAMPLE CORPORATE GOVERNANCE DISPUTE RESOLUTION TRAINING FOR DISPUTE RESOLUTION EXPERTS, SEE VOLUME 3 MODULE 3.

No dispute resolution professional is perfect. A sense of realism is essential: corporate governance dispute resolution is very difficult work, and no two ADR professionals have exactly the same combination of skills.

In some cases the best solution could be to hire a team of experts to cover all the skills and attributes required for the resolution of complex multi-layered and sometimes publicized disputes, or with dealing with cross-border disputes involving more than two parties. ■

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VOLUME 3 : TRAINING
MODULE 2 : Dispute Resolution Training for Directors

3.2

The board should ensure that it has the right mix of expertise and capabilities to resolve corporate governance disputes effectively. In considering the board's role in preventing and resolving corporate governance disputes, all directors should receive basic training in dispute resolution. In-depth training should be provided where needed, perhaps to the committee chairman or individual board members whom the board recognizes will assume peacemaker roles.

THIS MODULE PROVIDES

A standard course in corporate governance dispute resolution for directors. The course should be adapted and tailored to local needs and target audiences. This module provides:

- **Course outline**
- **Training notes**
- **Table of contents**
- **PowerPoint presentation**

MODULE 2
DISPUTE RESOLUTION TRAINING FOR DIRECTORS

COURSE OUTLINE

Although less common for well-governed companies, most companies experience corporate governance disputes or conflicts. Left unresolved, these tensions could 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. Just as boards have crisis management plans, so, too, should they have developed and adopted dispute resolution strategies, policies, and processes.

PRACTICE

Course Delivery

240 MINUTES/4 HOURS

- The course can be run independently or in conjunction with other corporate governance leadership courses.
- The course can be shortened, expanded, or adjusted to meet participants' needs.
- Trainers should be familiar with corporate governance issues and ADR processes.

Target Audience

- Executive and non-executive board directors of listed companies
- Financial institutions
- Family firms
- Small and medium-sized enterprises
- State-owned enterprises

Objectives

By the end of the course, participants will understand:

- What corporate governance disputes are and how they differ from other types of disputes;
- Who is involved in such disputes and how they can affect all types of companies;
- The importance of effectively and efficiently preventing and resolving corporate governance disputes;
- The potential negative impact and cost, and the risks associated with corporate governance disputes;
- The benefits of ADR processes and techniques, and the limits of court litigation;
- The board's role in properly preventing and addressing corporate governance disputes; and,
- How to apply dispute resolution skills in practice through a role play exercise.

FOR ROLE PLAYS TO BE USED WITH THIS COURSE, SEE VOLUME 3 ANNEXES 4-7.

Training Notes

Corporate Governance Training for Dispute Resolution Experts

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
10 MINUTES	**Introduction:** Learning Objectives	**Show slide S1 (Title Page).** ▸ Welcome the participants, introduce yourself, and ask participants to introduce themselves briefly. ▸ Elicit groundrules (timekeeping, cell phones, etc.). **Show slide S2 (Objectives).** ▸ State course objectives. ▸ Present the training notes and shape participants' expectations of what they will achieve during training. ▸ Emphasize that participants' experiences; insights will be sought throughout the course. ▸ Stress that the course is about resolving corporate governance disputes, not providing corporate governance substance.	Vol. 3 An. 1
5 MINUTES	**Quiz:** Warm-up Discussion	**Show slide S3 (Quiz: Questions).** ▸ Review both examples and ask participants whether the facts are true or false. **Show slide S4 (Quiz: Responses).** ▸ Emphasize the costs to companies and shareholders of prolonged CG disputes.	Vol. 1 Mod. 2
15 MINUTES	**Presentation:** CG Disputes	**Show slide S5 (What Are CG Disputes?).** ▸ Explain the nature of CG disputes. ▸ Differentiate CG disputes from other disputes. ▸ Stress that not all disagreements are disputes. The board must have robust debate. **Show slide S6 (Who Are the Parties to a CG Dispute?).** ▸ List the various parties. ▸ Explain the differences between internal and external parties to a dispute. **Show slide S7 (Internal and External Disputes).** ▸ Provide examples of internal and external CG disputes, but focus on examples relevant to the audience. **Show slide S8 (What Types of Companies Are Affected?).** ▸ Stress that all types of companies can be affected.	Vol. 1 Mod. 1

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
25 MINUTES	**Group Activity:** CG Disputes	**Show slide S9 (Exercise: Thinking About CG Disputes).** ▸ Divide participants into three groups to brainstorm for 10 minutes CG disputes that are: • *Most common in their country or region* • *Most costly in their country or region* • *Most likely in their company* ▸ One person from each group reports back. Allow two minutes for each report. ▸ Add examples to those presented by each group. **Show slide S10 (Common CG Disputes in Brazil).** ▸ Summarize the discussion using Brazil as an example. **Show slide S11 (What Is the Impact of CG Disputes?).** ▸ Review the potential negative impact of CG disputes. ▸ Emphasize the various ways CG disputes affect the company.	Vol. 1 Mod. 1 Vol. 1 Mod. 2
10 MINUTES	**Discussion:** Dispute Dimensions	**Show slide S12 (What Are the Three Dimensions to a Dispute?).** ▸ Elicit from participants examples for each dimension. ▸ Initiate a discussion on why all the dispute's dimensions must be considered.	Vol. 1 Mod. 3
5 MINUTES	**Presentation:** Limits of Court Litigation	**Show slide S13 (What Are the Limits of Court Litigation?).** ▸ Ensure that participants understand litigation's implications and consequences. ▸ Note that courts can only address the legal dimension of disputes.	Vol. 1 Mod. 3
20 MINUTES	**Presentation:** Benefits of ADR	**Show slide S14 (How Can ADR Help?).** ▸ Note that there are various definitions of ADR — ADR can even be referred to as "appropriate" dispute resolution. **Show slide S15 (Dispute Resolution Mechanisms).** ▸ Note the continuum of time, costs, and the parties' level of control as criteria for differentiating ADR processes. **Show slide S16 (Key Steps in Mediation).** ▸ Present key steps for third-party dispute resolution. **Show slide S17 (What Are the Benefits of ADR?).** ▸ Emphasize that win-win solutions can be tailored to the parties' specific needs and preserve business relations. **Show slide S18 (When Are ADR Processes Successful?).** ▸ Stress that a successful settlement depends on: • *Parties being willing to participate* • *Issues being negotiable* • *Agreements being reasonable and implementable*	Vol. 1 Mod. 3

PRACTICE

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
20 MINUTES	**Coffee Break**	**Show slide S19 (Coffee Break).** ▸ If you haven't done so before the course, distribute the role play background materials.	
5 MINUTES	**Presentation:** Board's Role	**Show slide S20 (What Is the Board's Role?).** ▸ Focus participants' attention on the board's "duty of care," which includes: • *Resolving disputes effectively and efficiently in the company's best interest* • *Preserving business relationships* • *Ensuring adequate risk management* **Show slide S21 (Board Approaches to CG Disputes).** ▸ Emphasize that boards should have in place dispute resolution policies and procedures before they arise. CG disputes before they arise.	Vol. 2 Mod. 1
10 MINUTES	**Presentation:** CG DR Strategy	**Show slide S22 (How to Develop a CG DR Strategy?).** ▸ Briefly present each step. **Show slide S23 (How to Assess Past CG Disputes?).** ▸ Select an example from a participant to illustrate questions from the slide. ▸ Note that reflecting on experience can inform strategy development and implementation. **Show slide S24 (Where to Incorporate CG DR Provisions?).** ▸ Talk to the slide's specific options. ▸ Ask participants if they plan to amend their corporate documents to include CG DR provisions.	Vol. 2 Mod. 1
5 MINUTES	**Presentation:** CG DR Skills	**Show slide S25 (Who Can Serve as a CG DR Peacemaker?).** ▸ Note that "peacemaker" is a generic term. ▸ Distinguish internal and external peacemakers. ▸ Ask participants what type of peacemaker do they prefer and why. **Show slide S26 (CG Dispute Resolution Skills).** ▸ Briefly present the skills required for good CG DR. ▸ Ask participants if their boards have good peacemakers. ▸ Ask participants if they were ever required to play the role of peacemaker.	Vol. 2 Mod. 1 Vol. 2 Mod. 3 Vol. 3 Mod. 1

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
10 MINUTES	**Presentation:** CG Dispute Prevention	**Show slide S27 (Steps to Prevent Boardroom Disputes?).** ▸ Outline the steps the board can take to prevent or resolve CG disputes. ▸ Provide practical examples. **Show slide S28 (DR Skills for the Boardroom)** ▸ Present practical skills that can be used to improve board dynamics. ▸ Provide examples and/or demonstrate some of the skills.	Vol. 2 Mod. 1 Vol. 3 Mod. 1
20 MINUTES	**Role Play:** Introduction and Preparation	**Show slide S29 (Role Play).** ▸ Note that participants will now practice CG DR. ▸ Distribute role play background materials. (If possible, distribute background materials before the course or at the coffee break.) **Show slide S30 (Role Play Objectives).** ▸ State learning objectives. ▸ Explain the various steps of the role play. **Show slide S31 (Case Presentation).** ▸ Summarize information available in the background materials. ▸ Outline the dispute. **Show slide S32 (Roles).** ▸ Introduce each role briefly. ▸ Divide participants into as many groups as there are roles. ▸ Distribute confidential role play instructions for each role. ▸ Ask for a volunteer role player from each group. ▸ Give each group 10 minutes to review the task and coach their role player. ▸ Ask participants if they have any questions.	Vol. 3 An. 3 Vol. 3 An. 4-7 Vol. 3 An. 4-7
30 MINUTES	**Role Play:** Phase 1	**Show slide S33 (Role Play: Phase 1).** ▸ Reconvene the groups and ask participants to form a fishbowl or take their seats. **Show slide S34 (Phase 1 Instructions).** ▸ Set the stage for Phase 1 and ask role players to interact according to their respective confidential instructions. ▸ Invite the other participants to observe. ▸ Limit your role to organizing the role play. Do not intervene during the role play. ▸ Be mindful of time and conclude Phase 1 of the role play by thanking the role players. Ask participants to applaud the role players. ▸ Do not do a de-brief at this stage of the role play.	Vol. 3 An. 3 Vol. 3 An. 4-7

PRACTICE

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
30 MINUTES	**Role Play:** Phase 2	**Show slide S35 (Role Play: Phase 2).** ▸ Invite participants to continue with Phase 2 of the role play. ▸ Ask participant playing the peacemaker's role to be mindful of the key steps for third-party dispute resolution. **Show slide S36 (Phase 2 Instructions).** ▸ Set the stage for Phase 2 and ask role players to interact according to their respective confidential instructions. ▸ Limit your role to organizing the role play. Do not intervene during the role play. ▸ Be mindful of time and conclude Phase 2 of the role play by thanking the role player. Encourage participants to applaud the role players' work	Vol. 1 Mod. 3 Vol. 3 An. 3
10 MINUTES	**Processing:** Role play de-brief	**Show slide S37 (Role Play De-briefing).** ▸ Ask role players for feedback. • *How did it feel?* ▸ Ask participants for feedback on the role play: • *Could the dispute have taken a different turn?* • *Was the peacemaker of any help?* • *Could there have been different solutions?* • *Could the dispute have been prevented?*	Vol. 3 An. 3
10 MINUTES	**Discussion:** Questions, Feedback	**Show slide S38 (Questions and Feedback).** ▸ Ask participants to summarize the session's main points. ▸ Take any questions and link back to the learning objectives. ▸ Seek feedback. Distribute course evaluation forms. ▸ Closure.	Vol. 3 An. 1

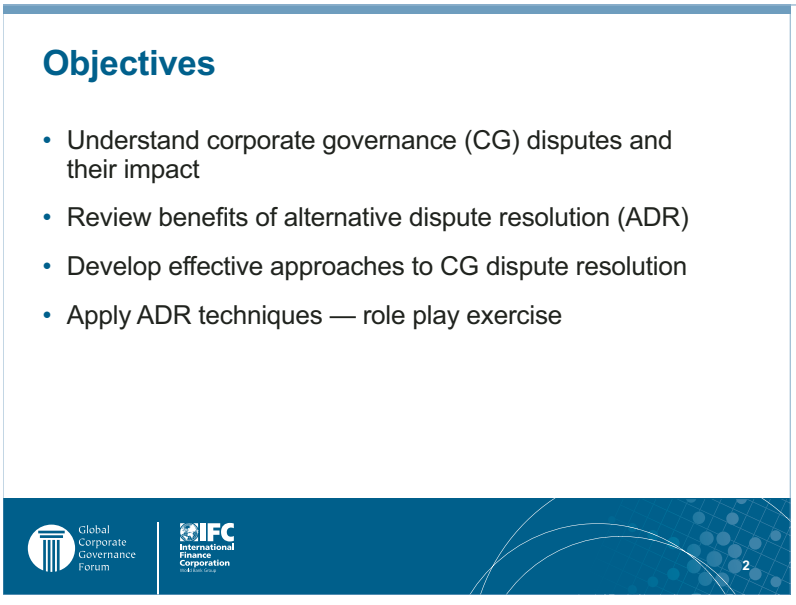
POWERPOINT PRESENTATION

Corporate Governance Dispute Resolution Training for Board Directors

Table of Contents

S1 | Title Page

TO REVIEW ADULT LEARNING GUIDELINES, SEE VOLUME 3 ANNEX 1.



S2 | Objectives

Quiz : Questions

- Canada: In 2005, the former president and CEO of Environmental Management Solutions Inc. (EMS), upon his termination, unleashed several lawsuits against the company and its board. These costs, along with the associated costs of defending against a dissident shareholder requisition, led by the former CEO, resulted in restructuring charges and other items in the amount of $2.5 million over 12 months, ending December 31, 2005.

TRUE OR FALSE?

- Germany: In 2005, several shareholders opposed the merger of Deutsche Telekom and T-Online. T-Online asked the regional court of Darmstadt to allow the merger despite objections from dissident shareholders. The court ruled against the merger. T-Online appealed the decision. In June 2006, the Federal Court of Justice cleared the way for the merger. Yet, Deutsche Telekom's problems didn't end there. Minority shareholders contested the merger's share-exchange ratio. In March 2009, a court ruled that the German Telecom giant must reimburse former T-Online shareholders. The cost could total $252 million.

TRUE OR FALSE?

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3

S3 | Quiz: Questions

Quiz : Responses

FALSE

According to the EMS annual report, the direct costs amounted to **$5.3 million** over 12 months, ending December 31, 2005.

TRUE

The cost could be **$252 million**, but T-Online shareholders still consider the share-exchange ratio too low.

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4

S4 | Quiz: Responses

What Are CG Disputes?

- Involve corporate authority and its exercise
- Involve the board s actions or its failure or refusal to act
- Require the board's attention, regardless of whether the board or individual directors are a direct party to the dispute, to resolve the dispute
- Are NOT issues arising as part of doing business

➢ *Corporate governance is the system by which companies are directed and controlled…."*

SIR ADRIAN CADBURY

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5

S5 | What Are CG Disputes?

Who Are the Parties to a CG Dispute?

- Shareholders vs. the company or its board
- The board vs. the CEO or senior management
- Board directors vs. board directors
- Board vs. employees' representatives
- Board vs. communities, social activists, or other stakeholders

➢ *CG disputes can involve internal and external constituencies*

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6

S6 | Who Are the Parties to a CG Dispute?

Internal and External Disputes

Internal	External
• New strategies and major transactions • Crisis situations • Board processes • Board composition and succession planning • Potential conflicts of interest • Personality clashes • Performance issues	• Mergers and acquisitions • Takeover processes • Share and bond valuation • Lack of disclosure • Nomination and discharge of board directors • Remuneration/bonuses • Sustainability and Corporate Social Responsibility (CSR)

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7

S7 | Internal and External Disputes

What Types of Companies Are Affected?

- Small companies
- Joint venture companies
- Family firms
- State-owned companies
- Listed companies

➢ *All types of companies are affected*

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8

S8 | What Types of Companies Are Affected?

Exercise: Thinking About CG Disputes

Split into three groups to brainstorm about:

- Most **common** CG disputes in your country or region
- Most **costly** CG disputes in your country or region
- Most **likely** CG disputes in your company or organization

➢ *One person from each group will report back*

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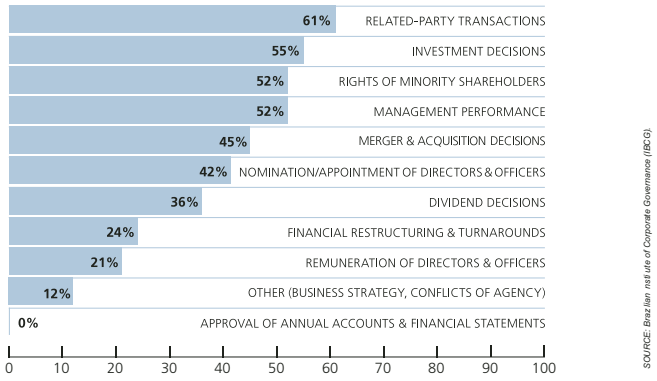
9

S9 | Exercise: Thinking About CG Disputes

Common CG Disputes in Brazil



SOURCE: Brazilian Institute of Corporate Governance (IBCG).

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10

S10 | Common CG Disputes in Brazil

What Is the Impact of a CG Dispute?

- Diverts board resources
- Disrupts board work
- Obstructs company operations
- Delays major strategic decisions
- Undermines company's reputation
- Reduces market share
- Weakens stakeholder trust and deters investors
- Diverts company financial and human resources
- Impairs growth and corporate results
- Entails high litigation, operational, and governance costs
- Triggers breakdown in shareholder relations

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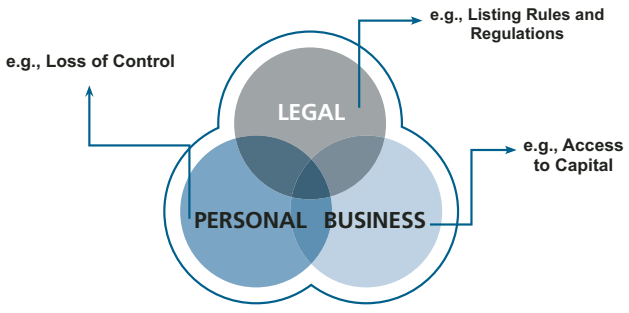
11

S11 | What Is the Impact of a CG Dispute?

What Are the Three Dimensions to a Dispute?



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12

S12 | What Are the Three Dimensions to a Dispute?

What Are the Limits of Court Litigation?

- Involves slow, cumbersome process
- Delays important decisions
- Lacks tailored solutions
- Results in high costs
- Entails weak enforcement (where the rule of law is weak)
- Creates legal uncertainties (especially for cross-border disputes)
- Results in a legal vacuum (CG is often principle-based and embedded in soft law)

➢ *Courts can only address the legal dimension of the dispute*

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13

S13 | What Are the Limits of Court Litigation?

How Can ADR Help?

➢ *"ADR is an amicable dispute resolution procedure based on the goodwill of the parties and the assistance of a neutral third party. It covers various techniques including mediation."*

INTERNATIONAL CHAMBER OF COMMERCE

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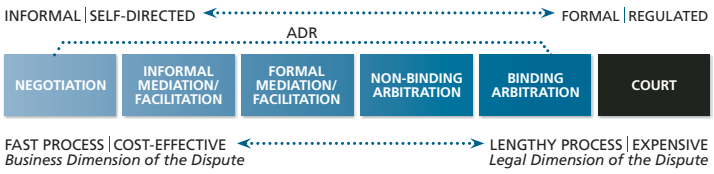
14

S14 | How Can ADR Help?

Dispute Resolution Mechanisms

Comparing Dispute Resolution Mechanisms



SOURCE: Adapted from Lukasz Rozdeiczer and Alejandro Alvarez. Alternative Dispute Resolution Manual: Implementing Commercial Mediation. *Washington, DC: IFC, 2006.*

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15

S15 | Dispute Resolution Mechanisms

Key Steps in Mediation

PREPARE
- Clarify process: Agree to mediation's terms
- Ensure commitment to problem solving
- Explore issues

ENGAGE
- Agree on communication rules
- Facilitate exchange of perspectives
- Caucus with parties as needed
- Build common ground
- Explore possible solutions

AGREE
- Review, clarify, and formalize terms of agreement

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16

S16 | Key Steps in Mediation

What Are the Benefits of ADR?

