

5-1-2016

## Session 4: Promoting Conflict-Competent Leadership and Holistic Conflict Management

Alexander Insam

David Huebner

Juergen Briem

Noah Hanft

Thomas J. Stipanowich

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Alexander Insam, David Huebner, Juergen Briem, Noah Hanft, and Thomas J. Stipanowich, *Session 4: Promoting Conflict-Competent Leadership and Holistic Conflict Management*, 16 Pepp. Disp. Resol. L.J. 233 (2016)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol16/iss2/5>

This Conference Proceeding is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact [josias.bartram@pepperdine.edu](mailto:josias.bartram@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu).

# Session 4: Promoting Conflict-Competent Leadership and Holistic Conflict Management

Moderator: Dr. Alexander Insam

Speakers: David Huebner, Juergen Briem, Noah Hanft & Tom Stipanowich

Tuesday, November 10, 2015

Pepperdine University in Malibu, California

## I. BIOGRAPHIES

**Dr. Alexander Insam** is a Partner of KPMG and KPMG Law Germany and a member of KPMG Germany's CHRO Services leadership team with over 320 human resources experts, consultants, tax specialists, labor lawyers, and mediators. He specializes in the strategic analysis and modification of employment conditions and remuneration systems, especially for the financial services industry. Additionally, Insam uses the tools of mediation to help executives and employees to use their working hours more efficiently and to increase their level of cooperation. As a mediator, he has conducted numerous high-profile mediations at the workplace during the last eight years. Currently he is involved in continuing mediations concerning structural conflicts and labor disputes in the aviation industry. Insam headed two studies on conflict costs conducted by KPMG in 2009 and 2012. From 2009 to 2014 he acted as a director at the Center for Conflict Cost Research (Zentrum für Konfliktkostenforschung) at the Humboldt-Universität School of Governance in Berlin, Germany, and was appointed member of the editorial board of the German journal *Die Wirtschaftsmediation (The Business Mediation)* in 2013. In addition, Insam held positions as Assistant Professor for Business Mediation at the Universities of Heidelberg and Bayreuth for more than five years. He lives in Seeheim near Frankfurt, Germany.

**U.S. Ambassador David Huebner (retired)** is a Partner in Arnold & Porter LLP's International Arbitration, Public International Law, Intellectual Property, and National Security Practices. Previously he held senior positions in the Asia Pacific region, including as ambassador to New Zealand and Samoa, chair and CEO of a large international law firm, founding chief representative of a firm in Shanghai, China, and special

233

policy assistant to a member of the lower house of Japan's Diet. As ambassador, he won awards for innovative statecraft and communication, and the Smithsonian Institution has taken certain of his materials into its permanent collection of American history. He has more than two decades of experience handling cross-border disputes, is on the panels of arbitrators of the principal arbitral institutions, and has served as advocate or arbitrator in more than 100 arbitrations in two-dozen jurisdictions. He is a Fellow of the Chartered Institute of Arbitrators, Distinguished Fellow of the Auckland University of Technology's Faculty of Business and Law, Life Member of the Council on Foreign Relations, Solicitor in England and Wales, and member of the Bars of California, New York, and D.C. A graduate of Princeton University (*summa cum laude*) and Yale Law School, he has taught law, policy, and dispute resolution at universities in China, Germany, New Zealand, and the U.S.

**Juergen Briem** is head of conflict management services (CMS@SAP) and head of the mediator pool at SAP SE. He also is cofounder and member of the board of Roundtable Mediation und Konfliktmanagement der deutschen Wirtschaft (RTMKM - *Roundtable and Conflict Management of the German Economy*). Today more than 70 companies are members RTMKM. At SAP, Briem has been responsible since 2009 for implementing a conflict-management system which connects all conflict resolution methods within SAP. This ensures that conflicts can be solved with a holistic approach. He focuses on workplace conflicts and sees mediation as the heart of a conflict management system. In his mediator pool more than 50 well-educated mediators offer services for employees and managers to solve conflicts in a sustainable way. Since SAP's founding of the mediator pool in 2007, several hundred mediations have been successfully conducted. Workshops for managers and target groups are part of the program. Briem also has been a guest speaker at many conferences throughout Germany. He served as the keynote speaker at European Conference on Cross-Border Mediation held in Florence, Italy in October 2011. He publishes in various magazines on a regular basis. He holds a degree in mathematics and received his master of mediation from FernUniversität in Hagen, Germany. In 2008 he went on to study to become a business coach.