- Cost
- Speed
- Flexibility
- Predictability
- Non-binding
- Quality
- Confidentiality
- Control
- Low risk
- Expertise
- Perspective

➢ *Win-win solutions can be tailored to the parties' specific needs and help preserve business relations*

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17

S17 | What Are the Benefits of ADR?

When Are ADR Processes Successful?

When parties are:

- Identifiable and willing to participate
- Interdependent — need each other's assistance
- Capable of exerting influence or leverage
- Sharing common issues and interests
- Needing resolution urgently
- Able to settle without major psychological barriers
- Willing to settle
- Authorized to decide
- Willing to compromise

➢ *To ensure a successful settlement, issues must be negotiable. Agreements must be reasonable and implementable.*

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18

S18 | When Are ADR Processes Successful?

Coffee Break

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19

S19 | Coffee Break

What Is the Board's Role?

- Exercise the duty of care
- Recognize that internal and external disputes may arise
- Understand the risk/threat posed by CG disputes
- Resolve disputes expeditiously and effectively
- Prevent internal and external disputes
- Adopt CG DR strategies and processes

➢ *"It is part of the duty of care of the board to ensure disputes are resolved quickly in order to maintain relationships that business people, particularly management, spend their lives building."*

MERVYN KING, SC

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20

S20 | What Is the Board's Role?

Board Approaches to CG Disputes

Ad Hoc	Preventative
Board dominant value: Harmony *Perception of dispute: Unlikely*	*Board dominant value: Consensus* *Perception of dispute: Likely*
1 Disagreement arises 2 Disagreement turns into dispute 3 Directors become defensive and positions harden 4 Dispute is "patched" 5 New disagreement arises 6 Board tensions escalate and dispute develops rapidly 7 Negative resentment builds up	1 Disagreement arises 2 Disagreement is addressed 3 Board applies dispute resolution techniques 4 Disagreement is resolved 5 New disagreement arises 6 Board dispute resolution skills improve 7 Positive reinforcement emerges

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21

S21 | Board Approaches to CG Disputes

How to Assess Past CG Disputes?

- What was the nature of the dispute?
- How did the board react?
- What was management's role?
- What are the company's general practices in terms of dispute resolution?
- What were the dispute's costs?
- How did the dispute get settled?
- What policies and procedures should be improved?
- What types of disputes may arise?

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22

S22 | How to Assess Past CG Disputes?

How to Develop a CG DR Strategy?

- Step 1: Plan ahead
- Step 2: Assess past and present disputes
- Step 3: Anticipate potential disputes
- Step 4: Adopt CG DR policies
- Step 5: Decide who will manage the CG DR process
- Step 6: Identify who will serve as an internal or external peacemaker
- Step 7: Incorporate CG DR provisions in corporate documents
- Step 8: Review the effectiveness of the CG DR
- Step 9: Remain prepared for litigation

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23

S23 | How to Develop a CG DR Strategy?

Where to Incorporate CG DR Provisions?

- Articles of association, company charter, and bylaws
- Company codes (CG, Ethics, CSR)
- Board policies
- Board committee charters
- Shareholder agreements
- Annual report statements
- Public statements

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24

S24 | Where to Incorporate CG DR Provisions?

Who Can Serve as a CG DR Peacemaker?

PEACEMAKER	CHARACTERISTICS
Internal Peacemaker • Chairman • Independent director • Corporate secretary • Ombudsman	• Confidentiality • Insider knowledge • Authority • CG expertise
External Peacemaker • Negotiator • Mediator • Consultant • Standing neutral	• Independence • Neutrality • Flexibility • ADR skills and expertise

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25

S25 | Who Can Serve as a CG DR Peacemaker?

CG Dispute Resolution Skills

DR Skills	CG Skills
• Impartial, independent • Diligent, discrete • Responsible, patient • Trusted • Active listener • Non judgmental • Consensus builder • Understanding of the dynamics of disputes and resolution approaches	• No vested interests • Knowledge of CG framework • Knowledge of CG best practices • Respected • Strategic • Leadership • Board experience • Understanding of issues in dispute

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26

S26 | CG Dispute Resolution Skills

Steps to Prevent Boardroom Disputes

- Step 1: Encourage effective board culture
- Step 2: Clarify roles of board vs. management
- Step 3: Establish orderly board processes
- Step 4: Ensure proper flow of information
- Step 5: Allow time for discussion, debate, deliberation
- Step 6: Improve communications
- Step 7: Apply ADR techniques
- Step 8: Step away from the boardroom to gain new perspectives and insights

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27

S27 | Steps to Prevent Boardroom Disputes

DR Skills for the Boardroom

- Listen actively ➔ show genuine interest
- Use open questions ➔ encourage speakers to share
- Clarify reasons ➔ confirm goals and objectives
- Be aware of body language ➔ be friendly and open
- Speak on behalf of yourself ➔ use “I” statements
- Focus on constructive ideas ➔ ask for practical suggestions
- Stay calm ➔ respect different views; reschedule discussions
- Avoid misunderstanding ➔ paraphrase ideas or statements
- Allow others to save face ➔ help reformulate statements

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28

S28 | DR Skills for the Boardroom

Role Play

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29

S29 | Role Play

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

Role Play Objectives

- Understanding CG disputes from different perspectives
- Learning to build common ground
- Exploring new, creative win-win solutions

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30

S30 | Role Play Objectives

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

Case Presentation: Techno Ltd.

- Techno Limited is a newly listed company founded by its chairman, Paul, a majority shareholder
- Before listing, Paul instituted good CG practices for Techno Ltd. and the family foundation
- Paul's daughter, Rosemary, must sell her Techno Ltd. shares to settle her divorce; the foundation also wants to sell shares, believing the price has peaked
- Both sales 5.5% of total shares may push down the share price. If the price drops to $1.47, the bank can terminate its $175 million credit line to the company

➢ *How can the board avoid large sales of shares by Rosemary and the foundation that will likely drive down the share price and trigger the debt covenant?*

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31

S31 | Case Presentation: Techno Ltd.

FOR TECHNO LTD. AND OTHER ROLE PLAY EXERCISES, SEE VOLUME 3 ANNEXES 4-7.

Roles: Techno Ltd.

- **Paul:** Founder. Chairman. "Larger than life." Dominant. Backs good CG practices. Hand picked independent directors. Seeks retirement. Wants succession strategy. Empathetic to Rosemary but doesn't want any solution to cost.
- **Rosemary:** Paul's daughter. Director and CEO. Effective but poor people management skills. Impatient to settle divorce but needs funds available only by selling her Techno Ltd. shares.
- **John:** Independent director. Takes his position seriously. Regularly challenges family or directors' perspectives. Wants to prevent share decline and avoid instability as senior management changes.
- **J.Alfred:** ADR professional. Expertise in mediating family, company corporate governance issues. No position other than to achieve a workable solution.

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32

S32 | Roles: Techno Ltd.

FOR TECHNO LTD. AND OTHER ROLE PLAY EXERCISES, SEE VOLUME 3 ANNEXES 4-7..

Role Play: Phase 1

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33

S33 | Role Play: Phase 1

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

Phase 1 Instructions: Techno Ltd.

Paul, Rosemary, and John each meet individually with the ADR professional to discuss their positions.

10 MINUTES

for each meeting

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34

S34 | Phase 1 Instructions: Techno Ltd.

FOR TECHNO LTD. AND OTHER ROLE PLAY EXERCISES, SEE VOLUME 3 ANNEXES 4-7.

Role Play: Phase 2

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35

S35 | Role Play: Phase 2

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

Phase 2 Instructions: Techno Ltd.

- Chairman (Paul) convenes a meeting with the CEO (Rosemary), the independent director (John), and the ADR professional (J. Alfred)
- With the help of J. Alfred, all parties together craft a common solution to be considered at the next board meeting

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36

S36 | Phase 2 Instructions: Techno Ltd.

FOR TECHNO LTD. AND OTHER ROLE PLAY EXERCISES, SEE VOLUME 3 ANNEXES 4-7.

Role Play De-briefing

- Other possible/better solutions?
- What may happen if no solution is reached?
- What could be the role of independent directors?
- Dispute resolution policies for family firms?
- Benefits, drawbacks in using external peacemakers?
- Could a dispute have been prevented?

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37

S37 | Role Play De-briefing

Questions and Feedback

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38

S38 | Questions and Feedback

VOLUME 3 : TRAINING

MODULE 3 : Corporate Governance Training for Dispute Resolution Experts

3.3

Conflicts and disputes affecting the governance of companies, family firms, financial institutions, and state-owned enterprises are widespread in developed and developing countries alike. To effectively meet the increasing demand for corporate governance dispute resolution services, ADR experts need to familiarize themselves with the subject of corporate governance and understand how such disputes may differ from other disputes. Corporate governance dispute resolution experts can play a significant role in advising boards, facilitating strategic and sensitive discussions, training directors, and resolving corporate governance disputes.

THIS MODULE PROVIDES

A standard course in corporate governance dispute resolution for dispute resolution experts. The course should be adapted and tailored to local needs and target audiences. It includes:

- **Course outline**
- **Training notes**
- **Table of contents**
- **PowerPoint presentation**

MODULE 3
CORPORATE GOVERNANCE TRAINING FOR DISPUTE RESOLUTION EXPERTS

COURSE OUTLINE

Conflicts and disputes affecting the governance of companies, family firms, financial institutions, and state-owned companies remain widespread in developed and developing countries alike. Left unresolved, these disputes can paralyze the board, destroy business relations, deter investors, and prove costly. ADR skills and processes can help prevent and effectively deal with corporate governance disputes. The board's role is to ensure that disputes are prevented or resolved effectively. This includes seeking third-party expertise to:

- Advise on ADR processes and dispute resolution strategies
- Facilitate board retreats and conversations among parties to the dispute
- Train directors to apply dispute resolution skills
- Mediate or arbitrate corporate governance disputes

PRACTICE

Course Delivery

240 MINUTES/4 HOURS

- The course can be run independently or in conjunction with other mediation or ADR courses.
- The course can be shortened, expanded, or adjusted to meet the participants' needs.
- Trainers should be familiar with corporate governance issues and ADR processes.

To effectively meet the increasing demand for corporate governance dispute resolution services, ADR experts need to familiarize themselves with corporate governance issues and understand how such disputes may differ from other disputes.

Target Audience

- Mediators, negotiators, arbitrators
- Lawyers
- Conflict resolution experts and researchers
- Change management consultants
- Human resource consultants
- Meeting facilitators

Objectives

By the end of the course, participants will understand:

- Corporate governance's purpose and importance
- Corporate governance disputes — what they are, how they differ from other commercial disputes, and how they affect companies and their stakeholders
- Who is involved in corporate governance disputes and their roles in achieving a resolution
- Prevention and resolution of corporate governance disputes
- Dispute resolution experts' roles and services
- Board's role in properly preventing and addressing corporate governance disputes
- Dealing with corporate governance disputes through a role play exercise

FOR ROLE PLAYS TO BE USED IN CONJUNCTION WITH THIS COURSE, SEE VOLUME 3 ANNEXES 4-7.

Training Notes

Corporate Governance Training for Dispute Resolution Experts

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
10 MINUTES	**Introduction:** Learning Objectives	**Show slide S1 (Title Page).** ▸ Welcome the participants, introduce yourself, and ask participants to introduce themselves briefly. ▸ Elicit groundrules (timekeeping, cell phones, etc.). **Show slide S2 (Objectives).** ▸ State course objectives. ▸ Present the training notes and shape participants' expectations of what they will achieve during training. ▸ Emphasize that participants' experiences and insights will be sought throughout the course. ▸ Stress that the course is about resolving corporate governance disputes, not learning dispute resolution skills and processes.	Vol. 3 An. 1
5 MINUTES	**Quiz:** Warm-up Discussion	**Show slide S3 (Quiz: Questions).** ▸ Review both examples. ▸ Ask participants whether the facts are true or false. **Show slide S4 (Quiz: Responses).** ▸ Explain the difference between "debate" and "dispute." ▸ Emphasize the costs to companies and shareholders of prolonged corporate governance disputes. Cite an example.	Vol. 1 Mod. 2
15 MINUTES	**Presentation:** Corporate Governance Overview	**Show slide S5 (What Is Corporate Governance?).** ▸ Define corporate governance. ▸ Explain how managers, shareholders, and the board relate to each other. ▸ Check if participants understand the differences between managers and directors. **Show slide S6 (What Are the Main Competing Tensions?).** ▸ Explain the natural tensions between managers, shareholders, and directors. ▸ Ask participants to provide examples. ▸ Note that corporate governance is a fertile terrain for disputes. **Show slide S7 (What Are the Pillars of Good CG?).** ▸ Carefully explain the principles of: • *Transparency* • *Accountability* • *Fairness* • *Responsibility* ▸ Ask participants to provide examples.	Vol. 1 Mod. 1

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
		Show slide S8 (Why Is CG Important?). ▸ Review the business case for CG. ▸ Indicate that these findings have been confirmed by many academic studies. (Provide a reading list for interested participants.) ▸ Invite participants to ask questions and share experiences.	Vol. 3 An. 9
	**Presentation:** CG Disputes	**Show slide S9 (What Are CG Disputes?).** ▸ Explain the nature of CG disputes. ▸ Differentiate CG disputes from other disputes. ▸ Stress that not all disagreements are disputes — the board must have robust debate. **Show slide S10 (Who Are the Parties to a CG Dispute?).** ▸ List the various parties. ▸ Explain the differences between internal and external constituencies. **Show slide S11 (Who Are the Other Stakeholders?).** ▸ List the various stakeholders who may be involved in CG disputes. ▸ Use the example of "employees" to distinguish CG disputes from commercial ones. **Show slide S12 (What Types of Companies Are Affected?).** ▸ Stress that all types of companies are affected.	Vol. 1 Mod. 1
	**Group Activity:** CG Disputes	**Show slide S13 (Exercise: Thinking about CG Disputes).** ▸ Divide participants into three groups to brainstorm for 10 minutes about: • *Typical boardroom disputes* • *Typical shareholder disputes* • *Typical CG disputes in family firms* ▸ Ask one person from each group to report back. Allow two minutes for each report. ▸ Add examples to those that each group presents. ▸ Ask participants if they have ever facilitated, mediated or resolved such disputes. If so, what have they learned from those experiences? **Show slide S14 (Internal and External Disputes).** ▸ Distinguish internal and external disputes, and provide examples for each. **Show slide S15 (Issues in Family-Firm Disputes).** ▸ Review the main issues that emerge in family-firm disputes. ▸ Ask participants for examples. **Show slide S16 (Common CG Disputes in Brazil).** ▸ Summarize the discussion using Brazil as an example.	Vol. 1 Mod. 3

PRACTICE

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
5 MINUTES	**Presentation:** Impact of CG Disputes	**Show slide S17 (What Is the Impact of a CG Dispute?).** ▸ Review potential impact of CG disputes. ▸ Note importance of overall impact of CG disputes on a company and its stakeholders — beyond the parties directly involved in the dispute.	Vol. 1 Mod. 2
5 MINUTES	**Presentation:** Board's Role	**Show slide S18 (What Should Be the Board's Role?).** ▸ Focus participants' attention on the board's "duty of care," which includes: • *Ensuring disputes are resolved effectively and efficiently in the company's best interests* • *Preserving business relationships* • *Providing for adequate risk management* ▸ Note that understanding the board's role is important for dispute resolution (DR) experts working on CG disputes.	Vol. 2 Mod. 1
20 MINUTES	**Coffee Break**	**Show slide S19 (Coffee Break).**	
5 MINUTES	**Discussion:** Role of CG DR Experts	**Show slide S20 (How Can DR Experts Help?).** ▸ Ask participants what type of services could DR experts provide to help prevent and resolve CG disputes. ▸ Draw participants' attention to the following functions: • *Advising* • *Facilitating* • *Resolving* • *Training*	Vol. 1 Mod. 3 Vol. 2 Mod. 2
10 MINUTES	**Presentation:** CG DR Consulting Services	**Show slide S21 (Advising on the Use of ADR Processes).** ▸ Briefly present the spectrum of ADR processes. ▸ Emphasize that boards need guidance on understanding and selecting appropriate ADR processes for their circumstances. **Show slide S22 (Advising on CG DR Strategies).** ▸ Indicate the steps that a board must go through to develop effective dispute prevention and resolution strategies. ▸ Note that a board may need to hire external experts to help discuss and design such strategies. **Show slide S23 (Facilitating Board Discussions).** ▸ Explain that DR experts can be invited to facilitate board retreats, discussions about strategy or evaluation sessions. ▸ Using the questions on the slide as examples, outline how DR experts can help boards assess ways to address disputes and surface issues related to the board's conflict-management style.	Vol. 1 Mod. 3 Vol. 2 Mod. 1

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
5 MINUTES	**Presentation:** CG DR Training Services	**Show Slide S24 (Training Board Directors).** ▸ Note that directors need to better understand the importance and dynamics of disputes. ▸ Using the slide's list, explain how a DR expert can train directors to better use DR skills in the boardroom.	Vol. 3 Mod. 2 Vol. 2 Mod. 1
20 MINUTES	**Discussion:** CG DR Services	**Show slide S25 (Resolving CG Disputes: Skills).** ▸ Ask participants about the skills required for good CG DR. Stress that CG DR requires a broad set of interpersonal skills and expertise. Note that the combination of required skills depends on the nature of the dispute and the parties involved. ▸ Discuss the importance of CG knowledge vs. DR skills. **Show slide S26 (What Makes CG Disputes Special?).** ▸ Draw participants' attention to what differentiates CG disputes from other types of commercial disputes. ▸ Discuss the implications for CG DR experts. **Show Slide S27 (What Issues May Arise?).** ▸ Discuss with participants the particular issues that may arise when mediating or facilitating a corporate governance dispute. Use the questions listed on the slide for guidance. ▸ Invite participants to think about how best to address these issues.	Vol. 3 Mod. 1 Vol. 1 Mod. 1
20 MINUTES	**Role Play:** Introduction and Preparation	**Show slide S28 (Role Play).** ▸ Note that participants will practice CG DR. ▸ Distribute role play background materials. (If possible, distribute background materials before the course or during the coffee break.) **Show slide S29 (Role Play Objectives).** ▸ State learning objectives. ▸ Explain the steps of the role play. **Show slide S30 (Case Presentation).** ▸ Summarize key points in the background materials. Note that each role player will have confidential instructions. ▸ Outline the dispute. **Show slide S31 (Roles).** ▸ Introduce each role briefly. ▸ Divide participants into as many groups as there are roles. ▸ Distribute confidential instructions for each role. ▸ Ask for a volunteer role player from each group. ▸ Give each group 10 minutes to review the task and coach their role player. ▸ Ask participants if they have any questions before the role play begins.	Vol. 3 An. 3 Vol. 3 An. 4-5

PRACTICE

TIME	TOPIC	COURSE ACTIVITY	TOOLKIT REFERENCES
30 MINUTES	**Case Study:** Phase 1	**Show slide S32 (Role Play: Phase 1).** ▸ Reconvene the groups and ask participants to form a fishbowl or take their seats. **Show slide S33 (Phase 1 Instructions).** ▸ Set the stage for Phase 1 and ask the role players to perform according to their respective confidential instructions. ▸ Invite the rest of the participants to observe. ▸ Limit your role to organizing the role play. Do not intervene during the role play. ▸ Be mindful of the time and conclude Phase 1 by thanking the role players. Ask participants to applaud the role players. ▸ Do not provide a de-brief at this stage.	Vol. 3 An. 3 Vol. 3 An. 4-5
30 MINUTES	**Role Play:** Phase 2	**Show slide S34 (Role Play: Phase 2).** ▸ Invite participants to continue with Phase 2 of the role play. ▸ Ask the participant playing the peacemaker role to be mindful of the key steps for third-party dispute resolution. **Show slide S35 (Phase 2 Instructions).** ▸ Set the stage for Phase 2 and ask role players to interact according to their respective confidential instructions. ▸ Limit your role to organizing the role play. Do not intervene during the role play. ▸ Be mindful of the time and conclude Phase 2 of the role play by thanking the role players. Ask participants to applaud the role players.	Vol. 3 An. 4-5
10 MINUTES	**Processing:** Role play de-brief	**Show slide S36 (Role Play De-briefing).** ▸ Ask role players for feedback on the role play: • *How did it feel?* ▸ Ask participants for feedback on the role play: • *Could the dispute have taken a different turn?* • *Was the peacemaker of any help?* • *Were there any issues the peacemaker needed especially to watch out for (e.g. power imbalance; authority of the parties; strong emotions)?* • *Could there have been different solutions?* • *Could the dispute have been prevented?*	Vol. 3 An. 2
10 MINUTES	**Discussion:** Questions, Feedback	**Show slide S37 (Questions and Feedback).** ▸ Ask participants to summarize the session's main points. ▸ Take questions. Link the discussion back to the learning objectives. ▸ Seek feedback. Distribute course evaluation forms. ▸ Closure.	Vol. 3 An. 1

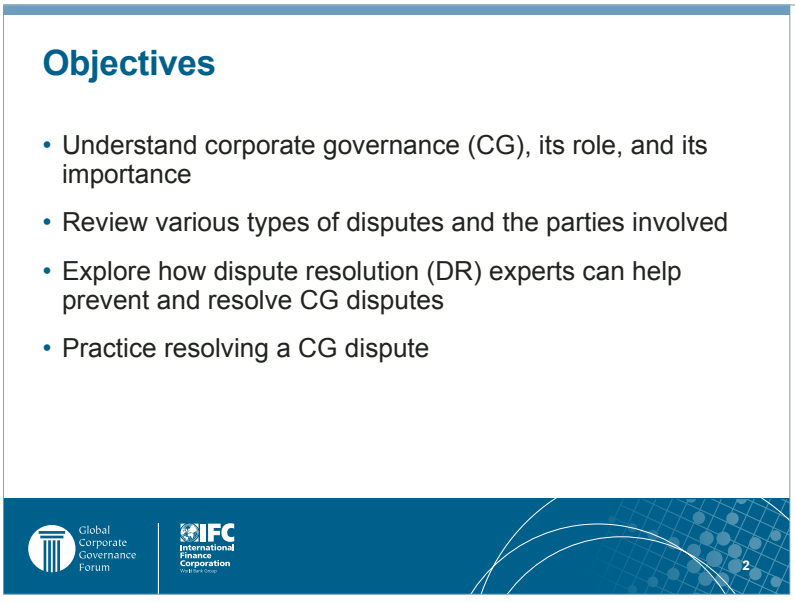
POWERPOINT PRESENTATION

Corporate Governance Training for Dispute Resolution Experts

Table of Contents

S1 | Title Page

TO REVIEW ADULT LEARNING GUIDELINES, SEE VOLUME 3 ANNEX 1.



S2 | Objectives

Quiz : Questions

- Former General Motors chairman Alfred Sloan summed up an executive meeting as follows: "Gentlemen, I take it we are all in complete agreement on the decision here." As everyone nodded their heads he added, "I propose we postpone further discussion… to give ourselves time to develop disagreement."

TRUE OR FALSE?

- In 2005, the former president and CEO of Environmental Management Solutions Inc. (EMS), upon his termination, filed several lawsuits against the company and its board. These litigation costs, along with the associated costs of defending against a dissident shareholder requisition led by the former CEO, resulted in restructuring and other charges of **$2.5 million** over 12 months, ending December 31, 2005.

TRUE OR FALSE?

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3

S3 | Quiz: Questions

Quiz : Responses

TRUE

Boards should discuss and debate strategic decisions. Disagreements are not disputes but left unspoken, they may evolve into destructive disputes.

FALSE

According to EMS's annual report, the direct costs amounted to $5.3 million over 12 months ending December 31, 2005.

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4

S4 | Quiz: Responses

What Is Corporate Governance?

"Corporate governance is the system by which companies are directed and controlled…."

SIR ADRIAN CADBURY

Global Corporate Governance Forum | IFC International Finance Corporation

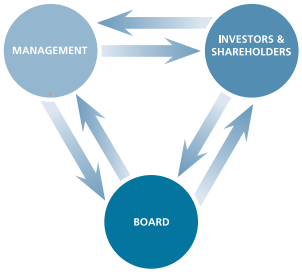
5

S5 | What is Corporate Governance?

What Are the Main Competing Tensions?

"If management is about running business, governance is about seeing that it is run properly. All companies need governing as well as managing."

PROF. BOB TRICKER, 1984



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6

S6 | What Are the Main Competing Tensions?

What Are the Pillars of Good CG?

- **Transparency:** Ensure timely, proper disclosure of financial and non-financial information and any material matters involving the company
- **Accountability:** Provide proper strategic guidance, effective monitoring, and accountability to the company and its shareholders
- **Fairness:** Respect shareholders' rights; ensure equitable treatment of all shareholders
- **Responsibility:** Engage the company's stakeholders; respect stakeholders' rights

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7

S7 | What Are the Pillars of Good CG?

Why Is CG Important?

- Mitigates risk
- Reduces vulnerability to financial crises
- Improves corporate performance
- Reduces the cost of capital
- Attracts and retains investors
- Builds better companies, better societies

➢ *"An effective system of corporate governance must strive to channel the self-interest of managers, directors, and the advisors upon whom they rely into alignment with the corporate, shareholder, and public interests."*

IRA MILLSTEIN

Global Corporate Governance Forum | IFC International Finance Corporation

8

S8 | Why is CG Important?

What Are CG Disputes?

- Involve corporate authority and its exercise
- Involve the board's actions or its failure or refusal to act
- Require the board's attention, regardless of whether the board or individual directors are a direct party to the dispute, to resolve the dispute
- Are NOT issues arising as part of doing business

➢ *Not every disagreement is a dispute. Discourse and debate are at the heart of the board's work. Diverse views and perspectives bring more information into the decision-making process, challenge assumptions, and sharpen the focus of deliberations.*

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9

S9 | What Are CG Disputes?

Who Are the Parties to a CG Dispute?

- Shareholders vs. board or a board director
- Board vs. CEO or senior management
- Board director(s) vs. board director(s)
- Board or board director(s) vs. employees' representative(s)
- Board vs. communities, social activists, or other stakeholders

➢ *CG disputes can involve internal and external constituencies*

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10

S10 | Who Are the Parties to a CG Dispute?

Who Are the Other Stakeholders?

- Contractual relationships
  - ✓ Employees
  - ✓ Contractors and suppliers
  - ✓ Providers of capital
  - ✓ Business partners, regulators, accountants, auditors, etc.
- No contractual relationships
  - ✓ Communities
  - ✓ NGOs
  - ✓ Analysts, investor associations, pressure groups
  - ✓ Media and other "reputational" agents

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11

S11 | Who Are the Other Stakeholders?

What Types of Companies Are Affected?

- Small companies
- Joint venture companies
- Family firms
- State-owned companies
- Listed companies
- Cooperatives

➢ *All types of companies are affected*

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12

S12 | What Types of Companies Are Affected?

Exercise: Thinking about CG Disputes

Split into three groups to brainstorm about typical:

- Boardroom disputes
- Shareholder disputes
- CG disputes in family firm

➢ *One person from each group will report back*

10 MINUTES

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13

S13 | Exercise: Thinking about CG Disputes

Internal and External Disputes

Internal	External
• New strategies and major transactions • Crisis situations • Board processes • Board composition and succession planning • Conflicts of interest • Personality clashes • Performance issues	• Mergers and acquisitions • Takeover processes • Share and bond valuation • Lack of disclosure • Nomination and discharge of board directors • Remuneration/bonuses • Sustainability and Corporate Social Responsibility (CSR)

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14

S14 | Internal and External Disputes

Issues in Family Firm Disputes

- Governance and control
- Succession/generational issues
- Personal goals conflicting with company objectives
- Key board and management roles
- Personal perspectives and grievances

➢ *"Conflicts within family firms have a special character. In most cases, what is involved is not merely a difference of opinion about business policy but issues within the family and its history."*

JOZEF LIEVENS

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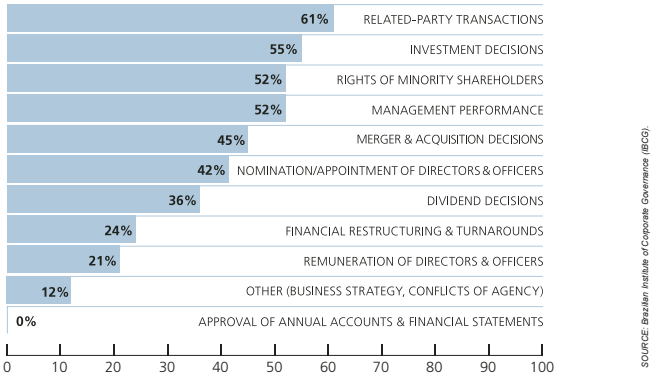
15

S15 | Issues in Family-Firm Disputes

Common CG Disputes in Brazil



SOURCE: Brazilian Institute of Corporate Governance (IBCG).

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16

S16 | Common CG Disputes in Brazil

What Is the Impact of a CG Dispute?

- Diverts board resources
- Disrupts board work
- Obstructs company operations
- Delays major strategic decisions
- Undermines company's reputation
- Reduces market share
- Weakens stakeholder trust and deters investors
- Diverts company financial and human resources
- Impairs growth and harms corporate results
- Entails high litigation, operational, and governance costs
- Triggers breakdown in shareholder relations

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17

S17 | What Is the Impact of a CG Dispute?

What Should Be the Board's Role?

- Exercise "duty of care"
- Recognize that internal and external disputes may arise
- Understand the risks/threats posed by CG disputes
- Ensure expeditious, effective dispute resolution
- Prevent internal and external disputes
- Understand when to seek external expertise
- Adopt appropriate CG dispute resolution strategies and processes

➢ *"The board's role is to provide entrepreneurial leadership of the company within a framework of prudent and effective controls…."*

UNITED KINGDOM COMBINED CODE(2006)

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18

S18 | What Should Be the Board's Role?

Coffee Break

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19

S19 | Coffee Break

How Can DR Experts Help?

- Advise on the use of ADR processes
- Advise on developing CG dispute resolution strategies
- Facilitate board retreats and stakeholder meetings
- Mediate CG disputes
- Train directors on preventing and managing CG disputes

➢ *"It is part of the duty of care of the board to ensure disputes are resolved quickly in order to maintain relationships that business people, particularly management, spend their lives building."*

MERVYN KING, SC

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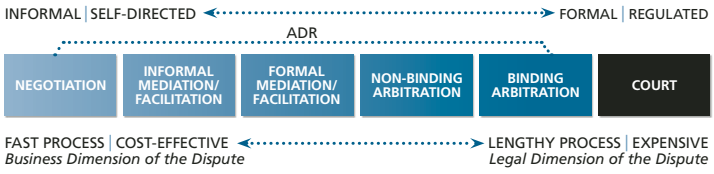
20

S20 | How Can DR Experts Help?

Advising on the Use of ADR Processes

Comparing Dispute Resolution Mechanisms



SOURCE: Adapted from Lukasz Rozdeiczer and Alejandro Alvarez. Alternative Dispute Resolution Manual: Implementing Commercial Mediation. *Washington, DC: IFC, 2006.*

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21

S21 | Advising on the Use of ADR Processes

Advising on CG DR Strategies

- Step 1: Plan Ahead
- Step 2: Assess past and present disputes
- Step 3: Anticipate potential disputes
- Step 4: Adopt CG DR policies
- Step 5: Decide who will manage the CG DR process
- Step 6: Identify who will serve as an internal or external peacemaker
- Step 7: Incorporate CG DR provisions in corporate documents
- Step 8: Review the effectiveness of CG DR policies
- Step 9: Remain prepared for litigation

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22

S22 | Advising on CG DR Strategies

Facilitating Board Discussions

- What was the nature of the dispute?
- How did the board react?
- What was management's role?
- What are the company's general practices for dispute resolution?
- What were the dispute's costs?
- How was the dispute settled?
- What policies and procedures should be improved?
- What disputes may arise?

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23

S23 | Facilitating Board Discussions

Training Board Directors

- Listen actively ➔ show genuine interest
- Use open questions ➔ encourage speakers to share
- Clarify reasons ➔ confirm goal and objectives
- Be aware of body language ➔ be friendly and open
- Speak on behalf of yourself ➔ use "I" statements
- Focus on constructive ideas ➔ ask for practical suggestions
- Stay calm ➔ respect different views; reschedule discussions
- Avoid misunderstanding ➔ paraphrase ideas or statements
- Allow others to save face ➔ help reformulate statements

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24

S24 | Training Board Directors

Resolving CG Disputes: Skills

DR Skills	CG Skills
• Impartial, independent • Diligent, discrete • Responsible, patient • Trusted • Active listener • Non-judgmental • Consensus builder • Understanding of the dynamics of disputes and resolution approaches	• No vested interests • Knowledge of CG framework • Knowledge of CG best practices • Respected • Strategic • Leadership • Board experience • Understanding of issues in dispute

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25

S25 | Resolving CG Disputes: Skills

What Makes CG Disputes Special?

- Complex issues
- High stakes
- Huge consequences
- Intimidating personalities
- Significant pressures

➢ *"Conflict resolution professionals are uniquely qualified to serve corporate boards in the constructive management of boardroom conflict and to use the energy of conflict to improve, uplift, and advance the company as it seeks to reach its maximum potential."*

RICHARD REUBEN

Global Corporate Governance Forum | IFC International Finance Corporation

26

S26 | What Makes CG Disputes Special?

What Issues May Arise?

- Do the parties at the table have the appropriate level authority to decide?
- Are there any power imbalances among the parties?
- Is there any ambiguity regarding the parties personal and professional identity?
- Are there any status issues to be aware of?
- Are there any strong emotions that need to be channeled?
- Are there any external parties or stakeholders who may influence the decision-making?

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27

S27 | What Issues May Arise?

Role Play

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28

S28 | Role Play

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

Role Play Objectives

- Understand and resolve a dispute involving board members
- Help refocus the board's attention on strategic issues
- Review the benefits of using a DR expert in the field of corporate governance

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29

S29 | Role Play Objectives

Case Presentation: MHU

- Max Henry University (MHU) is a private university facing financial difficulties
- President and one board director dispute donation's terms
- In exchange for his donation, the director expected the university's library to be named after his parents
- President argues she never made such a commitment; the library will be named after another donor
- Furious, the director threatens to take back his donation and sue both the university and its president

➢ *How can a damaging lawsuit be avoided while refocusing the board's attention on strategic issues?*

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30

S30 | Case Presentation: MHU

FOR MHU AND OTHER ROLE PLAY EXERCISES, SEE VOLUME 3 ANNEXES 4-7.

Roles: MHU

- **Maria Helena Santiago** — MHU president and board chairman. She has been the president for the last 15 years. She is 60, and the university is her life.
- **Michael Peruso** — Board director and donor. A self-made man who works long hours. He is 50 and proud of his daughter's recent graduation from MHU.
- **Juan Fernandez** — Board director and head of the funding committee. He is 38 and an optimistic fundraiser. He was appointed to the board six months ago.
- **Alfonso Lopez** — Seasoned mediator but not a corporate governance expert. He is 58 and has mediated 2,000-plus cases.

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31

S31 | Roles: MHU

FOR MHU AND OTHER ROLE PLAY EXERCISES, SEE VOLUME 3 ANNEXES 4-7.

Role Play: Phase 1

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32

S32 | Role Play: Phase 1

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

Phase 1 Instructions: MHU

- Juan calls a meeting with Maria Helena and Michael to discuss the university's future funding strategy
- He hopes to find an amicable resolution to the dispute over the donation
- He would at least like to convince Maria Helena and Michael to call in a professional mediator before resorting to litigation

30 MINUTES

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33

S33 | Phase 1 Instructions: MHU

FOR MHU AND OTHER ROLE PLAY EXERCISES, SEE VOLUME 3 ANNEXES 4-7.

Role Play: Phase 2

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34

S34 | Role Play: Phase 2

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

Phase 2 Instructions: MHU

- Alfonso, the professional mediator, has been called in by Juan to help sort out the dispute over Michael's donation
- Alfonso received a background briefing from Juan and and briefly met with Maria Helena and Michael
- A meeting has been scheduled to help Maria Helena and Michael find a solution
- Maria Helena and Michael both agreed that Juan should also participate in the meeting

30 MINUTES

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35

S35 | Phase 2 Instructions: MHU

FOR MHU AND OTHER ROLE PLAY EXERCISES SEE, VOLUME 3 ANNEXES 4-7.

Role Play De-briefing

- Other possible/better solutions?
- What may happen if no solution is reached?
- Specific issues the external peacemaker needs to look out for?
- Benefits, drawbacks in using external peacemakers?
- Could the dispute have been prevented?

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36

S36 | Role Play De-briefing

S37 | Questions and Feedback

1. Basic Adult Learning Guidelines
2. Standard Guidance for Corporate Governance Dispute Case Study Discussions
3. Role Play Techniques
4. Kardal Fashions Ltd.: A Corporate Governance Dispute Resolution Role Play
5. NeonSpark Corporation: A Corporate Governance Dispute Resolution Role Play
6. Techno Ltd.: A Corporate Governance Dispute Resolution Role Play
7. Max Henry University: A Corporate Governance Dispute Resolution Role Play
8. Agromash OSJC: A Corporate Governance Dispute Case Study Exercise
9. Corporate Governance Reading Guide for Dispute Resolution Experts

BASIC ADULT LEARNING GUIDELINES

Introduction

This section surveys techniques that strengthen and enrich training for resolving corporate governance disputes. This guidance moves away from traditional "sage on the stage" instruction to interactive adult learning, which engages experienced professionals in constructive problem-solving.

This approach will :

- Improve understanding of alternatives for preventing and resolving corporate governance disputes, emphasizing their value as alternatives to the courts
- Enhance constructive problem-solving skills
- Increase access to useful resources and professional networks

In reviewing this guidance, think carefully about how facilitation builds the trust required for candid deliberation and innovation in problem-solving.

Adult Learners

Participants in training sessions are accomplished professionals, including board directors, senior managers, mediators, and lawyers. These adult learners bring hard-earned wisdom to the discussion of corporate governance practices.

Adult learners are able to enrich deliberations with concrete examples of good practice, and they are well aware of the challenges. They serve as a vital resource when testing the local viability of dispute resolution alternatives.

In this respect, adult learning is fundamentally different from formal education, where students must achieve academic standards prescribed by instructors and institutions.

Adult learners are pragmatic. They are concerned about practical, achievable results given time, resources, and other constraints. They look to comparable examples for "lessons learned" to minimize the chances for failure. Many are leaders with corporate governance expertise.

In working with adult learners, consider the following:

- ***Knowledge.*** Adult learners value opportunities to gain pragmatic knowledge. As leaders, they deepen their understanding through open questioning, reflective analysis, and strategic team planning.
- ***Skills.*** Effective leaders rely upon communication skills such as storytelling, negotiation, and active listening. Skill-building is enhanced as they practice new techniques and exchange constructive feedback.
- ***Attitudes.*** Adults interpret issues in accordance with diverse values and beliefs. Principles of action help to foster the respectful mindsets required for constructive problem-solving.

Effective board members rely upon diverse styles and strengths as they engage in problem-solving. Through a variety of learning activities, encourage adult learners to expand and refine their preferred communication or negotiation skills. For example, recognize and demonstrate the power of an effective storyteller. Call upon the analysts to take leadership roles in prioritizing essential information. Offer opportunities for strategic planners to incorporate best practices in board procedures. And, offer dynamic leaders — those who volunteer — "trial and error" opportunities for adaptive learning.

Build the confidence, knowledge, and skills of adult learners by organizing increasingly challenging activities. A step-by-step sequence of adult learning activities flows logically from familiar to increasingly complex challenges. By engaging in relevant and increasingly challenging activities, board members:

- Recognize common concerns
- Acknowledge diverse interests
- Assess personal strengths and weaknesses
- Improve communication skills
- Enhance understandings
- Develop new professional relationships
- Practice cooperation in leadership roles
- Develop innovative solutions

ANNEX 1

Participatory activities, such as case studies, simulations and role plays, increase the likelihood that adult learners observe and learn from each other. As professionals, they exchange ideas and practice the communication skills required to gain new understandings from different perspectives. The recognition of common concerns serves as the basis for joint problem-solving. Instructional support materials reinforce learning if they are practical and appealing to different modes of learning (e.g., including examples, visuals, analysis, problem-solving activities).