**Noah J. Hanft** is the President and CEO of the International Institute for Conflict Prevention and Resolution (CPR Institute), an international nonprofit coalition of corporate counsel, top law firms, judiciary, and academics, dedicated to providing resources and information in commercial conflict prevention and dispute management. A long-time supporter of ADR, Hanft has devoted his career to finding the most effective and efficient resolutions for resolving business disputes. Prior to joining CPR, Hanft was general counsel and chief franchise officer for MasterCard, where he was

responsible for overseeing legal and regulatory affairs, public policy, and compliance. Hanft also had responsibility for Franchise Development and Integrity, Global Diversity, Corporate Security, and Information Security. In addition, he was a member of the company's Executive and Operating Committee. Since joining MasterCard in 1984, Hanft held positions of increasing responsibility within the Law Department, including that of senior vice president, U.S. counsel and assistant general counsel, ultimately becoming general counsel in 2001. He briefly left MasterCard from 1990 to 1993 to become senior vice president and assistant general counsel of AT&T Universal Card Services. Hanft began his career as an attorney with the Legal Aid Society in New York City. He has extensive ADR experience and has lectured at length on the value of ADR in resolving litigation. Hanft has served as an independent arbitrator and is on the Mediation Panel for the Southern District of New York. Hanft currently serves on the boards of the Legal Aid Society and the Network for Teaching Entrepreneurship (NFTE) and is a member of the Council on Foreign Relations. In 2012 he was named General Counsel of the Year at the Global Counsel Awards. Hanft has an LLM from New York University School of Law in trade regulation, a JD from Brooklyn Law School, and a BA from American University, School of Government and Public Administration.

**Thomas J. Stipanowich** is the William H. Webster Chair in Dispute Resolution and professor of law at the Pepperdine University School of Law. He has also been the academic director of the Straus Institute for nine of its eleven years at the top of the *U.S. News & World Report* rankings. Stipanowich brings a long and distinguished career as a scholar, teacher, and leader in the field along with wide-ranging experience as a commercial and construction mediator, arbitrator, federal court special master, and facilitator. From 2001 until mid-2006, he served as CEO of the New York-based International Institute for Conflict Prevention & Resolution (CPR Institute), a think tank focused on promoting more effective forms of business conflict management. He was also the founder and first director of a court-connected mediation program that has been in existence for more than two decades. He has authored two of the leading books on commercial arbitration and many articles on ADR; his works have been cited by the U.S. Supreme Court and many other federal and state courts. He is coauthor of a groundbreaking book and materials entitled *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW*, soon to be in its third edition. He recently conducted groundbreaking surveys of practices and perspectives among leading commercial mediators and arbitrators. For his sustained contributions to the dispute resolution field, he received the D'Alemberte-Raven Award, the

ABA Dispute Resolution Section's highest honor (2008), and the CPR Institute's James F. Henry Award (2015).

## II. SPEAKER PRESENTATIONS<sup>1</sup>

**David Huebner:** I will start by noting that my own approach to conflict management was formed very early in life, well before PowerPoint was even a gleam in Satan's eye. I was raised in a very small business environment in which our extended family, including immigrant grandparents, lived directly above the business. Two further contextual facts are worth note. First, child labor laws notwithstanding, from about age seven, my brother and I worked in the store regularly after school and on weekends serving customers of various temperaments and dispositions, and dealing with customer service issues. Second, our family was not of the buttoned-up variety. Disagreements and grievances were processed openly and immediately with spirited argument often occurring simultaneously in two languages, sometimes with bystanders jumping in, and then everybody went back to work. Important lessons, I think, can be learned about holistic conflict management in a kinetic, 24/7 environment from which there is no viable escape. Being trapped is, I think, a very useful instructional device. It teaches that conflict is just part of life. It is not an operative deviation. In fact, conflict is often an opportunity. Much of the conflict management dysfunction that I have observed or encountered in my adult life is, I think, a result of the natural human tendency, usually reinforced during puberty, toward flight, fight, or avoidance. Most disputes, as you all know, are simply not resolved by fleeing, fighting, or ignoring them. Most of us understood that at a very early age, pre-puberty. I am not suggesting regression therapy. At times, though, I think that the disputes industrial complex over intellectualizes when, at root, so much conflict is at least as much emotion as substance. Many of the most effective approaches to conflict prevention and management were taught to us in Sunday school or primary school, including the high art of listening more than talking. Without understanding, incorporating, and managing emotional dynamics and basic impulses, we miss too much of the picture to be effective.

Now moving from the personal, my professional involvement in conflict management began when I graduated from law school, unfortunately about 30 years ago I must admit. That involvement has been on two axis: internally as a manager or executive, and externally as a litigator or arbitration practitioner. Internally, the different domains in which I held

---

1. This presentation transcript has been modified to conform to the compositional criteria of this Volume. For the complete video of these presentations, see Pepperdine University, *Pepperdine Law: Managing Conflict 4.0 - Session 4*, YOUTUBE (Nov. 25, 2015), <https://youtu.be/pGBNjPzBQks> [hereinafter Presentation Four Video].

executive or management positions have all had key cultural characteristics in common. Whether a law firm, an embassy, or a not-for-profit advocacy group, they were all enterprises built on intellectual talent with flat collaborative organizational structures designed to produce creative strategies or solutions, and in which virtually all of the assets had first names and were highly mobile. Such environments posed obvious challenges in many respects, including and perhaps most particularly, in managing conflict. Externally, as I alluded, I began my legal career as an intellectual property litigator, and moved quickly into arbitrator, again, weighted towards clients and intellectual property-driven industries. Over the course of that work, I have often been surprised the degree to which combatants misjudge the equities, importance, and value of particular disputes, often because internal political dynamics or emotions. I have lost some business over the years because it is my practice to perform initial case evaluations with clients in as detached a manner as possible, rather than feed the emotion by jumping directly into a guns-blazing or feel-the-pain offense or defense, which is often what clients really want because it provides some sense of initial comfort. I think, though, that the most important steps in any dispute process are deep occasional breaths of evaluations, certainly at the start, but also periodically thereafter to consider upside, downside, cost, and ripple effects, and to rebalance your approach as necessary. When sitting as an arbitrator now, I am particularly surprised at the degree to which parties and counsel seem not to engage in such reflection, even when the neutral clearly invites it for what are, or should be, obvious reasons. Now, given our format, rather than lay out a list of tactics and advice, I thought I would lay out one I encountered upon arriving at my post as ambassador, and then I will make five or six summary observations simply to provoke you.