TO REVIEW GUIDANCE FOR CASE STUDY AND ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEXES 2 AND 3

Facilitator's Role

The facilitator's fundamental role is to *work with* adults to facilitate active listening, interactive learning, and innovation in problem-solving. This may require adapting one's training style to reduce tendencies to present long lectures or dominate discussions. Practicing conciliation skills enables one to better facilitate group deliberations and explore problem-solving approaches.

FOUR PILLARS 0F GOOD GOVERNANCE	
Responsibility	Plan ahead, use good judgment, and fulfill commitments.
Fairness	Be inclusive, consistent, and impartial in creating opportunities for adult learning and leadership.
Transparency	Communicate using concepts and language that are easily understood. Recognize personal limitations, and respond constructively to errors.
Accountability	Develop consensus on group objectives, monitor progress, and adapt, as needed, to achieve results.

The four pillars of good governance serve as a useful guide for facilitating adult learning that enhances understanding of conciliation. Apply these principles in practice.

The Training Process

Most professionals have significant family and work responsibilities, and they don't want to waste time. To organize pragmatic and fully engaging training sessions, take a systematic approach to planning and delivery.

In preparation, select participants with relevant qualifications and a high level of commitment. Choose a diverse variety of backgrounds, considering ethnic, regional, gender, and professional characteristics. Ideally, to encourage active learner participation, limit the training group's size to 20 adults or fewer. Review each applicant's questionnaire to become familiar with the names of selected candidates, their interests, and their expertise.

Next, create an engaging and welcoming training environment — one in which participants will be comfortable discussing their experiences and generating questions.

Use a checklist to organize:

- Training room with good lighting and ventilation
- Tables and chairs that are comfortable and movable
- Computer laptop, PowerPoint projectors, and screen
- Flip chart stands, pads of paper, felt tip pens
- Photocopying service
- Others?

A commitment to high-quality instruction is demonstrated through the organization of the learning environment. Print orientation materials in advance. These should include a program description, an agenda with session objectives, faculty biographies, and a participants list. These are visible indicators of planning, time management, pragmatic focus, and proposed achievements.

In the session, welcome participants and allow time for personal introductions, limiting these opening statements

to three or four sentences. Provide a demonstration of self-management as you briefly introduce yourself.

Elicit adult learners' expectations of the training, and relate these priorities to the agenda topics and session objectives. Be sure to re-check them throughout the program. Include information indicating an interest in participants' backgrounds and experiences.

To identify the group's learning preferences, take a few minutes to develop a consensus on norms of behavior.

Make a suggestion that involves your own behavior as the instructor, and provide opportunities for learners to propose their own norms. These are easily accepted once they are adopted through consensus. Add a few ideas to the list, and yet be sensitive to the group's preferences. The aim is to build adults' ownership of the learning process and environment. Display and revisit the group norms periodically to add ideas or adapt as needed.

During the session, facilitate a logical progression of increasingly challenging activities. Promoting an open, respectful flow of ideas is an essential step in the process. Begin by identifying shared concerns, thus motivating adult learners to share various experiences and approaches to problem-solving.

A four-phase approach to learning leads from reflection to application. *(See adjacent chart.)*

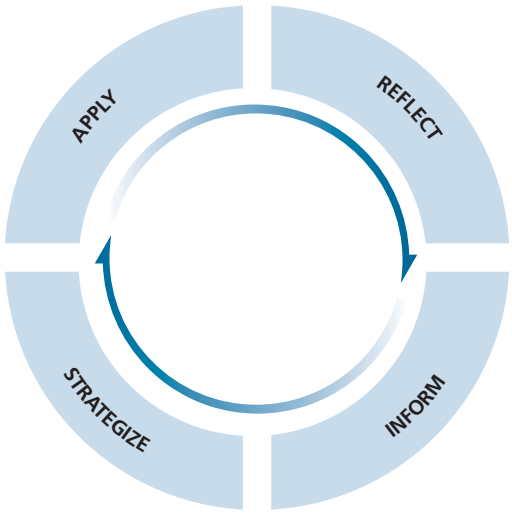
In closing the session, ask participants for key lessons learned, and finally, summarize the session's main points. Link these "take away" ideas to the learning objectives. Ask if there are any final questions, and allow time for participants to respond to each other's closing ideas.

Instructor Challenges

Addressing others' disputes presents opportunities and risks. In adult-learning deliberations, as in the boardroom, disagreements are unavoidable — especially when a group is composed of successful, independent-minded professionals in leadership roles within their organizations.

Some adult learners have well-developed social skills. They are able to acknowledge differing perspectives and "disagree without being disagreeable." Others can be provocative and challenging. They may interrupt,

A FOUR-PHASE APPROACH TO LEARNING



1. Reflect	Early in the session, raise curiosity by identifying shared interests. Why is the topic important? How have disputes caused companies to fail or experience poor performance? What are the potential costs of litigation? How can ADR resolve conflicts to the benefit of shareholders' interests? Motivate learners through positive examples and the recognition of risks.
2. Inform	Introduce new information with concrete examples. To build understanding, consider comparisons, logical categories, causes and effects, priority ranking, and evaluations. Describe key terms and be prepared with sources of additional information.
3. Strategize	Ask participants to note useful ideas and applications, and take time to prioritize options.
4. Apply	Skill building comes through practice. In groups, provide opportunities to apply basic negotiation and mediation skills. Encourage groups to provide each other with feedback.

SOURCE: Adapted from D.A. Kolb. 1984. Experiential Learning: Experience as the Source of Learning and Development. *Englewood Cliffs, NJ: Prentice-Hall. B. and D. McCarthy. 2005.* Teaching around the 4MAT ® Cycle: *Thousand Oaks, CA: Corwin Press.*

ANNEX 1

criticize, probe the depth of the instructor's expertise, or try to impose quick alternatives.

Adult learners will test each other's expertise with challenging "real world" questions. Don't be surprised by observations such as: "From my experience, there is a big gap between your ideas and the reality of business practice." Or: "In theory and academia, yes, this may work, but so many forces in business would work against your recommendation." Some participants may not see the value of others' suggestions, no matter how carefully phrased.

At times, if debates among participants are particularly contentious, take a step back, since you may need to mediate the discussions. Acknowledge your limitations and draw from the group's expertise. Problem posing is a technique that facilitates dispute resolution during training.

Make skillful use of questions to move the conversation from narrow *yes/no* positions to the identification of common interests. Useful training questions include:

- From your perspective, what is the situation? (**Define the problem.**)
- Why is this important to you? (**Exchange perspectives.**)
- Any suggestions for improving this situation? (**Brainstorm.**)
- Which suggestions are acceptable and most useful? (**Prioritize.**)
- Do we agree to _____ ? (**Establish common ground.**)
- What are the next steps? (**Implement.**)

As suggestions are proposed, note key words without judgment, providing fairly balanced opportunities for adult learners to communicate their ideas. You may need to clarify proposals by asking questions or paraphrasing statements. Be respectful of differing opinions and ideas, using such phrases as: *"From what I understand… Is that correct?"*

Be focused and concise when offering guidance. Do not try to impose values or solutions! Instead, draw lessons from the participant's own statements, or offer relevant examples. Adult learners appreciate and are better able to act on clear descriptions of techniques used in similar situations.

"5Rs" — Adult Learning Principles

The five learning principles — "5Rs" — provide a solid and flexible framework for encouraging adult learning and leadership:

- ***Respect.*** Create an environment that is welcoming, safe, and engaging. A well-managed, inclusive, and respectful tone sets the stage for open deliberations and constructive problem-solving.
- ***Reason.*** Adult learners are goal-oriented. To begin, relate common concerns to the learning objectives. A shared understanding of challenges provides the rationale for group cooperation and innovation.
- ***Roles.*** Provide opportunities for diverse adults to assume leadership roles. Balance responsibility and authority during participatory group learning.
- ***Relationships.*** Encourage professional mentoring, teambuilding, and networking. The consensus on group norms sets the stage for open and respectful communication.
- ***Rewards.*** Formulate action steps and celebrate the transfer of effective dispute resolution practices to corporate boards.

These principles are relevant in various corporate governance situations, from board meetings to the conciliation of stakeholder disputes. The aim is to engage adults as proactive learners and leaders of dispute resolution in corporate governance practice.

Be positive, and yet realistic, in the expectations of adult learners. Ultimately, professionals are responsible for adapting and implementing strategies that are meaningful and doable in unique corporate governance settings.

In summary, adult learning and corporate governance are enhanced by the practice of dispute resolution skills. As board members engage in strategic deliberation and risk management, respectful communication techniques facilitate wise decision-making, constructive dissent and the effective resolution of conflict.

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USEFUL WEBSITES

American Society of Training and Development (ASTD) website — members and non-member access — Resources to purchase and basic training information online. Also has monthly Periodical. *www.astd.org.*

Appreciative (positive and constructive) approaches to learning and change. *http://appreciativeinquiry.cwru.edu.*

Consultative Group to Assist the Poor (CGAP) On Line Training of Trainers. *http://www.cgap.org/direct/training/conduct_training.php.*

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ANNEX 2

STANDARD GUIDANCE FOR CORPORATE GOVERNANCE DISPUTE CASE STUDY DISCUSSIONS

STANDARD QUESTIONS	TOOLKIT REFERENCES
How would you summarize the dispute in a couple of lines?	Volume 1 Module 1
Is the dispute an internal or external corporate governance dispute?	Volume 1 Module 1
Who are the parties in dispute? Are there two or more parties involved?	Volume 1 Module 1
Are there any other stakeholders who might be affected by the dispute? Which ones?	Volume 1 Module 2
What could be the impact of the dispute if it escalates?	Volume 1 Module 2
What is the business dimension of the dispute?	Volume 1 Module 3
What is the legal dimension of the dispute?	Volume 1 Module 3
What is the personal dimension of the dispute?	Volume 1 Module 3
What is the position of each party?	Volume 1 Module 3
Do the parties have any common interests?	Volume 1 Module 3
What are the objectives of each party (best expected outcome of the dispute)?	Volume 1 Module 3
What are the fears of each party (worst expected outcome of the dispute)?	Volume 1 Module 3
What is each party's best alternative option (BATNA) if the dispute cannot be settled?	Volume 1 Module 3
What approaches to resolving the dispute would you advise the parties?	Volume 1 Module 3
Should a neutral third party be involved?	Volume 2 Module 1
What type of third party should be used?	Volume 2 Module 3
What should be his/her profile and skills?	Volume 3 Module 1
How would you advise the parties to prevent or more effectively deal with such a dispute?	Volume 2 Module 1

ROLE PLAY TECHNIQUES

Role Plays

A role play is an unrehearsed "acting out" of a case issue. It is one of the most interactive and potentially entertaining approaches to learning. There is no script. Instead, the trainer provides a safe environment, sets the stage, and encourages participants to volunteer as characters in hypothetical situations.

To engage in problem-solving, participants draw upon what they have already learned from the training program, their knowledge of the situation, and their creativity, imagination, and professional skills. Dramatic performances fully engage the role players and the observers.

Recommended Steps

1. **Preparation**
   - Distribute the case description and the short descriptions for each role player.
   - If the situation is complex, assign the case for review (homework) prior to the session.
   - Be sensitive to participants' personalities. To dramatize ideas with humor, consider asking a chairman to act as the CEO, and vice versa. Their insights (and misperceptions) can be surprising!
   - Arrange space for the scene so that everyone can observe the drama.
   - Set the stage by explaining the objectives, setting, and roles.
2. **Leadership**
   - Call for volunteers, or ask the group to suggest volunteers. Distribute role descriptions.
   - Performers have a limited amount of time to meet with their groups and prepare for their roles. Each group should prepare three talking points and anticipate questions.
   - Prepare the observers for active listening. Focus attention on one or two questions.
   - Start the drama.
3. **De-briefing**
   - Stop the role play at an appropriate point. (Avoid serious confrontation.)
   - Immediately after the role play, congratulate the actors. Use participants actual names while thanking them for their performances. Stepping out of role is essential, as there are conflicts among actors in most dispute resolution cases.
   - Before you ask others for feedback, ask role players for feedback. Encourage them to reflect upon what worked and what might be improved. Do this before you or others comment.
   - Invite observers to provide constructive feedback. Allow time for questions and discuss how the role play relates to the course objectives.

In closing, discuss how the role play relates to the session objectives. Reintroduce the performers as participants in training. Be explicit. Say, "You are no longer performing!" Use actual names while thanking participants for their performances.

GLOSSARY

The Fishbowl

- The fishbowl is a pair or group activity that others observe.
- The fishbowl is so named because everyone sitting outside the circle observes the role players in the circle as if they were watching fish in a fishbowl.
- A fishbowl can provide greater understanding than would otherwise be achieved through a lecture.
- The participants in role plays must feel comfortable negotiating or communicating their ideas and experiences before their peers.

ANNEX 3

PRACTICE

Organizing a Fishbowl

This toolkit uses the fishbowl in role plays. Attention is focused on the role players, who are engaged in a conversation. This activity requires adequate space to arrange the chairs so that the participants in the inner circle can see each other. The trainer introduces the situation; then, the role players act out their assignments.

Organize an inner group of role players and an outer group of observers so that everyone can see. Remind the role players to speak clearly and with strong voices. Observers (including the trainer) should not interrupt. They may take notes and then ask questions or add comments after the fishbowl deliberation. Fishbowl assignments can be informal or structured:

- ***Informal***. Discuss topic by sharing ideas, experiences, and suggestions freely, without documenting results. Participants are familiar with the topic. Assign a discussion topic that is familiar. For example, fishbowl participants may address a general question: "From your experience, how have you utilized mediation techniques?"
- ***Structured***. Participants receive clear instructions. They choose group leaders, discuss the topic, document ideas, and prevent results.

The role players may be understandably self-conscious at first, but they will quickly forget the audience as they engage in their roles. Some fishbowl observers may be anxious to ask questions or contribute ideas. Make clear before the fishbowl begins that they must refrain from posing questions or offering remarks until the appropriate time, which you will announce. After a sufficient length of time, thank the role players for their ideas. Manage the time so that the observers have an opportunity to ask questions and express ideas.

The Fishbowl

Kardal Fashions Ltd.

A Corporate Governance Dispute Resolution Role Play

SUMMARY ▸ This case explores a dispute between the chairman and the new independent director of a family firm, Kardal Fashions Limited (Ltd.). The company is preparing an initial public offering (IPO). Progress towards the IPO launch had been going well until the independent director began questioning family loans and the chairman's purchase of a new plant overseas (without prior board approval). Worried that these issues may thwart the planned IPO, he agrees to bring in a corporate governance dispute resolution expert. In this role playing exercise, participants consider the issues in reforming corporate governance policies and procedures. They examine the founder's decisions, the company's loans to family members, the directors' roles, and the new director's concerns. They feel pressed to resolve the dispute quickly so that the IPO can be completed successfully before an economic downturn occurs.

ROLE PLAY OVERVIEW : KARDAL FASHIONS LTD.

ROLE PLAY BACKGROUND NOTE: FOR DISTRIBUTION TO ALL ROLE PLAYERS AND THE AUDIENCE

OBJECTIVES

- Understand and resolve a rapidly escalating corporate governance dispute involving multiple stakeholders.
- Explore the role of third-party dispute resolution experts in helping resolve the issues.

THE EXERCISE

- Allow 90 minutes for this role play:
  - 20 minutes preparation
  - 30 minutes for Phase 1 enactment
  - 30 minutes for Phase 2 enactment
  - 10 minutes for the de-briefing
- This role play exercise will involve:
  - The frustrated, head-strong chairman: Da'ud Hussainy
  - The confident director: Sherin El Shabrani
  - The compliant CEO: Akil Bilal
  - The well-respected expert: Yasmina Fahim
- The role play may be held either as one continuous session or broken into as many as three parts: preparation; Phase 1 enactment; and, Phase 2 enactment and de-briefing.
- The role play may be used to train board directors and dispute resolution professionals.

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

THE COMPANY

- Da'ud Hussainy founded Kardal Fashions Ltd., a medium-sized, privately owned clothing manufacturer 15 years ago. He is the chairman and the largest shareholder, owning 30% of the company. In his view, the company's success resulted largely from his astute business decisions, particularly during economic downturns.
- Anbar, the chairman's wife, owns 5% of the company. Two sons — Tariq and Rashad — each own 5%. Ashraf, the chairman's brother, owns 10%. They are all board members but limit their roles to

rubber-stamping Da'ud's decisions. Having no interest in their father's clothing business, the sons are restless to pursue their own careers abroad after completing post-graduate degrees in, respectively, technology sciences and corporate finance.

- Other private shareholders collectively own 45% of the company. Generally, they have been satisfied with their dividends and the company's directors. Hence, as passive investors, they have allowed their investment to grow rather than question the board about the company's strategy and management.
- Since its founding, the company has done well. It employs nearly 300 persons. Yet, the board has supported Da'ud's determination that, if the company is to grow faster, it must diversify its customers by expanding sales in other countries, particularly those with high rates of economic expansion. The board must also cut costs to remain competitive in a low-margin industry and sharply reduce production times to meet the increasingly faster pace of fashion changes.
- Since Kardal Fashions Ltd. will need more capital than what the existing shareholders can provide, it will raise funds through an initial public offering (IPO) and list on the local stock market. To achieve this goal, the board will implement good corporate governance practices to meet the exchange's listing requirements and become more attractive to foreign investors. This effort includes appointing an independent director.
- The board also has agreed to implement steps that will improve the company's financial position to ensure a good IPO price. The company and senior management have been cutting costs to produce a good profit. They also have been strengthening the balance sheet. The window of opportunity for the IPO is closing, however, as an economic downturn seems likely, creating urgency to complete the offering quickly.
- The board supports Da-ud's long-term view that the manufacturing operations must eventually move overseas to lower costs, remain competitive in global markets, and expedite the production process. However, this is not an immediate priority since local labor costs remain competitive and the government provides incentives.

THE PARTIES

DA'UD HUSSAINY, FOUNDER AND CHAIRMAN OF KARDAL FASHIONS LTD.

- He is a head-strong, ambitious person who tightly controls his company. As the patriarch, he is somewhat intolerant of dissension against his views.
- As chairman, he recognizes his obligation to ensure that the company's best interests are being served. He has seen how his friends' family-owned private companies have collapsed from poor governance, which prevented them from attracting more capital to modernize and expand. Therefore, he advocates corporate governance best practices as a survival strategy.
- As the founder, chairman, and major shareholder of Kardal Fashions Ltd., he has continued to approach his role as if he and his family entirely own the company. He believes the company's success is due to his expertise, decisions, and vision, particularly during tough economic times.
- Da'ud is eager to get his company listed as quickly as possible given the likelihood of an economic downturn. He "hand picked" Sherin, whose excellent reputation Da'ud believes will help ensure a successful IPO.

SHERIN EL SHABRANI, INDEPENDENT DIRECTOR OF KARDAL FASHIONS LTD.

- As the only independent director and an accountant pledged to uphold high professional and ethical standards to maintain her credential, she takes her role seriously. Confident and competent, she is prepared to challenge family and individual positions. She knows Da'ud well; he has commented often on her integrity and excellence in her profession.
- She is anxious to improve the company's governance and disclosure practices, including the requirement that half the directors should be independent.
- She is excited about getting the company listed on the stock exchange. Yet this must be well-prepared. Rushing the process could result in needless mistakes and endanger the IPO's success. An upcoming downturn in the economy should not justify any compromise in the thoroughness and rigor that the IPO process requires.

AKIL BILAL, CEO OF KARDAL FASHIONS, LTD.

- Akil Bilal has been the CEO for the last five years. Da'ud chose him for the job when he decided to split the chairman and CEO positions to follow corporate governance best practices.
- Akil is indebted to Da'ud for this opportunity to join a profitable, growing company. Launching a successful IPO and then remaining as the CEO of the listed company would be great achievements.
- Akil revers Da'ud and dutifully follows his advice.

THE CONTEXT

- Anxious to quickly appoint Sherin as the independent director, Da'ud persuaded her to accept the position prior to the general assembly. An accountant, Sherin conducted a brief check of the company before joining the board. There was little time for a more thorough review. Given the company's long-term success, she reasoned that there was little cause for concern. From an online search, she learned from newspaper articles that Kardal Fashions Ltd. had been contemplating a major bank loan.
- Immediately after joining the board, Sherin asked for the most recent financial statements. Sahid, the CFO, provided her with these reports, but he was not very forthcoming with additional information. The loan, which is material to the company, is shown in that information. The interest expense in the income statement is commensurate with the size of the loan Sherin had read about.
- At the first board meeting, Sherin asked questions about the loan and complained to the chairman about unsatisfactory access to the company's financial information. Surprised and annoyed at her "inquisition," Da'ud confirmed the loan's eight-year existence. To end the discussion, he abruptly adjourned the meeting.
- After probing further, Sherin discovered that the funds were applied to the purchase of a home for each family board member in the town's best neighborhood. Loans to private company directors are legal but require shareholder approval. Sherin could not locate any board resolution approving the loan.
- At the next board meeting, Sherin raised more questions about the loan, insisting that the family borrowers repay the loan. Corporate governance best practice, she insisted, required the loan's dissolution.

ROLE PLAY OVERVIEW : KARDAL FASHIONS LTD.

- Angered by Sherin's aggressiveness, Da'ud dismissed her demand by emphatically stating that "this was none of her business." He also reprimanded her for putting the IPO in jeopardy and then abruptly ended the board meeting. Sherin and Da'ud have not spoken to each other since then.
- Immediately after that board meeting, Da'ud, Anbar, Rashad, and Tariq left for a vacation in South Asia. By chance, Da'ud saw a property that he believed would be ideal for a new clothing factory. It was also offered at a price that was purported to be a "bargain" since it was a forced sale.
- Da'ud contacted the CEO and immediately sought advice from Kardal's property advisor. After research, the advisor was not convinced that it was a good deal. The price seemed to be about 20 percent above the market price for similar properties. The CEO advised against the purchase, noting that the purchase could hinder the IPO strategy, which he was working hard to achieve quickly before an economic downturn sours investors' appetite for equities.
- Despite this advice, Da'ud negotiated a deal and signed a sales contract on behalf of Kardal Fashions Ltd.
- When Sherin heard about the deal, she was incensed. This transaction compounded Sherin's anxiety about the loan and the family's use of company assets as if they were their own. She tried to raise the matter with Da'ud but she was unable to reach him. The other non-family board members were becoming concerned.
- Word spread throughout the company that Da'ud had bought a new plant to relocate production abroad. The CEO feared that the workers would strike if these rumors were not "squashed." He notified Da'hud about his concern.
- After returning from vacation, Da'ud found more than 10 voice mails from Sherin requesting him to urgently meet with her and discuss the use of the company's assets. His CEO also sent an urgent note to inform him that the workers were planning to strike in protest of future plans to relocate jobs abroad and cut costs. Frustrated and upset, Da'ud calls his friend at the Corporate Directors Association. The friend recommends hiring a corporate governance dispute resolution consultant to help resolve the issues and clear the way for the IPO.

THE ISSUES

- **Use of company assets:** Sharp differences in views towards proper uses of company assets have festered since Sherin raised the matter at her first board meeting. The differences between Da'ud and her relate to:
  - Dealing in company assets, especially the loan used to purchase several family homes about eight years ago
  - Acquisition of property abroad without board approval and against the advice of both the CEO and the professional property advisor
- **Proper planning for the IPO:**. The IPO's success could be jeopardized by:
  - A public dispute between the chairman and the independent director
  - Negative publicity regarding the use of company assets
  - Employee strike
  - Deterioration of the company's financial position through the property acquisition

- **Corporate governance practices:** Da'ud publicly endorses good corporate governance practices and is taking steps to improve the company's governance policies and practices, but the newly appointed independent director raises the following weaknesses:
  - Board directors' complacency towards the chairman's actions
  - One independent board director
  - Infrequent formal board meetings
  - Obscure, authoritarian decision-making process
  - Lack of financial transparency
  - Possible unlawful dealing with company assets

THE SCENARIO

PHASE 1: TODAY

- Da'ud will be meeting with Yasmina, the consultant recommended by the Corporate Directors Association, after briefly discussing the matter over the phone with her. Upon her insistence, Da'ud also agreed for her to meet with Sherin later in the afternoon.

PHASE 2: THE NEXT DAY

- Yasmina has set up a meeting to help Da'ud and Sherin build common ground and find some joint solutions to the issues in dispute. Upon Da'ud's request, the CEO will also be joining the meeting.

The Frustrated, Head-Strong Chairman: Da'ud Hussainy

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are the founder, patriarch, current chairman, and major shareholder of Kardal Fashions Ltd. Collectively controlling 55% of the company, your family generally defers to your views and recommendations. Even the investors on the board rubber-stamp your proposals.
- You are a strong, decisive person who is very proud of how you single-handedly built the company from scratch into a successful venture over the last 15 years. Although you personally own only 30% of the company, you generously continue to handle all matters and deal with the company as if it were still owned only by you and your family. All the shareholders are satisfied with the company's performance and do not interfere with your management.
- After witnessing your friends' companies implode from family squabbles, you became a supporter of good corporate governance practices. You recently spoke at an event on the governance challenges for family-owned firms at the Corporate Directors Association. You also know that good governance is essential for the IPO and listing the company on the exchange.
- You are very keen on managing a successful IPO. Unanimously approved by the board, the new infusion of capital would help the company grow. Privately, though, you hope you can better engage your sons in helping to transform the company into a multinational success. This prospect may entice them to abandon their personal career plans.

YOUR POSITION

- Initially, you were happy to have the input of an independent director, particularly since you knew Sherin and appointed her. However, she has proved to be a problem. She interferes in your family's personal matters and questions everything she can put her nose in. She thinks she knows everything about governance and running a business, even though she has never set up or managed a company. And now, she's hysterically calling you about your recent purchase of the manufacturing facility. Doesn't she realize how you took time from your vacation to find this opportunity?
- You have built the company to what it is today by taking chances. Your judgment has neither let you nor the company down. In any event, when the company does list, it will invariably want to purchase the property overseas. Offshore manufacturing is the way of the future. The purchase is just ahead of the IPO timing that you and the board approved.
- Before Sherin's arrival, things looked great. Now, you wish you had chosen a different independent director. She seems to be the cause of all your problems. With the coming IPO, asking for her resignation would look bad. Worse, she could contact the press and ruin your attempt to list the company.
- You especially want to avoid unwarranted publicity around the family loan. Over time, you have rethought the appropriateness of this loan and would like to repay it soon. But, you do not have the funds to do so before the IPO is completed.

ROLE PLAY OVERVIEW : KARDAL FASHIONS LTD.

The Frustrated, Head-Strong Chairman: Da'ud Hussainy

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- You must also have to defuse the employees' discontent. If a strike erupts, the company's reputation would suffer. How could this unrest have happened? Has your loyal CEO lost his senses? There has never been a strike in your company, and you have always ensured that your employees are compensated above market rates. You have no plans to lay off any workers. All you did is to buy a property — a strategic necessity for the future and a good deal. You felt you had to move quickly but would seek the board's endorsement of the purchase at the next meeting.
- Remembering how your friends' companies collapsed amid family disputes, you feel threatened. You hope the dispute resolution consultant you hired will be able to advise you on solutions to your current problems and talk some sense into Sherin.

WHAT'S AT STAKE?

- **The company's future and successful IPO:** A major dispute with the independent director, striking employees, and the controversy over the use of company assets — these issues may end plans to list and destroy investors' trust in your leadership.
- **Control:** With Sherin's appointment, you sense that your control over the company has weakened. She is aggressively challenging your authority and integrity. You are not accustomed to this. You want her to work with you — not against you.
- **Your reputation:** This situation could tarnish your reputation and patriarchal authority. Most of all, you would hate to look like a failure in your sons' eyes.

WHAT WILL YOU DO

PHASE 1: TODAY

- You will talk to Yasmina, the ADR consultant. Upset, you will share your frustrations. Explain your position and try to persuade Yasmina to adopt your views. You will ask her to influence Sherin regarding the company's best interest as you have defined.
- You will agree to hold a meeting with Sherin facilitated by the consultant, but you will insist that Akil join that meeting. He has always been extremely loyal to you. He might help influence Sherin positively, but you also want some clear answers from him regarding the employee problems.

PHASE 2: THE NEXT DAY

- You feel much better after meeting with Yasmina and venting some of your frustrations. You hope that Sherin has calmed down and is now willing to work with you on the IPO launch and listing. You are willing to advance efforts to improve the company's governance, but, more urgent, you would like to agree on a message that you and your CEO can deliver to employees to dissipate any misunderstandings about the property purchase so that a strike can be avoided.

The Confident Director: Sherin El Shabrani

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You were appointed six months ago to Kardal Fashions Ltd.'s board. You were particularly attracted to the opportunity of participating in a company's IPO and its listing. You are ambitious and confident; you abide by your profession's high ethical and professional standards. You have only held director positions in non-listed companies.
- As a trained accountant and the only independent director of Kardal Fashions Ltd., you take your role seriously. Given your expertise, professional esteem, and confidence, you are prepared to exert your views and challenge specific family and / or individual perspectives.
- While "hand picked" by the chairman, you are not a "yes" person. You believe that Da'ud chose you for your integrity, strength of character, intellect, and personal capacity to earn the respect of current and future investors. You believe your role is to act in the company's best interest. You also believe you are personally accountable for board decisions. You want to help improve governance practices while supporting the company's plans for sustainable growth and a successful listing.
- Since joining the board, you have had a difficult time. In hindsight, you wished you had researched the company's background more thoroughly and discussed your concerns with Da'ud before accepting the board position.
- You trusted Da'ud and were seduced by his support for good governance. You now suspect that this was all just "trendy window dressing." The family loan and the recent purchase of a property without board approval and against the advice of the CEO — both actions are irresponsible in your view and violate corporate governance best practice.
- What angers you most is that Da'ud hasn't even bothered to return your calls about these issues while he was on vacation. This morning, you received a call from Da'ud's executive assistant to inform you that he wants you to meet with a consultant, specifically a third party to discuss your disputes. You are not quite sure what this is about. Does that person even have a "clue" about corporate governance and board procedures? If this mediator is to become involved in the latest issues, how much can or should you disclose? Whose side is the mediator on? You are, of course, worried that this may actually be about Da'hud trying to negotiate the terms of your resignation.

YOUR POSITION

- You did consider resigning but felt it would be a premature decision. You feared your resignation may be misinterpreted and prevent you from being offered any new director positions. Another concern: Da'ud may publicly criticize you to cover his own mistakes. He is a powerful man, and business leaders are very skeptical about having women on boards aside from those with family ties. You are ready to try your best, but if you cannot get Da'ud and the board to comply with corporate governance best practices, you will have no choice but to resign. At a minimum, you want:
  - The family loan to be repaid to the company quickly
  - A board decision immediately to approve or terminate the purchase of the new property abroad. You know the CEO is unhappy about this idea, but you feel that the board will allocate sufficient time for him to present his position, using facts to support his statements.

The Confident Director: Sherin El Shabrani

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- If Da'ud is willing to agree to these terms, you are willing to remain. But, he must also understand that this can no longer be a "one man show." If the company is to be listed, he must change both his behavior and his approach to handling company matters and assets. This means that you want greater clarity between his role as the Chairman and that of the CEO, insisting that the two roles are truly separated. Further, at least half the board must be composed of independent directors. This would strengthen your position and demonstrate corporate governance best practices during the IPO process. Da'ud must also be prepared for greater transparency in board decision-making and more extensive public disclosures as the listing rules require.
- Da'ud must see the IPO as "not an end in itself." Meeting the IPO criteria is only the beginning of a new era for the company. Once listed, scrutiny of the company will be far more comprehensive to ensure compliance with listing requirements and shareholder safeguards. Otherwise, even if the IPO is a success, the company's rating and shareholder value could tumble.
- If Da'ud wants to negotiate your resignation, you will not engage in any further discussion at the meeting with the ADR consultant before consulting your lawyer.

WHAT'S AT STAKE?

- **Your board position:** You may lose you director position if you are forced to resign either because a workable solution to your governance issues cannot be found or because Da'ud wants you dismissed.
- **Your reputation:** You would like to remain on the board and work hard on behalf of the shareholders and the company's best interest, but, most importantly, you have an ethical and professional reputation that must be preserved. You do not want to be implicated in any wrongdoings.
- **The IPO and the company's future:** The company has tremendous potential and could grow into a highly successful listed company but public knowledge of your dispute with Da'ud and any publicity around the use (or misuse) of company assets could derail those plans. Pressure is building because there is a limited window of opportunity to launch the IPO before investor concerns about the economic outlook sour.

WHAT YOU WILL DO

PHASE 1: TODAY

- You will meet with Yasmina, but you are suspicious. You will avoid volunteering any information before you have a clear understanding about the meeting's focus and her role. You will try to get as much information as possible on where Da'ud stands since you haven't spoken directly to him before his return from vacation. You will mention that you want to meet with Da'ud in person — sooner rather than later.

PHASE 2: THE NEXT DAY

- You have agreed to meet with Da'ud and Akil to build common ground and find some joint solutions to the issues in dispute. You are more confident about Yasmina and hope that she will help craft a constructive solution

The Compliant CEO: Akil Bilal

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- Da'ud hired you five years ago when he decided to embrace good governance practices and split the position of chairman and CEO. Neither of his sons was an option then since both had not completed their studies. From all that you know, neither is interested in the company after they graduate. The sons take board meetings very lightly and are often absent, much to their father's regret.
- Da'ud has always inspired you. You remain extremely loyal and grateful to him for the opportunity he gave you to run this company. Some people say Da'ud is "running the show," but you don't take offence since he is the founder and the only shareholder actively engaged in the company's activities. Da'ud is the only one you can look to for guidance.
- You don't feel comfortable around Sherin. She doesn't know the company's history. You found her to be abrasive in how she harassed you and the CFO for financial information immediately after joining the board. You smelled trouble, but Da'ud seemed very enthusiastic about her. Now, you see that they are in conflict with each other.
- Excited about the IPO, you are very glad that the board approved the listing strategy that you had personally developed under Da'ud's supervision. This is a tremendous opportunity to grow the company worldwide and to become the CEO of a listed company. This success will boost your career, increase your compensation, and elevate your prestige in society.

YOUR POSITION

- You are worried about the growing tensions between Da'ud and Sherin. Their conflict was inevitable, but it must be curtailed to protect the IPO.
- In your view, the family loan was not a concern since it was approved eight years ago (before you had joined); these loans, therefore, were not your responsibility. However, Sherin made a good point when she explained that new investors may care about this, in contrast to the current investors, who never saw the matter as an important concern. If she could persuade Da'ud to repay the loan, that would improve the company's balance sheet and enhance the IPO's success. You refrained from making any comment at the board meeting when the subject was tabled. You could see Da'ud's anger.
- Your main, immediate concerns: stopping purchase of the new property and averting an imminent strike by the employees. This is not the right time to buy the property. Even if it were a good deal (which it may not be according to your property advisor), it would have been better to postpone the transaction until after the IPO. The board could then make a decision that would be recorded in the minutes. Da'ud did not consider your advice, which disappointed and upset you.
- The most pressing issue: employees' morale. Your company has never had a strike because you worked hard to create good working conditions and pay above-market compensation. Kardal Fashions Ltd. is seen as a leader in the textile manufacturing industry for its employee policies. You must dispel the rumors triggered by the property purchase. A strike would harm the company's reputation and delay production. Your customers may decide to seek other manufacturers. All these

The Compliant CEO: Akil Bilal

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

consequences would harm the IPO process. You must discuss this matter with Da'ud immediately to determine how to manage the situation.

WHAT'S AT STAKE?

- **IPO's success:** The strike, the dispute between the chairman and the independent director over the loan, and the untimely, unilateral purchase of property — all three matters may jeopardize the IPO's success.
- **Your career and reputation:** Although none of these problems are your fault, you could be blamed for launching an unsuccessful IPO. Not only are you at risk of losing your job but your dreams of becoming the CEO of a listed company could disappear.
- **The company's future and the employee's welfare:** If the company fails to resolve these issues, it could lose customers and shut down. This would mean permanent job losses and harm the employees' futures, for which you feel partly responsible.

WHAT YOU WILL DO

PHASE 1: TODAY

- This afternoon, Da'ud informed you that he wants you to meet with him and Sherin tomorrow to address pending issues. To your surprise, he mentioned that the meeting would be facilitated by Yasmina, an ADR consultant he hired for that purpose. He also asked you to prepare a letter to all employees regarding the property's purchase. He did not provide further details but said the letter should clearly state that the company's operations will be not be relocated abroad and that no job cuts are planned. You will prepare a draft for tomorrow's meeting.

PHASE 2: THE NEXT DAY

- You are nervous about the meeting. You don't know exactly how tense the situation is between Da'ud and Sherin, or where they stand with their respective positions. You hear that they each met with Yasmina, who is apparently a dispute resolution expert. She never contacted you. You will be extremely cautious about what you say. You are ready to address the strike but you do not want to position yourself on the loan and the property purchase issues. Even if you agree on the substance of Sherin's views, you do not want to upset Da'ud. He could fire you immediately, and you would lose the opportunity of becoming the CEO of a listed company. Yet, you do hope that this meeting will go well so that the IPO can move forward. If the IPO collapses, everyone may blame you.

The Well-Respected Expert: Yasmina Fahim

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are a corporate lawyer by training. Over the last few years, you have dedicated most of your time to resolving disputes in family firms and consulting boards on succession planning. You had previously advised companies on IPO preparations.
- You believe that most issues and governance disputes that arise in the boardroom, or with shareholders, do not find a satisfactory outcome in court. Having recently become an accredited mediator, you favor mediation.
- You have no conflicts of interest with the company, its vendors, its customers, Da'ud's family, and Sherin. You met Sherin once at a lecture of the Corporate Directors Association but have had no personal or professional interaction with her since.

YOUR POSITION

- Da'ud hired you based on the advice of his friend at the Corporate Directors Association. It was not clear whether he was seeking an advisor or a mediator, but you're assuming he will need both. In your first call with him, you clarify that you are a neutral third party. Your objective is to try to help achieve a workable solution for the chairman, the independent director, and, more broadly, the company's best interest. You request a separate meeting with Sherin and underscore to Da'ud that you will not be negotiating a deal "on behalf of the chairman." You emphasize the importance of being seen as a "neutral" third party — not "Da'ud's person."
- Da'ud agrees to your conditions, but your instincts suggest that he has neither discussed nor clarified your role with the Sherin: neither has he cleared your involvement with the board. You expect this to be a very informal mediation process. A formal agreement cannot be reached without the board's endorsement. You see your role as that of a facilitator. In your meetings, you will need to make sure everyone understands your role, particularly your neutrality.
- Believing this to be an interesting case, you sincerely want to help the parties "get back on the right foot" in the company's best interest. You are confident, cheerful, and optimistic by nature. You are convinced that the process will end in a successful resolution.
- Since you are a corporate lawyer and an expert in family governance matters, your biggest challenge will be to refrain from making any judgments or spelling out a solution. For the process to succeed, the parties need to own the dispute and its resolution.

WHAT'S AT STAKE?

- For you, there is not much at stake beyond the satisfaction of helping resolve a conflict among board members. You also enjoy demonstrating to your husband, another lawyer, that there is great value in using ADR approaches. This case's success will enhance your ability to attract other clients — especially since you were recommended for this assignment by the Corporate Directors Association.

The Well-Respected Expert: Yasmina Fahim

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHAT YOU WILL DO

PHASE 1: TODAY

- Meet individually with Da'ud and Sherin.
- With each party, clarify your role, emphasize your neutrality, and outline both the objectives and the limits of the process. Establish clear ground rules. Create a non-threatening and confidential forum in which each party can vent and express their concerns. Focus each party's discussion on the issues — not their personal views of directors.
- Help each party understand what the best and worst outcomes to this dispute could be.
- Ensure that they commit to finding a constructive solution when they meet together the following day.

PHASE 2: THE NEXT DAY

- You will facilitate a meeting between Da'ud and Sherin. At Da-ud's request, Akil will join this meeting. You hadn't expected this, but since Sherin had no objection, Akil's participation appears to be a good idea. However, you wish you could have met him before this meeting. In witnessing this example of Da'ud's unilateral decision-making, you are concerned that this may obstruct the ADR process. Sherin may feel outnumbered in the discussion.
- When all parties are present, you begin the meeting by clarifying your role and the ground rules. You ask them to each make a brief introductory statement and then list their issues (e.g., the family loan, the property purchase, the strike, and the company's corporate governance practices). Once the issues are established, initially help build common ground around those areas in which the three parties are generally in agreement. From there, work towards agreement on the disputes impeding a successful IPO.
- Without rushing, try to help the parties find common solutions to the issues that the board would next consider. Start with the potential strike, since it appears to be the most pressing issue.
- If time allows, discuss with the parties what needs to change so that the board and the company do not come to this situation again. Ask if these changes are being addressed as the company works to comply with the exchange's listing requirements. Throughout, demonstrate your leadership of the discussion.
- Draw in Akil to show how separation of the roles of chairman and CEO are good corporate governance practice. Doing so will also show that his position doesn't become an issue moving forward or compromises any common ground that you manage to help build between Da'ud and Sherin.