I was running a law firm in Shanghai in 2009 when the president nominated me and then the senate confirmed me as the ambassador to New Zealand and Samoa, which I actually admit, ruined me for life because it is, in fact, the best job on earth. The State Department itself is the oldest and perhaps the most elite executive agency in the U.S. government. It has a very strong professional culture. I was a political appointee though from outside the system. Foreign service officers, I have learned and seen presumably unseasoned political appointees come and go every two to four years. For excellent reasons, the Department is organized in some way to buffer political appointees to keep us from harming ourselves or others. When I first arrived at post, it became clear to me that my two embassies were overall underperforming. For a variety of understandable situational reasons, they lacked focus, direction, and ambition. In my view, though, if one has an embassy, it should produce something meaningful. Therefore,

237

and recognizing the unfamiliar context in which I found myself, we engaged in a series of internal dialogues designed to move us toward a new and much more specific outcomes-oriented strategic plan, which may or may not be traditional in many foreign affairs ministries. In response, the folks below me on the organizational chart sorted quickly as one might expect, but in unpredictable ways, into four overlapping categories. There was a good deal of caution, there was some support, there was some direct pushback, and then there was some sub-rosa resistance. Having comfortably survived a string of prior ambassadors, the culture seemed quite prepared to attempt to outlast the new one, which in my view was a recipe for unacceptable stasis in both of terms of that meaning: inactivity and conflict. Things came to head a few weeks into the experience when a senior colleague of mine acted on a clear misread of my approach and intentions. By then we had started to roll out a limited number of pilot projects as part the strategic planning process. In a group meeting, after I had framed a particular program idea for discussion, this colleague stated, “Your pet projects are all well and good, but we have our day jobs to do. We will try to help if there is any time leftover.” I know it is a quote because I wrote it down. So what do you do in that environment? A big mistake sometimes ambassadors make is they pull out the letter. Does anyone know what the letter is? When you are sworn in as ambassador, the president gives you two letters which he has signed, which identify you as his personal representative and the spokesperson of the American people. You carry them and you give one to the Head of State in the place where you are posted, and you keep the other one in case anyone questions you. Now I think it is a bad tactic to actually pull the letter out in a meeting and wave it at people. What I did do to respond to the direct challenge was based on a few core principles and beliefs of mine about conflict management.

As I previewed earlier, emotional intelligence, first of all, is essential in conflict management. You must recognize and understand what motivates, de-motivates, worries, and energizes people, and you need to manage the stew of emotions in your environment even before conflict arises. Number two: institutional culture matters. Conflicts arise and are resolved in an operational environment. Thus, the manner and tools of managing conflict need to resonate within that institutional culture. They need to re-enforce positive values and objectives and they need to strengthen rather than disrupt operations. Number 3: change and conflict are interrelated concepts and they have to managed simultaneously. I have never seen change occur without conflict. I have seen, though, a lot of people seemed surprised by that fact. Number 4: fully understanding your machine matters. Even if you are lucky enough to sit in the admiral’s chair on the flag bridge of an aircraft carrier, to act effectively you need to understand better than anyone else the configuration and functions of the eighteen decks and the thousands of

people, procedures, and rules below you, as well as those in the carrier group around you. There simply are no shortcuts. Number 5: conflict prevention and resolution competency is essential at all levels of an organization. Conflict occurs at all levels, and must be resolved at all levels. Viewing conflict management as a senior function rather than as an organic part of everybody's portfolio creates distortions and dangerous pressure. Nonetheless, in most environments in which I am familiar, there is little or no focus on conflict training anywhere, let alone below the C-level. Number 6: an instinct toward consensus cannot be allowed to create veto power. If certain cells begin to metastasize, those cells may need to be surgically removed. Unduly hesitating can have dire consequences. And Number Seven, finally: conflict management and conflict resolution are, I think, two completely different concepts. Instigating and/or feeding conflict can be a useful strategy for many people in many enterprises and in many walks of life. It makes us less effective if we assume that those around us prioritize an absence of conflict. One of the curious things about the conference so far is we seem to be talking about conflict as a bad thing to suppress. I disagree to some extent on that conclusion. Now that is even fodder for now, so I think I will yield the microphone back to Alexander. Thank you.

\* \* \*

**Juergen Briem:** Good morning, everybody. First of all, I have to say a few things about me. I am not a lawyer and I think I am in the minority here, but I can say to everybody who is not a lawyer that we have a very great place in the world. There is not only a place for lawyers in conflict management. This is something I experienced in many discussions with companies as well. There is a different way of thinking between lawyers and non-lawyers, and hopefully I can give you a small idea of the thoughts of a non-lawyer. I studied mathematics and joined SAP sixteen years ago as a sales representative. I sold software and was trained in negotiation and how to increase revenue, etc. In 2003, I thought about what we can do with our employees and how to behave, and asked myself why we do not use techniques like negotiation skills in our work environment. That is the reason why I decided to study and get a master's degree in mediation, which I finished in 2006. Fortunately, I met a colleague who was the head of the Worker's Counsel in Germany and was Deputy Chairman of the Supervisory Board of SAP. We decided to think about what we can do with mediation within the company. The first thing we started was a mediation project without informing the executive board. Nobody knew about it, but we did it. For the first few mediations we ran, we looked closely at prerequisites of the conflict and only accepted conflicts where we were 100% sure we could

239



resolve with mediation. For example, after a few weeks after finishing one of the first mediations, a manager wrote us an email asking what we did with his employees; their productivity increased dramatically after they resolved their conflict through mediation. Another example involves a manager and an employee. We ran the mediation, and although I was not the mediator on the case, the manager wrote me an email saying that he would like to talk to me. I wondered what happened, but the reaction was that the manager wanted to become a mediator because it was such a wonderful method of conflict resolution. That was the experience we had in the beginning, so we decided to take the next step and thought about a systematic approach of conflict resolution and how we could manage conflicts. As a company, we are in a market that changes rapidly and we have to adapt. This causes some dramatic changes in business processes as well as in business models. Therefore we are in transformation and change as a company, but who makes the difference? Who makes the changes? Who makes the transformation? The employees within the company are doing these changes! As a manager, you have new employees. As an employee, you have a new team or a new manager. You have to follow new business processes, your organization model is e.g. a matrix, so you have to report to two managers, you have to work on a new product, etc. This all leads to more difficult situations or to more conflicts. Our thought was, "How can we use these conflicts?" Instead of avoiding conflicts, it is my view that we should use them as a resource for development and growth.

This leads us to the vision. I wrote here that we leverage conflict as an opportunity for development and growth. If we can act on the observations we have, then we have significant advantages. First, I think conflicts can be seen as a business process. If we know how conflicts work, how they arise, and why they arise, we can control, coordinate, and use conflict as a part of our development and growth—not only for the company, but also for everyone in the company. Think about if you have a conflict with your husband or wife, and you solve the conflict in a win-win situation. It feels comfortable; it is very good that you have this kind of development. It is the same in business. If we can use conflict and solve conflicts in a very good way, it creates an opportunity for growth in the company.

So what did we do? First of all, we have to know how we handle and deal with conflict. Nobody was able to tell me at SAP how we did this. So we asked a student doing a thesis paper to find out what the normal ways conflicts are handled in a company. This student thesis raised some very surprising results because there are so many contact points to solve conflicts in the company that we did not expect. As a result, we invited those people and discussed with them how they deal with conflict. I have three examples here on this slide. [Referring to PowerPoint presentation.]

The first is when the employee says, “Oh I didn’t know that we have colleagues offering coaching or mediation.” When the actors involved in the conflict management did not know what we have to solve conflicts, I cannot expect from a normal employee to know what our solutions and offerings are. So we have to inform them about our offerings. We have to build up a strategy. How can we inform employees because we are normally not in the situation that we have conflicts? But when you are in a conflict situation you do not always know where you can go to. So we have to inform, and we have to give short ways to get this information.

The second is “often colleagues come to us when their conflict is really escalated”. And this is a very important point because often you can only solve conflicts with damage control. Often, if a conflict is highly escalated, you cannot solve the conflict in a way that everybody is satisfied with the solution. So we have to find a way to monitor the employees and encourage them coming to us in the early stage to ask for some support.

And the third example is the idea that there is no coordination of conflict between the conflict contact points. When you go to a business partner in HR, they will deal and work with you, and nobody knows if this is the best way to handle it or not. So when we have to create coordination between the actors in the conflict and the contact points in order to improve our dealings with conflicts.

Here is an example for Germany. [Referring to PowerPoint presentation.] There are many contact points, and these contact points work within conflict management and they have functionality over the conflict management. For example, coaching; you can contact a coach not only in case of conflicts, even in case of work-life-balance or planning your career, etc. Conflict management is only a small part of coaching.

There are many contact points, but when you see this network that is for normal employees, it is very difficult to find the right place to address the conflict. At SAP we only look for workplace conflict. We do not support business-to-business conflicts. Business-to-business conflicts are in a separate environment.

Networking these contact points was one of our first steps. We would ask, “What is your strengths in conflict management?” We developed a process model whereby conflicts can be transported from a conflict resolution point A to a conflict resolution point B. This is part of coordination of conflict management; we have the information for marketing of our conflict contact points. It is an ongoing job and it is doing well. You see in the middle of the circle “conflict navigators.” [Referring to PowerPoint presentation.] It is a new role because we found out that it is very hard for an employee to go to a business partner, counsel, coaches, or

the mediators because these are *official* contact points and sometimes the employees do not want to talk about their conflicts. It is uncomfortable because most of us do not want to have conflicts. When I am in a conflict, I think a long time about what I can do. Sometimes the conflicts escalate and then we are in the situation that I mentioned previously, where conflicts can only be resolved with damage control.