NeonSpark Corporation

A Corporate Governance Dispute Resolution Role Play

SUMMARY ▸ This case explores a dividend policy dispute in a partially privatized utility company. Privatized 18 months ago, the electric utility NeonSpark Corp. is ready to report a significant profit for the first time. The State, which holds one-fifth of the company's shares, wants dividends paid to shareholders. The CEO wants to reinvest the after-tax profit into the plant to improve the efficiency of electricity generation and expand production. Having no opinion on whether to pay dividends, the chairman wants to avoid any adverse publicity.

ROLE PLAY OVERVIEW : NEONSPARK CORP.

ROLE PLAY BACKGROUND NOTE: FOR DISTRIBUTION TO ALL ROLE PLAYERS AND THE AUDIENCE

OBJECTIVES

- Understand and resolve corporate governance disputes involving the State as a shareholder.
- Review the benefits of using an external dispute resolution expert to help reconcile differences among board members on key strategic policy questions.

THE EXERCISE

- Allow 90 minutes for this role play:
  - 20 minutes preparation
  - 30 minutes for Phase 1 enactment
  - 30 minutes for Phase 2 enactment
  - 10 minutes for the de-briefing
- This role play exercise will involve:
  - The well-connected chairman: George Tolstoi
  - The ambitious CEO: Vladimir Velikov
  - The genteel state-appointed board director: Ivan Mendelev
  - The charismatic neutral facilitator: Igor Kandinski
- The role play may be held either as one continuous session or broken into as many as three parts: preparation; Phase 1 enactment; and, Phase 2 enactment and de-briefing.
- The role play may be used for training board directors and dispute resolution professionals.

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

THE COMPANY

- NeonSpark Corp, an electricity distributor privatized 18 months ago, is listed on the stock exchange.
- The State retains a 20-percent stake in the company.
- A foreign investor owns 40 percent of the company.
- The remaining shares are dispersed widely among shareholders.

ROLE PLAY OVERVIEW : NEONSPARK CORP.

THE BOARD MEMBERS

GEORGE TOLSTOI, THE WELL-CONNECTED CHAIRMAN

- George was appointed chairman of NeonSpark Corp. immediately after its privatization. He is well-connected.
- He is well-versed in good corporate governance policies, having sat on other companies' boards. Under his leadership, NeonSpark Corp. recently received an award for being the stock exchange's best corporate governance reformer.
- He has the company's reputation and performance at heart; he also wants to maintain good relations with the State.

VLADIMIR VELIKOV, THE AMBITIOUS CEO

- Vladimir was appointed after the privatization to turn the utility around; he did so, and the company posted its first dividend.
- He is considered hard-working, ambitious, and straightforward.
- He wants to continue modernizing the power-generating plant so more electricity can be produced at less cost. Such investments will create jobs and help the economy grow, generating more demand for electricity.
- He wants to ensure that the utility continues to achieve good results, promote his personal career ambitions, and strengthen state support for his leadership.

IVAN MENDELEV, THE GENTEEL STATE-APPOINTED DIRECTOR

- Ivan is a young but senior dedicated civil service employee whose career ahead is very promising.
- This is his first experience sitting on a large company's board; his success will determine much of his future career. His appointment was dictated by political circumstances.
- He believes his role is to advocate the best interests of the State and society while acting in the company's best interests.

THE CONTEXT

- After major restructuring, the company is expected to record a significant profit for the first time ever.
- Official results are not available yet to the public, but they are expected to be discussed at the company's board meeting in a week from now, along with the next fiscal year's investment strategy.
- Twelve months ago, the parliament adopted a new tax policy that provides for a flat tax rate of 10 percent on all companies' profits.
- Six months ago, the regulator approved a 30-percent hike in electricity rates.
- GDP growth is at 6 percent, inflation exceeds 8 percent, and interest rates are about 7 percent.

THE ISSUES

- **Reinvest profits to modernize equipment:** The CEO believes that to sustain these good results and become more competitive, major investments are needed to modernize the company's plant, including power-generating equipment. Interest rates are high, so rather than borrowing money, he thinks the dividends should be reinvested into the utility rather than being paid to shareholders.
- **Increase state revenues:** The State representative on the board believes that all shareholders should receive a dividend. The State is expecting dividends from well-performing, state-owned enterprises (SOEs) to meet its revenue needs. Much has already been invested in the company; further investments can be phased in over the coming years.
- **Avoid negative publicity:** NeonSpark Corp. has come a long way. If a dispute around the dividend policy inflates and becomes public it could negatively impact the company's overall performance.
- **Maintain good relations with public officials:** NeonSpark Corp. is a utility company and maintaining good relations with regulators and public officials is important.

THE SCENARIO

PHASE 1: TODAY

- Aware of the dispute over the dividend policy, the company's chairman has called a meeting in his office today with the CEO and the State representative. The chairman wants to better understand the issue and the rationale behind each of their positions. He fears that this situation may split the board and escalate into a public dispute.

PHASE 2: TWO DAYS LATER

- Unable to find a workable solution to resolve the dividend policy dispute, and fearing the worst, the chairman calls on an outside expert, as allowed under board procedures. He hopes the neutral corporate governance expert will help him craft an appropriate solution and avoid a full-blown dispute. He is aware that the board must ultimately decide the dividend question, but at least he wants management, (represented by the CEO), and the State (represented by its designated board director), to agree on a joint position for the board's consideration.

The Well-Connected Chairman: George Tolstoi

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You have been appointed as the chairman of NeonSpark Corp. immediately after its privatization.
- You are tactful, well-educated, highly respected, impressive, and strict.
- You want to retain good relations with the foreign investor but also with the State representative for personal and business reasons.
- You are well-versed in good corporate governance policies and have sat on several companies' boards. You are proud that the company recently received an award for being the exchange's best corporate governance reformer.
- You are politically well-connected and treasure your relations with important people, including government leaders.
- Your image is important to you; hence, you want to remain the successful chairman of a well-managed, company with strong performance.

YOUR POSITION

- You know that the board must make the best decisions for the company's interests while considering its main stakeholders' expectations.
- You have no strong feelings about the dividend policy as long as it makes sense and doesn't create any issues.
- Of course, if no dividends were to be declared, then a strong case would have to be presented at the shareholder meeting, even though it seems that the foreign investor would be satisfied with that option. You think the State representative is a bureaucrat who has no idea how to manage a business, but you don't want to jeopardize your political connections.
- You think the CEO is performing well and has done a good job in restructuring the company, but he may be too ambitious and is often too outspoken.

WHAT'S AT STAKE?

- **Avoid public conflict:** You want to avoid public conflict at all costs and prevent any leaking of this dispute to the press.
- **Company's reputation and performance:** Public conflict would harm the company's image and performance and cast a shadow on your own performance as the chairman.
- **State relations:** You want to retain good relations with the State (for personal reasons, but this is also a utility company) and the foreign investor, given his influence with a 40-percent ownership.

The Well-Connected Chairman: George Tolstoi

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHAT YOU WILL DO

PHASE 1: TODAY

- Welcome the CEO and the State representative to your office. Explain why you called the meeting. Hear both positions (starting with the CEO). Call it a day if things get too loud or if the discussions hit a dead end. Invite them back to your office in two days.

PHASE 2: TWO DAYS LATER

- Introduce the neutral expert and sit back. Once a solution is in reach, take over the meeting again, rephrase the solution, and thank all for their constructive thinking. Ask the CEO to prepare a proposal for the board's consideration that reflects a mutual agreement over the dividend policy.

The Ambitious CEO: Vladimir Velikov

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You were appointed after the privatization to turn around this company, and you did so. The results are there, and you are proud of them, but much remains to be done.
- You are hard-working, ambitious, and straightforward. You have no patience for bureaucrats. You are a doer. What people see is what they get.
- Part of your compensation package is tied to the company's results. If you don't perform well, the board can fire you.

YOUR POSITION

- You believe you work for the company's best interests and, consequently, all its shareholders — even though only the foreign investor seems to understand what you are doing.
- The best, cheapest, and fastest way to modernize the company is to reinvest its own profits. No argument about that — as far as you are concerned.
- Modernizing the facilities to continue the pace of improvement and growth cannot be sustained without further investments.
- You think that, if you can make the needed investments, you can create jobs in the mid-term (instead of having to lay off people) and better serve customers.
- You want to persuade the State representative to see things your way. At the board meeting, you want the directors to agree that the total after-tax profits should be invested in the plant and new power-generating equipment.

WHAT'S AT STAKE?

- **Personal reputation and career:** Your reputation and your job, which is tied to the company's performance not only this year but for future years. Even the foreign investor has made that clear.
- **Company's modernization:** It's true that the company's results are not only due to your efforts; tax cuts and increases in electricity prices helped, too. To maintain good results, you need a more modern, more efficient plant to complete the utility's restructuring program.
- **Stats Support:** You don't like dealing with the State, but you need the support of the State representative and the chairman to lobby for another increase in electricity prices. Further, a small plant needs to be closed. You'll need all the support you can muster to avoid issues with the town's mayor and prevent social unrest.

The Ambitious CEO: Vladimir Velikov

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHAT YOU WILL DO

PHASE 1: TODAY

- When invited by your chairman, you will do your best to explain and defend your position.
- You are not ready to take any nonsense from the State representative. When he speaks, you may show your impatience and even interrupt him.
- You are happy the chairman decides he will get a neutral expert to look into the dividend policy dispute.

PHASE 2: TWO DAYS LATER

- You will show more restraint before the neutral facilitator (whom you don't know).
- You will show more understanding for the State's position and be prepared to look into developing a board proposal that sets out the company's capex (capital expenditure) needs and cash flows in the year ahead, which will probably indicate that the company can pay a dividend and continue its restructuring.
- You would agree to have 50 percent of the after-tax profit paid as dividends and the remaining 50 percent reinvested — but the same principle should be reapplied next fiscal year.
- You want the State representative to recognize that NeonSpark Corp. and its CEO are doing a good job.

The Genteel State-Appointed Director: Ivan Mendelev

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- Having earned a PhD in Engineering, you are a young but senior dedicated civil servant of the Ministry of Economy and Industry with a brilliant career ahead.
- This is your first experience sitting on a large company's board; you would like it to be a positive one — much of your future career depends on it.
- Your appointment was a political move, and although you don't have much experience with business management, you don't want your opinions to be ruled out.
- Since your board appointment, you have been watching the restructuring process with skepticism.

YOUR POSITION

- You believe your role is to work in the interests of the State and society, but you also have a legal duty to act in the company's best interests.
- You are satisfied with the expected positive financial results that the company is about to announce, and you know that the shareholders would welcome a dividend.
- You are not a corporate governance expert, but you believe that the State (along with all the other shareholders) is entitled to get its share of the company's profits through dividend payments.
- You don't like the CEO. You think he is arrogant and suspect that he may be working primarily to appease foreign investors' interests.
- You think the CEO is exaggerating his own achievements. The company's good results are mostly due to the tax cuts and the increase in electricity prices.
- Although GDP growth rates are good (6 percent), inflation is high (above 8 percent). The rise in electricity prices has been tough on pensioners. Pensions need to be increased, but that can only be done with higher state revenues.
- You think that tremendous amounts of capital have already been invested in the company (which was part of the deal in selecting the foreign investor), and you are worried that further modernization would involve buying equipment from abroad and not from national suppliers.
- You know that the declaration of dividends is a board decision, but you want management, represented by the CEO, to support your position at the board meeting.

WHAT'S AT STAKE?

- **Personal reputation and career:** Things have been going great so far; you want it to stay that way.
- **Appease the chairman:** You like the chairman and you want to keep him happy — he is well-connected.

The Genteel State-Appointed Director: Ivan Mendelev

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- **State revenue needs:** You need to return some cash to the state budget. (If all well-performing SOEs skip paying dividends, state revenues will suffer.).

WHAT YOU WILL DO

PHASE 1: TODAY

- You will do your best to defend your position.
- You will talk primarily to the chairman and avoid eye contact with the CEO. You will ask the CEO to refrain from interrupting you and to act in a polite manner, if needed.
- You can threaten to publicly announce the State's position if you feel you are not being heard.

PHASE 2: TWO DAYS LATER

- You are glad that the chairman has called in a neutral expert — although you find that intimidating.
- You are worried about the turn that the discussions have taken, and you don't want this to become an open conflict. You are open to finding a solution but not at any cost.
- You could agree to the partial payout of dividends (at least 50 percent of the after-tax profit) and partial reinvestment of after-tax profit in the company's modernization — but only if preference is given to national contractors and suppliers for the modernization of the company's plant and equipment.
- You would like it recognized that the company's good performance is also due to the government's new tax and energy policies.

The Charismatic Neutral Facilitator: Igor Kandinski

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are a retired judge, a seasoned director, and an experienced mediator.
- You are a corporate governance expert served as director on several corporate boards.
- You are highly respected and charismatic.
- You believe in the benefits of mediation, and you think it should be used to deal with boardroom disputes — in the company's best interests.
- You are a neutral party to the conflict. You do not have any direct or related material or emotional connections to the company, its board members, and the stock.

YOUR POSITION

- You have no position other than to achieve a workable solution for all and you have several ideas to make this work. You think this is a great opportunity to show off your skills, and demonstrate the benefits for boards to call on dispute resolution experts such as yourself.

WHAT'S AT STAKE?

- **Finding a sustainable solution:** You want this intervention to be successful and the solution sustainable.
- **Demonstrating value of ADR techniques:** If this is a success, not only will it reflect well on you, but it will help make the case for the use of ADR techniques in other boardrooms.
- **Supporting chairman:** You need to keep your charismatic personality in check in order not to overpower the chairman. He needs to look good and feel that he did the right thing by calling you in and that your involvement doesn't jeopardize his status of being a good chairman — on the contrary, it reaffirms his wisdom.

WHAT YOU WILL DO

PHASE 1: TODAY

- For the sake of the exercise and because of time constraints, you will be provided with all the role parts. You will also be allowed to discreetly listen to the initial discussion between the chairman, the State representative, and the CEO.

PHASE 2: TWO DAYS LATER

- You made yourself available at short notice to facilitate a dispute over the dividend policy to be adopted by NeonSpark Corp. You have been provided with the background information. The company's Chairman has briefed you on the respective positions of the State representative and the CEO.

The Charismatic Neutral Facilitator: Igor Kandinski

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- You can see that there is room for negotiation. A solution may be found by giving shareholders a dividend representing part of the company's after-tax profit while setting some of the after-tax profit aside for reinvestment, which, in turn, will increase share value. Once a solution's outlines are in sight, you will hand over matters to the Chairman and let him take ownership and leadership over the process.
- You will summarize the issues based on the briefing you received from the Chairman.
- You will ask the CEO and the State-appointed director whether they agree with your summary and rephrase as needed.
- You will ask the CEO and the State-appointed director to state their willingness to find a good solution.
- You will have both parties agree on their common objectives (e.g., ensure the sustainable performance of the company and the best returns for all shareholders — including the State).
- You will help both parties find a solution that could include but not be limited to having the:
  - State-appointed director recognize that the CEO is doing a good job
  - CEO recognize that the State's tax policy and increase in electricity prices have been very beneficial to NeonSpark Corp.
  - CEO and the State-appointed director agree to pay 50 percent of the after-tax profit as dividends and reinvest the remaining 50 percent. This dividend policy could be recommended to the board for this and next year.
  - CEO and State-appointed director agree to use local contractors as much as possible. This could reduce the costs for NeonSpark Corp., support the local job market, and limit job losses due from NeonSpark Corp. restructuring plans.
  - CEO and the State-appointed director agree that NeonSpark Corp. has much to gain by presenting itself as a responsible corporate citizen.
  - CEO and the State-appointed director agree to show support and understanding for each other's position at the next board meeting.
- You will hand matters over to theChairman once a good solution is in sight and let him summarize the agreement that emerged from both parties' efforts.

Techno Ltd.

A Corporate Governance Dispute Resolution Role Play

SUMMARY ▸ This case explores how the personal problem of the company's CEO — selling her shares of Techno Ltd. to pay her divorce settlement — may affect the share value of Techno Ltd. and trigger a covenant that could end the company's credit facility. This matter draws out other issues, including the succession plans of the founder/chairman after his retirement and one board director's skepticism of the value of an external dispute resolution expert. In the role playing exercise, participants consider how to solve the disputes using best practices for alternative dispute resolution.

ROLE PLAY OVERVIEW : TECHNO LTD.

ROLE PLAY BACKGROUND NOTE: FOR DISTRIBUTION TO ALL ROLE PLAYERS AND THE AUDIENCE

OBJECTIVES

- Understand and practice resolving family governance disputes
- Review the benefits and limits of using external dispute resolution experts
- Discuss the benefits of adopting corporate governance dispute resolution policies

THE EXERCISE

- Allow 90 minutes for this role play:
  - 20 minutes preparation
  - 30 minutes for Phase 1 enactment
  - 30 minutes for Phase 2 enactment
  - 10 minutes for the de-briefing
- This role play exercise will involve:
  - The dominant chairman: Paul Schmidt
  - The cash-stranded CEO: Rosemary Schmidt, his daughter
  - The righteous independent board director: John Doe
  - The dispute resolution expert: J. Alfred Peacemaker
- This role play may be held as one continuous session or broken up into three parts: preparation; Phase 1 enactment; and Phase 2 enactment and de-briefing.
- The role play may be used for training both board directors and dispute resolution professionals.

TO REVIEW ROLE PLAY TRAINING TECHNIQUES, SEE VOLUME 3 ANNEX 3.

THE COMPANY

- Techno Ltd. was founded more than 20 years ago by Paul Schmidt. He is currently the company's chairman and major shareholder. Techno Ltd. was recently listed. On listing, the company's capitalization was approximately $550 million.
- There are 300-million shares on issue. Paul owns 36.5 percent of these, while his daughter Rosemary owns 3.5 percent, his son Andrew 3 percent, and his wife Susan 2.5 percent. The family's charitable foundation (the "Schmidt Foundation") owns another 2 percent.

ROLE PLAY OVERVIEW : TECHNO LTD.

- Techno Ltd. buys media for sports events. Its prime revenue comes from selling advertising space on TV and radio sports shows and around sports stadiums while events take place.
- In preparation for its listing, Paul established good corporate governance structures and practices for the company and the family council. The company is governed by a board of six directors — three family members, including himself as chairman, his daughter Rosemary as the CEO, and his son Andrew — and three independent directors. Paul hand-picked each independent director. The company has several other shareholders who have been happy with the dividends and Paul's leadership.
- The company is not highly leveraged, but it does have a banking facility of $175 million with Bank West, which imposed an unusual covenant. This covenant states that the facility becomes immediately callable if Techno Ltd.'s market capitalization falls below $425 million (i.e., about US$1.417 per share). This facility is renewable by negotiation every two years.
- There are few specific issues that would influence Techno Ltd.'s share value, other than market forces. As a result of the financial crisis in 2007-2008, Techno Ltd.'s share price tumbled. Its competitors' share prices also fell, as did the broad equity market indices. Techno Ltd.'s shares now trade at US$1.60, down from a high of $2.50 before the crisis.

THE FAMILY

THE FAMILY COUNCIL

- The family council was established prior to the company's listing. This council was to handle the family's affairs, following best practices. It consists only of family members and is privately advised by a lawyer and an investment banker. The family's strategy is to gradually reduce its shareholdings in Techno Ltd.

PAUL, FOUNDER AND CHAIRMAN OF TECHNO LTD.

- Paul, 70, eventually wants to retire from active participation in the company and the board. This is partly why he listed the company. He felt the listing would bring fresh interest to the company and attract new board members.
- Paul's goal is to ensure that the succession plan is carried out. Until he retires from the chairmanship, Rosemary will be the CEO and Andrew will lead the family council with the authority to vote the family's shareholdings (other than Rosemary's) in Techno Ltd. at board meetings. After Paul's retirement, Rosemary would become chairman.