We decided to train employees to work as conflict navigators. The main duty of a conflict navigator is listening, listening, listening! And taking the time that the employee needs to talk to you. This is what we did, and of course the navigators know the system and this circle as well. [Referring to PowerPoint presentation.] So when we started using this system, we did not know what would happen. We ran an evaluation after two years and found out that one out of every three of the people who contacted conflict navigators did not need any further support. Therefore the person contacting the navigator sees what is behind the conflict and can go to the person having the conflict with and solve it directly. This is, in my opinion, the best way to solve conflicts if the parties in conflict can discuss the conflict by themselves.

This is the result I hoped would happen, and it was really satisfying to me that indeed it did. Conflict navigators work part-time. They have a maximum of one-hour per week for conflict navigation; it is not a job that requires much time, but it is a really good offering for employees to go and get in touch with some experts to solve the conflicts. As a result, many conflict navigators are today trained mediators. They found out that it is a very good job to navigate in conflict situations. Their work is purely reactive; no navigator goes to an employee and says, “Hey, you have a conflict. I have to support you.” No. That is absolutely forbidden. The employees decide what they want to do. This program is an offering—not more and not less. If you want to use this, it is okay. If you do not want to use this offering, it is absolutely okay, too. This was the experience we had when we connected the conflict contact points within the company. You do not have to use every contact point on this slide; if you have three contact points or four contact points that is enough. It is important, however, that when we use this method we measure the success of conflict management. I collect all of the feedback from the colleagues and we have had some very overwhelming feedback about the system.

The next thing we developed was a three-pillar model for conflict management. After some time we thought about extending our services to offer some services to improve employee’s ability of handling conflicts by themselves. This should include communication skills, their attitude and the ability to deescalate conflict situations. Therefore we have to train people, and this is what we have: On the right hand side you see the third pillar: the contact points for handling and managing conflicts. [Referring to

PowerPoint presentation.] On the left hand side, the first pillar, you see we have the prevention. [Referring to PowerPoint presentation.] Prevention means, in this instance, preventing escalation of conflicts. In German we use the word “prophylaxis.” It is a medical term, but in a sense it is a better word because we want to prepare the employees to deal with conflicts in a better way, and not to avoid conflicts. We developed some workshops to improve conflict solution skills. These workshops fall into three categories and range from a half a day to two days, and are really appreciated by employees. Every scheduled workshop has been immediately fully booked.

The second pillar is analysis. [Referring to PowerPoint presentation.] When we run the system, we have the appearance that the employees contact the contact points and the navigators are working very well. We run the workshops for prevention and the prophylaxis for the entire company. You will not find any manager on my slides because managers are responsible for everything that has happened in the area they work in. Thus, they are responsible for conflicts. Often times, the managers’ conflict management competence can be improved. I think, and this is my opinion, the first jobs should not be to teach conflict management for managers because we have so many support points for conflict management. Managers have to bring other competencies. But as a manager sometimes you have a feeling the motivation of your people is decreasing, or there is an uncomfortable situation. There are rumors that productivity is decreasing and nobody knows what is happening. Nobody knows what the reason is, and therefore, we offer a workshop format called “Analysis”. This format includes a meeting for 1.5 to 2 hours asking questions and giving the attendees of this meeting the possibility to give us information anonymously, and, of course, if necessary we have a face-to-face discussion about confidential information. We analyze this information and then we give a proposal to the management and to the team on what they can do. The manager then makes the decision what they will do.

We ran an evaluation of our system supported by a University in Germany in 2012-2013, and got very positive results that this system is accepted by employees and managers, even in the case of controlling costs for conflict resolution. The only question that arose was how this method works for increasing productivity. The amount invested is not the topic on concern here, because the fact that resolving conflicts in a win-win solution will save costs automatically is understood. So there is no question about the return on the investment. We were very happy about this.

Now I want to tell something about the “Roundtable Mediation and Conflict Management in the German economics” ([www.RTKMK.de](http://www.RTKMK.de)). In German, conflict is written with a “K” and not a “C.” At the beginning of

the thoughts on our systematic approach to conflict management, we were looking to see what other companies have done with regard to conflict management. In a software company, you first look to see if there is anything developed that you can reuse. In conflict management, we were in the same situation and thought about what other companies had developed that we might be able to adopt. Therefore, it was at the end of 2007. There was a conference for conflict management in Hamburg, and we went to this conference and talked with other companies, and we found out that nobody had realized a conflict management system. However, we found out that many companies were interested in conflict management. So, in May 2008, we invited seven or eight companies to our headquarters in Walldorf near Heidelberg, and these eight companies decided to look at how to manage conflicts on a regular basis. We created and founded the “Roundtable for Mediation and Conflict Management for Germany economics”. Today there are more than seventy companies who are members of this roundtable. I do not want to think about what is coming up in 2020. We are very happy about this development and the growth of this roundtable, but there are also some challenges. The first time we met, there were ten to twelve people, but today we are talking to fifty or eighty people, so you cannot discuss special topics with that many people. Therefore, we founded working groups or task forces for specific topics. For example, documentation is a very interesting point. How to document conflict cases? You have to abide by confidentiality, and to only document that there was a case on September 15 is nonsense. What kind of documentation can you do and still maintain confidentiality?

Another example is marketing: how can we widen the interest of conflict management in companies? We are all here because we are interested in conflict management, but we have to bring this message to others. We should talk about the success we have had in our companies and offer to help other companies. I am very excited that three out of seventy companies now adopt the system we developed at SAP in their company. I am working close together with the responsible people in these three companies to help them implement such a system. This is the kind of marketing you should do; we should talk about the advantages for the company. We should not go out and say, “Hey, we have found the great idea and you are all stupid.” That is not the way to do it. You have to show the added value for companies when they invest in conflict management.

The seventy companies are not all big companies as they may seem. Our smallest company has sixty employees. It is a very small company and the problems and the challenges in the small company are quite different than in big company. We at SAP have many internal mediators, but you cannot do it in a small company because of the missing neutrality. The mediators have to be neutral and you have a company with sixty people

everybody knows everybody so you cannot do it this way. You have to solve it in a different way, and these are the things we discuss in our task force “small to medium sized companies.”

The RTMKM have three meetings a year, hosted by a member of the roundtable. We have one team called the strategy team, which coordinates the roundtable, and the board is made up of four members from the roundtable. My colleagues and I are thinking about increasing the roundtable. The target crew for the roundtable is HR people and legal people and where applicable, as in Germany, the works council. We invite them to come as guests and look at what we do.

That is what I have to say about conflict management and I am now very interested in your questions. Thank you.

\* \* \*

**Noah Hanft:** Good morning, everyone. I have a deep interest in this area and the speeches have been largely consistent until now. But I do come with a slightly different perspective than most other speakers. I had been in-house counsel for thirty years, so I have a very commercially orientated approach and perspective on dispute resolution. I want to start by challenging the name of the topic. In fairness to my co-panelists that have raised this before, let me ask you what you all think of topic name promoting conflict-competent leadership and holistic conflict management? Anybody has any views on that name? Anybody see anything wrong with it? Well there is nothing wrong with it except it sounds complicated. Even overwhelming. And I think to be successful in driving dispute resolution into businesses around the world it cannot be complicated. It has to be grounded in commercial sense. The simpler it can be, the more compelling it can be. How about making conflict management a commercial imperative? Simplicity helps drive success as we move forward in terms of accelerating and encouraging adoption of thoughtful dispute resolution processes. Now, my initial experience litigator—I tried criminal cases, I was IP litigator, I was in a law firm and in-house, and I will not say how long ago, but it was a long time ago. I was with MasterCard and I had a great run. We started with 4 lawyers and ended up with about 120. So the department grew; we went through successful IPO, we had a lot of litigation, a lot of successes, but also a lot of challenges. And at some point in my career I realized, looking back, that all of our major conflicts were resolved through mediation. I said to myself, “Something is not right.” There is too much of focus on litigation. I recognized the litigation just was not getting it done; not getting it done for me personally and not getting it done for the company. So essentially I became the ADR zealot. I started to learn and

245

think about how to drive ADR early case assessment and early dispute resolution into my company. Because I realized that the cases we mediated, every single time, the earlier we mediated the more successful the result.

One of the things they did, and this is something somewhat optics but I renamed the litigation department to the “dispute resolution group.” We moved them at the direction and all of these and all of my focus on early assessment of cases led me CPR. Alexander mentioned the CPR pledge, which calls for companies to seek to avoid litigation through implementing sustainable dispute resolution processes. I realized that is what I was trying to do at MasterCard. That is what CPR is all about and one of the main reasons you all are here today. The thing about that pledge is that it sounds pretty easy, but that is not the case. It is a lot harder than it sounds, in part, because of two key words: “sustainable” and “global.”

In some ways ADR culture is like bringing democracy into an environment that has not seen it before. It is fragile; it needs constant care and attention. There are a lot of challenges. So today, what I want to do is set out what I see as the aspiration, what the challenges are, and hopefully what the way forward is. One of the things I have learned from Scott is that there is definitely more than one way forward. Scott’s approach, in terms of bringing to Monsanto dispute resolution approach outside of the law department, is fascinating. I do not think it is necessarily the only way, but it is a really interesting way. I think understanding that there are different ways to move this along is important.

So what are we seeking? I think what we seek is deeply engrained and embedded process with this early identification of disputes and management and resolution process that has several key attributes.

First, it has to be embraced by the law department and the business. And when I say the law department I do not mean just the general counsel; not only the general counsel, but also the rank and file of the law department has to buy in on it, and business has to buy it.

Second, it has to be recognized by the CEO and the Executive Management Team and appreciated and understood by the Board of Directors and even potential investors and shareholders. When I presented to MasterCard board, my presentation evolved from talking about cases and risks and challenges to talking about dispute resolution and processes and how we might succeed.

Third, it has to be globally applicable with appropriate local customization. We had attorneys all over the world. The only way to convince them about the ADR process was to actually sit down and meet with them, whether through webcast or in person, but you have to recognize that it has to be globally adopted.

Fourth—and I do not know if this has been talked about a lot, my company had risk champions, diversity champions, and ethics champions—there needs to be ADR champions, and ideally on the business side as well.