ROSEMARY, CEO

- Rosemary, 42, left her studies early to enter the family business.
- Rosemary has recently separated from her husband. He left the family home for another partner, leaving behind their two children. Rosemary is bitter about her marriage break-up and wants all her associations with her husband to end quickly. The separation, divorce proceedings, and her expanded role as a single parent have distracted her attention from managing Techno Ltd.

- Under the divorce settlement, the couple's assets will be split 50/50. Since Rosemary wants to keep the house and the other assets, she must make a cash settlement to her former husband of about $15 million. To do this, she must sell Techno Ltd. shares to raise those funds. At the current share price, this would mean she would have to sell almost all her shares.
- Rosemary gets along with her brother Andrew but resents his being considered the smarter of the two. She is also envious of his completion of university studies, which she could not do.

ANDREW, CHAIRMAN OF SCHMIDT FOUNDATION, TECHNO LTD. BOARD DIRECTOR

- Andrew, 38, has a business degree and is a very capable manager of the family initiatives. He is a member of the family council, and chairs the Schmidt Foundation.
- The Schmidt Foundation's endowment is $50 million — a series of earlier gifts from Paul. The annual income from the endowment's investments is disbursed to charities. Two percent of the foundation's funds is invested in Techno Ltd. shares.
- He has no formal role in Techno Ltd.other than that of a director. He and the independent directors, especially John Doe, share the same views about Techno Ltd.'s future.
- He gets along with his sister but resents her being the CEO just because she is the eldest child.
- He is currently travelling but believes John Doe represents his and the company's interests well. Besides, he wants to stay away from the family tensions and not get involved in his sister's divorce matters.

THE CONTEXT

- Rosemary needs cash for her divorce settlement and is seeking a quick resolution; selling her shares is the obvious answer.
- The Schmidt Foundation does not wish to buy shares. It is looking at reducing its holdings of Techno Ltd. shares.
- If Rosemary and the Schmidt Foundation sell shares, 5.5 percent (16.5-million shares) of Techno Ltd. could be offered in a very short period of time.
- Paul, with his family and the Schmidt Foundation, own 47.5 percent of Techno Ltd. since the listing; that share could fall to 42 percent if Rosemary and the Schmidt Foundation sell their holdings (a total of 5.5% or 16.5-million shares).
- A large share sale, and/or an announcement to the market that the CEO has pledged her entire holding of Techno Ltd. shares as collateral for a third-party loan, would likely depress Techno Ltd.'s share price, perhaps to the point that triggers the bank to end its lending facility with Techno Ltd.
- The company's debt covenant is in danger of being terminated as the share price trades near the covenant's trigger point. The stock market remains volatile. Techno Ltd.'s shares trade at $1.60, with rumors about the company's future leading to volatility. The board and the shareholders are worried the bank covenant will end because of the stock's performance. They want to stabilize the share price and prevent any announcement of a director selling shares.
- Each 10-percent fall in the Techno Ltd. share price reduces the value of Paul's holdings alone by approximately $17.5 million.

ROLE PLAY OVERVIEW : TECHNO LTD.

- Aware of the CEO's personal need and the danger to the company and his own personal interests if her shares are sold, Paul called a board meeting. The discussion over these issues became deadlocked, with the directors' individual positions becoming more entrenched.
- The chairman took the view that the only way to resolve the issues reasonably was to utilize the services of an independent dispute resolution expert. Although John Doe was reluctant to the idea, the board agreed to that suggestion.

THE ISSUES

- **CEO's immediate cash needs:** CEO wants a quick cash settlement for her divorce; a sale of her shares is an obvious solution.
- **Retain family control:** Paul has his interests in any share transaction, too, and wants to retain the level of family control at 47.5 percent of total shares and thereby support the share price to prevent diminution of value of his personal holdings.
- **Avoid triggering the covenant:** The board and the company want to avoid triggering the termination of the debt covenant. Since they want to keep the share price as high and as stable as possible, a large sale would undermine their ability to do so.

THE SCENARIO

PHASE 1: TODAY

- The expert meets individually with the two family members (Paul and Rosemary) and the independent director (John) to understand and clarify their issues and individual expectations.

PHASE 2: TWO DAYS LATER

- The expert calls a meeting with Paul, Rosemary, and John to find common ground and develop a solution agreeable to all.

The Dominant Chairman: Paul Schmidt

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are the founder, current chairman, and major shareholder of Techno Ltd., owning 36.5 percent of total shares. You are very proud of your leadership in building the company over 20-plus years.
- You are a strong, dominant "larger than life" personality in the company and your family. However, you despise conflict, especially within your family.
- You supported good governance practices within the company and the family, setting up a family council, for example. This approach helped you to successfully list Techno Ltd.
- At 70, you want to retire from active company involvement, including your role as board chairman. You would also like to sell some of your shares. Only Andrew knows this. This is a recent decision on your part.
- You do not want the solution to Rosemary's cash needs and concerns over leadership to reduce your shareholdings' value.

YOUR POSITION

- You empathize with Rosemary's position. You never liked her husband, particularly since he made no effort to fit in with the family or participate in the family's business. He blamed the company, you, and your family for their hold on Rosemary. You grudgingly accepted the divorce settlement.
- You do not wish to see the share price of Techno Ltd. fall since this would reduce your personal shareholdings' value. You want to avoid the company's future being jeopardized. You have worked too hard over many years to build the company and your wealth. It is a matter of pride.
- As chairman, you have an obligation to ensure the company's best interests are served. You have been concerned about Rosemary as the CEO, given her poor people management skills and the strain from the divorce. You are thinking of having her become the next chairman but Andrew might after all do a better job as a CEO — if his sister would be willing to groom him.
- You know that your needs, and those of your family, must be aligned with the company's best interests. You support finding a harmonious solution to the issues presented and have appointed, with board consent, a dispute resolution expert.

WHAT'S AT STAKE?

- **Losing the loan facility:** If the share value falls too low, the covenant will be triggered and Techno Ltd. will lose its access to the credit it needs to survive.
- **Family harmony:** Harmony within the family must be preserved while serving the company's best interests.
- **Your retirement:** You want to retire but you need to ensure that you have a good succession plan in place.

The Dominant Chairman: Paul Schmidt

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- **Share value:** You want to get the best value for the sale of family shares, including your own.

WHAT YOU WILL DO

PHASE 1: TODAY

- You explain your view of the situation and the issues to the expert in a one-on-one meeting. You know that the expert is having similar one-on-one meetings with Rosemary and John.
- You see Rosemary's need for funds to settle her divorce as the problem. You are anxious to find a solution — even if it means changes in the company's succession plans and delaying your personal sale of Techno Ltd. shares.

PHASE 2: TWO DAYS LATER

- The expert facilitates a meeting with you, Rosemary, and John.
- You voice your position and suggest solutions.
- You are ready to help Rosemary with her cash problems but you also want her to agree to groom her brother into the CEO position. She could become the next chairperson and allow you to retire and enjoy some time off with your wife.

The Cash-Stranded CEO: Rosemary Schmidt

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are the CEO and director of Techno Ltd. You left school to enter the family business; you resent having never completed your studies.
- You own 3.5 percent of the total shares outstanding for Techno Ltd.
- You and your brother get along as siblings, but you are envious of his university degree and peoples' general impression that he is smarter than you. You sense that Andrew resents your being the CEO, questioning a decision that he feels was based solely on your being the eldest child rather than on your expertise and skills.
- Your father's plans for the company's succession placed you, being the eldest, as the CEO for now. After your father retires, you would also become the chairman of Techno Ltd. Your brother now leads the family council and votes the family's shareholdings (other than yours) in Techno Ltd. at board meetings.
- You recently signed a divorce agreement with your husband. He left the family home for another partner, leaving you behind to care for two children. In his plea for a divorce, he alleged that wider family and company interests took too much of your time, depriving your immediate family of their needs.
- The divorce settlement calls for a 50/50 split of the couple's assets. You must provide your ex-spouse with $15 million in cash since you want to retain the house and other assets. To do this, you must sell all your Techno Ltd. shares.
- You are bitter about the marriage break-up and want all associations with your ex-spouse to be terminated quickly.
- The divorce proceedings and your new role as a single parent have distracted your attention from managing Techno Ltd.

YOUR POSITION

- You believe you have been an effective CEO. However, there have been complaints about your people management skills; some say you delegate too many responsibilities to others. You will fight hard to keep your job as CEO until the chairmanship becomes available with your father's retirement.
- Your top, urgent priority is to settle in cash with your ex-spouse the sum of $15 million, as ordered by the Family Court. You must sell all your shares at the current price to raise these funds. You don't see what else could be done. You will definitely not consider selling your house.
- You are concerned about the outlook for the share price and want it to remain as high as possible as a demonstration of your effective leadership. For sure, selling your shares won't help but you have a good reason to do so. You don't see why anyone else would need to sell their shares.

The Cash-Stranded CEO: Rosemary Schmidt

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- You do not want your sale of Techno Ltd. shares, or any other sales being contemplated by family members, to send a signal to the market that there are troubles in the company, which would trigger steep declines in the share price. If that were to happen, shareholder pressure would build to force your resignation.
- You are against stepping down as the CEO unless you can become chairman, as the succession plan specifies. If you were forced to step down, you would adamantly oppose Andrew becoming CEO.

WHAT'S AT STAKE

- **Your leadership reputation:** You have performed well as a CEO. Share prices have fallen as a result of the financial crises.
- **Your relationship with your father:** You don't want to disappoint your father. His views matter to you.
- **Your divorce settlement:** You need to find the cash to settle the divorce. This has taken too long already and you want to start a new life.
- **Your future with Techno Ltd.:** Your father is considering retiring soon but you are not sure anymore about his intentions in terms of succession.

WHAT YOU WILL DO

PHASE 1: TODAY

- You explain your view of the situation and the issues to the dispute resolution expert in a one-on-one meeting. You know that the expert is having similar one-on-one meetings with your father and John.

PHASE 2: TWO DAYS LATER

- The expert facilitates a meeting with you, your father, and John.
- You explain your financial situation. An obvious solution would be for you to sell your shares, but you are open to other ideas as long as you can settle your divorce as quickly as possible. You also want to gain back your father's respect — even if that means agreeing to a new succession plan. If your father wishes to retire, you would be happy to assume the role of chairman and agree to groom your brother Andrew into becoming the new CEO. After all, that would help you build a new life and maybe finally earn that university degree you are longing for.

The Righteous Independent Director: John Doe

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are one of the independent directors of Techno Ltd. "hand-picked" by Paul. You take your role seriously and know what is expected of you by the company and the shareholders. You are prepared to exert your position and challenge specific family and/or individual perspectives.
- You have been an independent director since Techno Ltd. was listed 18 months ago. You are not a "yes" man. Paul picked you for your integrity, strength of character, and personal capacity to both earn the respect of Rosemary and Andrew and to challenge their views. They will listen to you.
- Paul also saw your value as a director because of your extensive contacts in the media-buying industry from previous experience elsewhere.

YOUR POSITION

- You want to prevent any further decline in Techno Ltd.'s share price so you will explore how to prevent any family member or the foundation from selling part or all of their shareholdings.
- You want Bank West to relinquish its debt covenant, given Techno Ltd.'s low leverage of debt.
- You believe stability of senior management is critical. You nevertheless agree with Andrew that Rosemary's attention has been excessively sidetracked by her divorce.
- You are skeptical about how an external dispute resolution expert can be of any help, and voted against Paul's request to the board. You think it should be your role to find an agreeable solution — although you haven't been successful thus far.

WHAT'S AT STAKE?

- **Company's performance:** Clearly family issues and Rosemary's divorce are starting to affect the company's performance. These issues have to be resolved quickly.
- **Share value:** You are worried about various family members wanting to sell their shares. That would be the wrong signal for the market at this time. Most importantly, this could trigger the covenant.
- **Leadership:** You also hope that Rosemary's divorce will be over soon so she can focus on her job as a CEO. Otherwise, Andrew might make a better CEO.
- **Personal reputation:** Last but not least, you fear that this whole situation could negatively impact your reputation as a board director. You think it should be your role as an independent director to help the family resolve its issues.

The Righteous Independent Director: John Doe

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHAT YOU WILL DO

PHASE 1: TODAY

- You reluctantly explain your view of the situation to the expert and question his ability to help resolve the issues at hand. You know that the expert is having similar one-on-one meetings with Paul and Rosemary.

PHASE 2: TWO DAYS LATER

- The expert facilitates a meeting with you, Paul, and Rosemary.
- You focus on the best interests for the company. You will suggest ideas and help Paul and Rosemary come to a good solution. You want them to feel that if this meeting is a success, it is thanks to you.
- You explain that something needs to be done about the covenant.
- As much as possible family members should hold on to their shares for now.
- If a settlement must include Rosemary's departure, as much as you have supported her, you would support Andrew becoming the next CEO.

The Dispute Resolution Expert: J. Alfred Peacemaker

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You have been appointed by the Techno Ltd. board to help resolve some issues involving family members that could affect the company's share value.
- You have been selected based on your expertise in mediating corporate governance issues involving family companies.
- You are skilled at focusing on the hard issues while understanding the more sensitive family issues behind positions being taken. You have demonstrated your ability to inspire trust and confidence in your work.
- You are a senior partner in a leading law firm and are looking to expand the firm's alternative dispute resolution practice.

YOUR POSITION

- You have no position other than to achieve a workable solution that all can agree on.
- You have received some background information on Techno Ltd. and a summary of the issues from the board.

WHAT'S AT STAKE?

- **Professional reputation:** Although the effective resolution of the issues at hand depend on the parties' willingness to find a workable agreement, you are anxious to find a positive outcome.
- **Expansion of your law practice:** This is important for your reputation and will help make the case in your law firm for expanding the alternative dispute resolution practice.

WHAT WILL YOU DO

PHASE 1: TODAY

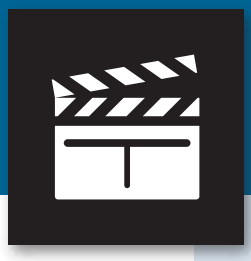
- Meet individually with Paul, Rosemary, and John to better understand what the issues are and what's at stake for each of them.
- Explain that you have no vested interests in the matter. Your sole goal is to help find solutions agreeable to all.
- Actively listen to Paul, Rosemary, and John. You will paraphrase, clarify, and explore their positions. You can show empathy but you cannot take sides.
- Have Paul, Rosemary, and John agree to meeting together two days later.

The Dispute Resolution Expert: J. Alfred Peacemaker

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

PHASE 2: TWO DAYS LATER

- Welcome Paul, Rosemary, and John to the meeting. Remind them that your sole goal is to help them find agreeable solutions to their problems.
- Have Paul, Rosemary, and John review and agree on their common interests (e.g. acting in the best interests of the company; avoiding the covenant to be triggered; avoiding an escalation of the dispute; etc.).
- Have Paul and Rosemary agree on what the issues are (e.g., share value decline; risk of triggering the covenant; Rosemary's need for cash; company's reputation; Rosemary's performance as a CEO; Chairman's succession planning; foundation's and other family members' desire to sell shares; etc.).
- Review each issue and invite Paul, Rosemary, and John to craft joint solutions. Check if the solution for each issue is agreeable to all. Issues and solutions may be linked.
- If discussions are stuck, suggest ideas for solutions but do not impose any solution. Possible solutions to explore may include, but may not be limited to the following:
  - Rosemary could use her Techno Ltd. shares as collateral to borrow $15 million to settle her divorce. She may need additional cash though since the bank is skeptical that the current share price can be maintained. She may have to use her home and other fixed assets as additional collateral.
  - Techno Ltd.'s board could persuade the Schmidt Foundation that it would likely be in its better interests to "drip" its Techno shares into the market in an orderly manner so that these sales do not artificially depress the share price and, in turn, reduce the foundation's endowment value.
  - The Board could approach Bank West to determine the reduction in size of the facility necessary for removing the covenant.
  - Find a new succession plan that would allow Paul to retire without fearing for the future of the family company. This could include having Rosemary become the new chairperson. However, she would need to step down as a CEO in favor of Andrew, whom she could groom for the position.



Max Henry University

A Corporate Governance Dispute Resolution Role Play

SUMMARY ▸ This case explores a dispute between the president of a private university and one of its board members over the terms of a donation he contributed. In exchange for his donation, the board member expected to have the library named after his parents. The university president argues she has never made such a promise. The library is actually to be named after another donor. Furious, the director threatens to take back his donation and to sue the university and its president. This matter draws out other issues, including the university's increasing financial difficulties and the president's leadership skills. In the role playing exercise, participants consider how to best resolve the dispute and avoid a potential costly and damaging lawsuit.

ROLE PLAY OVERVIEW : MAX HENRY UNIVERSITY

ROLE PLAY BACKGROUND NOTE: FOR DISTRIBUTION TO ALL ROLE PLAYERS AND THE AUDIENCE

OBJECTIVES

- Understand and resolve a dispute involving the board members of a private university facing financial problems
- Review the benefits of using a dispute resolution expert to help resolve the dispute and refocus the board's attention on strategic issues.

THE EXERCISE

- Allow 90 minutes for this role play:
  - 20 minutes preparation
  - 30 minutes for Phase 1 enactment
  - 30 minutes for Phase 2 enactment
  - 10 minutes for the de-briefing
- This role play exercise will involve:
  - The beleaguered president: Maria Helena Santiago
  - The betrayed donor and board director: Michael Peruso
  - The optimistic board director: Juan Fernandez
  - The seasoned mediator: Alfonso Lopez
- This role play may be held as one continuous session or broken into three parts: Preparation; Phase 1 enactment; and, Phase 2 enactment and de-briefing.
- The role play may be used for training board directors and dispute resolution professionals.

THE UNIVERSITY

- Founded 50 years ago, Max Henry University has built a strong reputation in the field of political and social sciences.
- The university is confronting severe financial challenges as its donations dry up and its endowment continues to lose value following the global financial crisis.
- Student enrollment has been declining over the last two years while operational costs have been rising.
- Weaknesses in the university's academic resources and campus facilities have not been addressed for years.

ROLE PLAY OVERVIEW : MAX HENRY UNIVERSITY

- Some of the university buildings urgently need to be renovated. A new library is currently under construction.
- The university has repeatedly postponed the launch of Web-based graduate programs, which could have expanded student enrollment.

THE PARTIES INVOLVED

MARIA HELENA SANTIAGO, PRESIDENT AND CHAIR OF MAX HENRY UNIVERSITY

- Maria Helena, 60, has been the university president for 15 years. She had been the head of the sociology department for 10 years. She often says the "university is her life" since she is not married and does not have siblings or children.
- The faculty strongly supports Maria Helena. They believe she is the heart and soul of the university. Her academic publications have contributed to building the university's reputation.
- Maria Helena's management style is low-key and consensus-oriented. She delegates operational matters to her administrative staff.
- Realizing that the university is facing serious financial problems, she is frantically trying to raise funds.
- Maria Helena and the university's endowment department have worked hard to secure Michael Peruso's donation. Having his commitment enabled Maria Helena to convince another donor to provide funds.

MICHAEL PERUSO, BOARD DIRECTOR AND DONOR

- Michael, 50, is an aggressive entrepreneur, who works long hours.
- He has been a board member for just over two years and sits on the funding committee.
- He is a self-made man and is very proud of his daughter, who just received her bachelor's degree in urban sociology from MHU.
- Rumor has it that his once successful construction business is facing severe challenges following the housing crisis.
- He authorized a donation for what he believed was the library's construction, which he saw as a perfect way to remember his parents.

JUAN FERNANDEZ, BOARD DIRECTOR AND HEAD OF THE FUNDING COMMITTEE

- Juan, 38, was appointed six months ago to the university's board and agreed to head the Funding Committee.
- He has worked as a professional fundraiser but this is his first experience on a board.
- He has been tasked with developing a funding strategy for the university and is only starting to realize that this might be =-more complicated then expected.
- He wasn't involved in the initial discussions between Maria Helena and Michael regarding the donation's terms.

THE CONTEXT

- The latest university bulletin announced that the construction of the new library should be completed by the end of the calendar year and bears the name of famous sociologist Emil Durkheim.
- Board Director Michael Peruso contends that the University's president had agreed to name the university library after his parents, Anna and Rodriguez Peruso. This was a condition for his donation to the university.
- Although this was not stated in the written agreement he signed with the university, he readily transferred the funds, which were used immediately to cover initial construction costs and pay for an overhaul of the campus information technology system.
- As soon as he saw the announcement in the university bulletin, Michael challenged Maria Helena. She countered that he had misunderstood the terms they had agreed upon verbally. Besides, the library naming rights have been committed to another donor through a signed contract.
- Clearly upset, Michael threatened to sue the university and its president; he is asking for his donation to be returned.
- This dispute arises as the university faces increasing financial difficulties and struggling to integrate new information technologies in its programs.

THE ISSUES

- **The terms of Michael's donation:** Unless the library is named after his parents, Michael wants his donation returned. He has threatened to go to court. Michael's donation has already been partially spent and the remaining funds fully committed by the university.
- **The university's financial problems:** Student enrollment is declining and generous donors are difficult to find. The university is facing increasing operational costs and must upgrade its systems and venues. The university cannot afford to reimburse Michael.
- **The president's performance:** The conflict over Michael's donation and the mounting problems faced by the university are creating tensions on the board and casting a shadow on Maria Helena's leadership skills.

THE SCENARIO

PHASE 1: TODAY

- Juan Fernandez, the head of the funding committee, has called a meeting with Maria Helena and Michael to discuss the university's future funding strategy. He is secretly hoping to find an amicable resolution to the dispute over the donation. He would at least like to convince Maria Helena and Michael to call in a professional mediator before resorting to litigation.

ROLE PLAY OVERVIEW : MAX HENRY UNIVERSITY

PHASE 2: A WEEK LATER

- Alfonso Lopez, a professional mediator, has been called in by Juan to help sort out the dispute over Michael's donation. The mediator received a background briefing and briefly met with Maria Helena and Michael. A meeting has been scheduled to help Maria Helena and Michael find a solution. Maria Helena and Michael both agreed that Juan should also participate in the meeting.

The Beleaguered President: Maria Helena Santiago

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- Age 60, you have been the university's president for 15 years. Before that, you headed the sociology department for 10 years.
- The "university is your life." You never married and don't have any children or siblings. You have always been extremely dedicated to your work and career.
- You have strong support from the faculty. They see you as "one of them."
- You are more comfortable discussing abstract concepts and strategy than holding meetings on pension programs and maintenance contracts. You delegate day-to-day operational responsibilities to your staff. You value a consensus approach to decision making.
- You realize your understanding and use of information technologies are limited and you have been reluctant to embrace online teaching.
- You find it hard to press potential donors for university contributions, but you have been trying very hard to raise funds to help the university overcome its financial difficulties.

YOUR POSITION

- You contend that you outlined the terms of Michael's donation verbally, which would allow some form of recognition on the library building, but not naming rights.
- You are unable to understand how anyone could question your credibility and honesty.
- You feel betrayed by Michael's allegations and suspect personal motives lie behind his deceit. You think he is a rude , uneducated man who doesn't belong on the university's board.
- You are under pressure to ensure the university's financial recovery and reputation.
- Your personal prestige and your good relations with the faculty are all in jeopardy.
- You want to settle the dispute as quickly as possible to avoid any backlash from other donors who have either committed funds or expressed an intent to do so.
- The university must avoid a lawsuit. At a difficult time, it cannot afford the consequences to its reputation; its survival is at stake. You are confdent that you would win since the donation agreement signed by Michael does not mention any naming rights.

WHAT'S AT STAKE?

- **The university's financial situation and reputation:** The university's future is in jeopardy if it loses Michael's funding and that of other donors.
- **Your personal reputation:** Your reputation and your leadership skills are on the line. You need to find a solution to this dispute and regain the board's trust. You don't want to disappoint the faculty, which has always been extremely supportive.

The Beleaguered President: Maria Helena Santiago

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- **The university's future:** You understand the university's needs to make several important strategic decisions to continue attracting new students. It cannot live on past glory.
- **The threat of a lawsuit:** You want to avoid a lawsuit but are not willing to succumb to Michael's demands.

WHAT YOU WILL DO?

PHASE ONE: TODAY

- You will meet with Juan and Michael to discuss the university's fundraising strategy. If Michael brings up the question of his donation, you will express your views. How could he even think that the library could be named after his parents! What you took for a generous philanthropic donation was just buying fame for his family. The more you think about it, the more you find the dispute very upsetting.

PHASE TWO: A WEEK LATER

- You are glad Juan convinced you to retain a mediator. Obviously, you will be able to find a solution to the dispute without external help. Besides, you think you may have gone too far with Michael and upset his feelings. You know he is very sensitive about not having any formal education and very proud about his daughter going to college. You are open to exploring solutions with the mediator and are very scared that this might end up in court, which would be truly embarrassing and devastating for yourself and the university. You have done a lot of thinking over the past week regarding the university's future, and you are certainly not ready to resign.

The Betrayed Donor and Board Director: Michael Peruso

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are 53, a self-made man heading a large construction company, which you founded 20 years ago.
- Your business is suffering from one of the worst housing crisises that the country has seen in years.
- You pride yourself in making fast, direct decisions. You value your business acumen and your work ethic.
- You work long hours and you have no patience for small talk. You can be brusque and stubborn.
- Yesterday your bank called you and demanded that you repay one of your company's loans to cover losses from defaults in commercial and residential real estate loans. Your loan's terms allowed for the bank to recall the loan after a 30-day notice.
- You pride yourself for sitting on a university board but consider all these academics as being useless. You accepted this position to make your family and daughter proud.

WHAT YOU THINK

- The university has your money, and you believe Maria Helena has a moral obligation to honor the verbal agreement you believe you made with her. You want your parents' names on that library. It means a lot to you.
- If Maria Helena doesn't agree to name the library after your parents, then you may as well demand your money back to help you deal with your own financial issues.
- At first, you were polite and deferential to Maria Helena, but you have become angry with her. Her laidback, arrogant leadership style is a major source of the university's problems.
- This issue with your donation is the latest in a series of problems demonstrating Maria Helena's sloppiness in handling major issues upon which the university's survival rests. You want to expose Maria Helena's incompetence and use this debacle to force the installation of a new president, fearing that her continued involvement will not provide the leadership and vision the university needs to survive the difficult years ahead.
- You have threatened Maria Helena with a lawsuit, although this is the last thing you need in your life now.

WHAT'S AT STAKE?

- **Your personal honor and reputation:** You will not tolerate Maria Helena questioning your understanding of your donation's terms. She is just short of calling you a liar. You have already told your daughter that the library would be named after her grandparents and you want to surprise them with that fact when the new building is inaugurated.

The Betrayed Donor and Board Director: Michael Peruso

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- **University's future and leadership:** The university is struggling to meet new challenges. Student enrollment is falling, and funding needs are not being met. Teaching methods are outdated and hardly use modern information technologies. The university cannot move forward if Maria Helena remains as the chairperson and president.
- **Your credentials as a board member:** The university's difficulties and now this dispute over your donation badly reflect on the board's performance, including yourself. You can already hear people gossiping in town.
- **Your company's own financial issues:** You hadn't planned to reimburse your bank loan this year — let alone in 30 days. The university is not going to feed your family, so if they don't want your parents' name on the library, you could use that money to reimburse your bank instead of seeking an alternative and more expensive solution.

WHAT YOU WILL DO?

PHASE ONE: TODAY

- You will attend the fundraising strategy meeting called by the young head of the funding committee. You will use this opportunity to confront Maria Helena. After all, it is only normal that Juan, the funding committee's head, be involved in this discussion. Further, the issues around your own donation are bound to have an impact of the fundraising strategy. You will not take "no" for an answer and challenge Maria Helena's leadership skills. You will threaten to sue her if needed.

PHASE TWO: A WEEK LATER

- You feel you have painted yourself into a corner and are glad that Juan convinced you to agree to retain the services of a professional mediator. You don't want to go to court. This would mean additional expenses and could lead to adverse publicity. Besides, you would never get your money back in time to repay your bank loan. You will be more reserved and open to finding some workable solutions around the term of your donation and the university's future, but you want your parents' names to be publicly recognized.

The Optimistic Board Director: Juan Fernandez

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are 35, well-educated, and a talented professional fundraiser.
- You were appointed six months ago to the university's board. This is your first experience as a board director. You look forward to making this a success. You hope to serve soon on the board of some listed companies.
- You are an optimist by nature and believe the university's funding difficulties can be overcome with your leadership.
- You were just married, enjoy entertaining people, and are generally a happy person. Some of your friends call you ambitious and think you are too eager to please others.

WHAT YOU THINK

- You were not involved in the discussions that led to Michael's donation. To you, this all sounds very unprofessional regardless of who is right or wrong. Most likely, this was just a misunderstanding that could have been straightened out immediately at the onset. Things really need to change in the university's administration and processes.
- You are amazed at how immature Maria Helena and Michael are behaving, and you are starting to worry about the direction that this dispute is taking. If this incident becomes public, your fundraising objectives will be much more difficult to achieve. Moreover, people may think the fault was yours since you are heading the fundraising committee. No one will notice of the fact that you were not involved in this donation agreement.
- You personally like Maria Helena. She is an incarnation of old world class, and you are thankful for her supporting your board appointment.
- Michael is not really your type, but you think he brings a pragmatic approach to the board deliberations, which the university needs.
- You think you may find a way to talk sense into both Maria Helena and Michael and then resolve the dispute. But, you are not sure how to do so.

WHAT'S AT STAKE?

- **Your reputation as a board member and head of the funding committee:** If this dispute is not resolved, it could tarnish your reputation and jeopardize your ambitious plans.
- **The success of your fundraising strategy:** You think that the university could raise more money but you need the board's support. Maria Helena and Michel need must act in the university's best interest instead of fighting each other.
- **University's future:** The university needs to rethink itself and improve its image. You look forward to doing your part of the job, but the rest of the board also needs to wake up to reality.

The Optimistic Board Director: Juan Fernandez

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHAT YOU WILL DO?

PHASE ONE: TODAY

- You will warmly welcome Maria Helena and Michael to the meeting you call to discuss the university's fundraising strategy. If they approve, you will present the strategy at the next board meeting. You want to use this opportunity to help iron out issues between Maria Helena and Michael over his donation. If they don't manage to see eye-to-eye on this donation matter, you want to have them at least agree to meeting with a professional mediator before seriously considering litigation. You will show empathy but remind them that the university's best interest is at stake.

PHASE TWO: A WEEK LATER

- You are relieved that a mediator has made himself available on short notice to meet with Maria Helena and Michael. The dispute over the donation runs deeper then you thought; it has brought out many other issues between them. If a solution cannot be found with the mediator, you are considering quitting yourself rather than being exposed to a lawsuit. Maria Helena and Michael have both agreed that they want you to be part of today's meeting — at least they like and respect you. You will take the back seat at this meeting, but can help find creative win-win solution and positively reinforce any steps taken in the right direction.

The Seasoned Mediator: Alfonso Lopez

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

WHO YOU ARE

- You are 58 and one of the most experienced mediators of the National Mediation Center. You have mediated nearly 2,000 dispute,. most of them linked to construction and insurance issues.
- You believe disputes are part of life and, if channeled properly, they can lead to amazing positive developments.
- You have written much about ADR and its benefits, and you are looking forward to doing some dispute resolution work with the Max Henry University board.
- You are not a corporate governance expert and have never sat on a board, although you would find that experience tempting. Regardless, helping resolve disputes — any dispute for that matter — requires good mediation skills and some common sense.
- You do not have any conflicts of interest with the university, Maria Helena, Michael, or any of the other board directors. You hadn't heard about Juan before he contacted the Mediation Center's secretariat for assistance.

WHAT YOU THINK

- Juan briefed you on the dispute over Michael's donation, and you briefly met independently with Marie Helena and Michael.
- They both seemed quite upset at each other, but individually admitted that they did not want a court battle.
- There is some obvious room for compromise over the dispute's terms, but this is just the tip of the iceberg.
- If these two want to get along and do constructive work together, some deeper resentments will need to surface. Or else, even if this donation matter is resolved, they will find something else to fight over sooner rather than later.
- Obviously, there are some tensions over the university's leadership, finances, and many other issues that need to be addressed. You would very much like to suggest a strategic board retreat, which you or one of your colleagues would be happy to facilitate. This would allow issue to surface, prevent disputes, and help find a more effective way forward for the university and its board.

WHAT'S AT STAKE?

- **Resolving the dispute:** A dispute can only be resolved if the parties are willing participants. It's their dispute and their solution. But, mediators often get blamed when discussions end in a deadlock. You will do your best to facilitate a workable outcome to the dispute.

The Seasoned Mediator: Alfonso Lopez

CONFIDENTIAL ROLE PLAY INSTRUCTIONS

- **National Mediation Center's and your own exposure:** This case is good exposure for the center; it could help broaden the scope of potential clients. You are personally very interested in making a name for yourself as a mediator specialized in boardroom disputes.

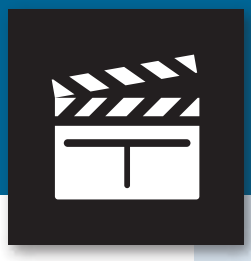
WHAT YOU WILL DO?

PHASE ONE: TODAY

- For the purpose of this exercise, you will be allowed to listen in on the meeting Juan has called with Maria Helena and Michael. You can also look at their confidential role playing notes.

PHASE TWO: A WEEK LATER

- You will welcome Maria Helena, Michael, and Juan. You will state the meeting's purpose and ask the parties to express their commitment to finding a workable solution to their dispute. You will ask Maria Helena and Michael to present their positions without interrupting each other. You will then move to building a common understanding of the overall situation including: the university's funding difficulties; the need to modernize the facilities; and, the necessity of Web based training programs. Through this discussion you will help build common ground on their understanding of the university's best interest. You will encourage Maria Helena to acknowledge that — considering the university's situation — she is most grateful for Michael's donation. You could then explore with Michael if he would be willing to have his parents acknowledged in any other way than having the library named after them. You can ask Juan for ideas and invite Maria Helena to make some suggestions.
- If time allows, you could help Maria Helena, Michael, and Juan think about how they could more effectively address the issues, which the university is confronted with. If there is appetite for constructive work, suggest organizing a board retreat.



Agromash OSJC

A Corporate Governance Dispute Case Study Excercise

SUMMARY ► This case explores a dispute between a group of shareholders and the management board of a partially privatized company, Agromash OJSC, over governance practices. Led by the company's former CEO, dissident shareholders try to convene an extraordinary shareholder meeting to approve an anti-crisis program and reelect the management board and its chairman. The management board rejects the request because the shareholders do not collectively meet the 10% minimum share voting rights threshold. After a second unsuccessful attempt to call an extraordinary meeting the case is publicized in the media. Management files a complaint with the local prosecutor while the dissident shareholders file a lawsuit. The management board and dissident shareholders eventually agree to mediation while the case is pending in court. In this exercise, participants will consider the respective merits and possible outcomes of court litigation and mediation.

CASE STUDY OVERVIEW : AGROMASH OSJC

OBJECTIVES

- Understand and discuss a corporate governance dispute between the board and a group of shareholders collectively controlling a minority share of total votes.
- Understand and explain the potential benefits and limitations of mediation and litigation.

THE EXERCISE

- Allow 50 minutes for this exercise:
  - 10 minutes to read the case
  - 15 minutes to discuss the case
  - 15 minutes to compare the potential benefits and limits of mediation and litigation
  - 10 minutes for the de-briefing
- This case study exercise should be conducted as one continuous session.
- This case may be used for training board directors and dispute resolution professionals.

FOR GUIDANCE ON CORPORATE GOVERNANCE DISPUTE CASE STUDY DISCUSSIONS, SEE VOLUME 3 ANNEX 2.

THE COMPANY

- Agromash OJSC (Agromash) was created through the country's privatization program in 1995. It manufactures small-size farming tractors, towing equipment, and other implements. As required by the country's company law, Agromash has a two-tier board structure.
- As a result of the country's voucher privatization program, the company's ownership is widely disbursed but the company is not actively traded. The government (State Property Fund) owns 29% of the company, the work collective (427 employees) 69%, and other individuals and legal entities 2%.
- Agromash faces major financial problems as two other companies begin operations in the country. It is having difficulties raising capital to finance a modernization program and become more competitive.
- Agromash's former CEO, Ivan Petrovich Zubitsky, was ousted after the privatization and replaced by Nikolay Vasilyevitch Rostotsky. Ivan Zubtsky remained a shareholder and was appointed Head of the Foreign Relations Department of the Region's Administration.

THE CONTEXT

- September 27, 2004. A group of shareholders, cumulatively holding 10.6% of total votes, submitted a request to convene an extraordinary general shareholders meeting (GSM) with the following agenda:

  (1) Reelection of the management board and the management board's chairman

  (2) Approval of the anti-crisis program

  Their request's justifications included: critical financial and economic position of the joint-stock company; absence of a clear turn-around program; and, dilution of Agromash OJSC's assets. The request was addressed to the region's State Administration, the State Property Fund, management, and the board directors; however, the request was sent only to the regional Administration. The following morning, the Oblast Administration delivered the request to the CEO against his signature.

- September 29, 2004. The management board reviewed the shareholders' request and decided to verify authenticity of the shareholders' signatures. A commission was formed to test the signatures' accuracy by checking them against the shareholders' registry and polling the shareholders. The commission established that: shareholders controlling 0.9% of the vote had not signed the request and that their signatures had been forged; and, shareholders controlling 0.7% of vote, gave up their claim in writing for a variety of reasons (e.g., "did not understand implications of their actions," "changed their mind").

- October 15, 2004. Following the verification procedure, management decided to turn down the shareholders' request because: (1) it had been signed by an insufficient number of shareholders (possessing 9% instead of 10% of votes); (2) in August 2004, at a public board meeting, management already reported on its performance results for the first six months of 2004; and, (3) the regular GSM is scheduled for first quarter of 2005, subject to clause 8.2.1. of the company's statute.

- November 12, 2004. Dissident shareholders reapplied to management with the request, signed by shareholders controlling 11.2% of the votes.

- November 23, 2004. At their own discretion, this group of shareholders published in a local newspaper a notification of an extraordinary GSM. The meeting's agenda included: management's report on Agromash OJSC's financial and economic standing and on Agromash OJSC assets divestiture transactions, and, elections of all management bodies.

- November 26, 2004. Management published in the media a notification to convene a GSM on March 22, 2005 with the following agenda: CEO's report on Agromash OJSC's operational results for the reporting period; board report on performance results for the reporting period, and, approval of the annual report and financials.

- In parallel, management filed with the local prosecutor's office a complaint concerning the illegal actions of the group of shareholders. The shareholders filed a lawsuit with a local court, which scheduled the first hearing for February 5, 2005. In an effort to manage the conflict, management suggested

- Mediation will be attended by: Ivan Petrovich Zubitsky, Agromash's OSJC, the former CEO, and currently the head of the Foreign Relations Department in the region's state Administration. (He will be representing the shareholders who initiated the meeting.); and, Nikolay Vasilyevich Rostotsky, the incumbent CEO of Agromash OJSC.

THE TASK

- Split participants into two groups:
  - Group 1 will review the merits of the dispute using the courts and the likely outcome
  - Group 2 will review the merits of mediation and the likely outcome

Participants may use the following table for guidance:

AGROMASH OJSC: BENEFITS AND LIKELY OUTCOMES OF COURT LITIGATION AND MEDIATION

	COURT	MEDIATION
Plaintiff's interest		
Defendant's interest		
Possible decision with regard to plaintiff		
Possible decision with regard to defendant		
Further actions of the plaintiff		
Further actions of the defendant		

SOURCE: Adapted from IFC Europe and Central Asia Department - Corporate Governance Unit.

ANNEX 9

CORPORATE GOVERNANCE READING GUIDE FOR DISPUTE RESOLUTION EXPERTS

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USEFUL WEBSITES

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www.bccg.tu-berlin.de

Brazilian Center for Corporate Governance (IBGC)
www.ibgc.org.br

Centre for International Private Entreprise
www.cipe.org

Egyptian Institute of Directors
www.EIOD.org

European Corporate Governance Institute
www.ecgi.org

Global Corporate Governance Forum
www.gcgf.org

Hawkamah
www.Hawkamah.org

International Chamber of Commerce
www.iccwbo.org

International Financial Corporation
www.ifc.org

International Corporate Governance Network
http://www.icgn.org

OECD - Corporate Governance
www.oecd.org

The Corporate Library
www.thecorporatelibrary.com

The Encyclopedia About Corporate Governance
www.encycogov.com

World Bank
www.worldbank.org