Fifth, ADR has to be part of objectives and even, ideally, a basis for compensation. There has to be ability to measure success with metrics. At the end of the day it cannot be a pet program; it has to be commercially driven. It cannot be something that goes in and out of vogue depending on who is the chief litigation officer or who the general counsel is. Importantly, the environment and processes have to encourage attorneys to see around corners and catch potential disputes before they become a problem, and to be able to address and mitigate disputes. The process has to require you to analyze, and I think this is really important, in an open and honest way. Consider possible and likely outcomes and what success looks like. What is the goal? I will give few examples on why I think that is important.

Finally, you need an environment that really encourages truth telling and celebrates lessons learned and even mistakes, as long as they were thoughtfully made.

So now along the list, what are the challenges? I think one of the biggest challenges is ourselves. Those of us who have been general counsel, I think recognize that we have spent our careers trying to be different; trying to have the law department viewed as a separate organization, not subject to some of the pronouncements from the CEO about budget cuts, titles, and compensation policies. We do not want to be treated as if we are marketing widgets. I was primary arguer when we talked about getting rid of walls and not having separate offices and a whole host of other issues. We say, “Well the law department is separate.” Well, the problem with that is it leads to not viewing disputes as part of the business, which is a real problem. Many law departments do not hold themselves up to business cases.

Second, chief legal officers are often an issue because they grow up as litigators in law firms and they have ties to law firms. The whole notion of ADR is not necessarily consistent with their view as to how litigation should run.

The third challenge you have heard about is the fear of being second-guessed. Anything non-traditional—anything outside of the status quo—creates risk. Have you noticed that one bad experience with arbitration or mediation is never forgotten? You could get burned in litigation in courts of Texas or overseas and it is just business, but in arbitration or mediation it is always remembered.

Now a general counsel can drive adoption of ADR policies, but it is not sustainable unless the rank and file is adopted and driven into the business and culture, and the biggest obstacle is often what I will call middle



management, who tends to be embedded in the status quo. You can capture ADR with processes, with manuals, with pictures, with trinkets, but it only works if the value is widely recognized and proven out. One of the challenges, and I think this is an interesting one, and it might not be intuitive, but it is the culture of empowerment. Many companies have moved to an environment where we empower our staffs, whether lawyers or not, to have degree of autonomy, to be independent, to be decision-makers, and to act quickly. In some ways that runs counter to having a policy where ADR is globally driven, but unless that happens, and if ADR becomes discretionary and random, it is ultimately not sustainable and certainly is not going to be global.

The rationale for ADR cannot be too soft, it cannot be too academic, and it cannot be too complicated. It has to be grounded in good business and in good result. If we think about what Scott did in terms of Monsanto, he actually drove it after winning a lawsuit. It must be clear to the business that it is not this soft altruistic concept, but a real, hard, commercially driven necessity. One other challenge, and I do not know if you have seen this, is companies that are really good at this—not the examples you have heard today; they are the exceptions—do not share their experience. They do not share their savings when implementing ADR policies because they see it as a competitive advantage. And it truly can be. Other obstacles include cultures of blame and retribution, passive-aggressive cultures, and cultures of silence. ADR does not work there. Then, of course, there is the unharnessed excessive emotionalism that companies have, forgetting that dispute resolution is a means to an end and not the end in itself. I am going to give one example of one of my greatest successes, but I think it is emblematic of what happens when you get too wrapped up in the battle and with litigation. This success relates to the battle we had with FIFA.

So some of you might be familiar with this: MasterCard had a long-standing relation with FIFA for the World Cup sponsorship for decades. We reached this agreement and the terms of another long-term agreement with FIFA, and they have said to us, “Hey, we got a deal. We will send you execution. You guys go sign it and we are done, congratulations.” Unannounced to us, there were negotiating a very similar deal with our arch competitor, Visa, who now sits on the CPR board. God bless them and all of our competitors now, but we ended up furious. Essentially, we got screwed. Now, fortunately we had the right of first refusal provision in our agreement. We had the right to injunctive relief in the New York court and an arbitration provision in Switzerland. I will not take you back and forth on the fascinating struggle, but we literally we won every juncture of the proceeding and every motion—every attempt that they had to take away the jurisdiction from the Southern District. We won and we won and we won. Everyone was really pleased about the results and we were just about to face

the final appeal when I sat down with my boss and I said, "What do you want to do?" He looked at me like, "What do you mean?" I said, "Well we are winning." Then when he asked, "Well, that is good isn't it?" I replied, "Well you have told me how you think this is the most corrupt enterprise and this is really been born out of reality, and that you don't want to partner with these guys. That's what happens; we are suing for specific performance." So he said, "how do I get out of this?" Without getting into the specifics he gave me a dollar amount. I was able to fly over to Switzerland and negotiate a ninety million dollar settlement for us to walk away from our partnership with FIFA. I only mentioned that, of course, to pat myself on the back, but also to get across the point that you have to know what the end game is. If it is all about the fight then something is wrong. I really learned from that experience, which leads me to what I call the way forward.

Here, there are lots of examples but these are not all inclusive. There are so many other ways, like things that I have heard about today, where one can foster an environment to drive ADR in a corporate culture. The first and most important thing to me is: I think alternative dispute resolution cannot be viewed in a vacuum. It has to be in part of an overarching partnership between law and business, integrating law into the business. The law department must not be viewed, or view itself, as separate; it has to view itself as a business function. Once you get there, it really helps because, at that point, then you can look at processes and ADR becomes a no brainer.

MasterCard had a number of businesses and lawyers and, in trying to bring the group together, we came up with a module that we call the three E's. There were about ensuring integrity, enhancing reputation, and most importantly, enabling business. That became an integral part of our strategy to evolve from becoming a resource to the business to an advisor to a strategic partner. As I said, once the law department looks at itself that way and the business looks at the law department that way, the argument about dispute resolution becomes much easier. Credibility of the law department is essential. One time someone in HR it was being abusive and difficult and the HR department was looking the other way. A number of people came to the law department, and we did an investigation, spoke to the CEO, and we ended up walking the individual out of the company. The reaction was as if the law department had done the work of God. It was so well received that we had instant credibility. It is kind of like Scott [Partridge] winning his lawsuit. We did not have anything that big but we established credibility, so then we started talking about dispute resolution it was a lot easier to sell. The other thing we did was the law department used to be viewed as separate entity and we had our CEO reviews and no one would come. So we

invited all of the members of executive management to come to our CEO review and they realized that we were putting in business case analysis. We were running the department as a business. Their view began to change and then they began to accept what we were trying to get across in terms of the dispute resolution processes as critical.

When we talk to members, we talk about one of the biggest challenges they find, which is getting the information about a case from their client: getting the true facts early on so you know how to evaluate the case. Because without that input, you can have as many early cases assessment protocols and early dispute resolution programs as you want, but if the inputs are flawed, they are worthless. So creating that environment is critical. Partnering with CEO is critically important to success. You cannot do it alone. I analogize it to driving diversity in a company or ethics. ADR has to be recognized for being good for business. We use to talk about diversity not only as doing something good, but also as doing things well. The same argument can be made for dispute resolution. One of the things that I think makes me optimistic about where we are going with all the challenges that I mentioned is there is a convergence of events. Despite the statics about women versus men that you heard yesterday, I think the feminization of law departments and the number of female general counsel is actually helping. I think law departments facing budget challenges is also helping because they are looking on how to be more economical. I think law departments now often have operations management and finance offices and they are all driving efficiencies. Efficiencies mean effective approaches to dispute resolution. And I do believe that technology is also going to drive dispute resolution. I believe that online dispute resolution has a future, and I do not think online dispute resolution should be looked at narrowly because it gives you the ability to move from online to offline. I think the more companies in time will be looking at that as the way to reduce costs and approve the evaluation of disputes.

I think I do not think it is that complicated. Lawyers must look at disputes in a commercial orientated pragmatic way and business people must look at disputes in a commercially oriented pragmatic way. Once they are both looking at it that way, I think there is likely of success. I recognized that there is a lot of fragility in the process. We all talk about ADR champions leaving a company and all the advances go back. So that is why processes in places is important and a conducive environment is important. Credibility is important. Executive support is important. And finally: CPR membership. When I talk about fragility I mean we have to constantly breathe life into ADR. It is intuitive that CPR is called CPR because it is all about breathing life into ADR. I think I am being half facetious. Those companies that are active in CPR get involved in our committees that are focused on dispute management and dispute resolution. If you have number

of people from an organization that truly believe in getting best practices, their boss may believe they are still driving the organization forward. So I think it is that ability and access that is truly important. Whether it would be GSK advice or Monsanto or MasterCard or Visa. These are companies that get it. I am going to stop there, other than to finally say that looking at lawyering preventive of lawyering really leads you to ADR. It is not only about management of disputes; it is about the avoidance of disputes. When I speak to conferences of in-house lawyers, their ears perk up when I talk about preventive lawyering and how important that is to keeping budgets down and avoiding disputes. That is what everyone wants to focus on. We have a great opportunity, I want to thank Alexander and all of you for listening. I look forward to your questions.

\* \* \*

**Tom Stipanowich:** David, I also started as a math major, but then fell off the straight and narrow and went to architecture school. I got a Bachelors and Masters in architecture and then I went further off the path and became a lawyer and found myself in a boutique firm. It was leading aggregation of lawyers doing construction and engineering and architectural disputes. They were all complex cases.

One of my early cases involved the expansion of a large hospital in the Chicago area. The lawyers came in very early in the project; then the project ended and the lawyers were still there. After five years of litigation we accomplished a resounding victory unlike any I have ever experienced. We received all of the compensatory damages – millions of dollars that we were seeking on behalf our client. We received all of our attorney fees, which, as our international students know is very unusual in the U.S. system. We received punitive damages in an amount equal to the compensatory damages. And the award was against The Franciscan Sisters. So it was an extraordinarily unique experience. Of course we came together for a celebratory dinner with our client, you know, expecting the ultimate pat on the back. My client however, surprised me with a reflection I've never forgotten. He said, "You gave my business and my family everything that we could possibly get out of the legal system. You hit a home run. I know that. So why am I not satisfied? It is because we spent five years in rooms with lawyers. My elderly father (then in his eighties) spent weeks and months with lawyers." He continued, "We are in business to do business. We are not in litigation to make money that way." He finished by asking me, "Isn't there a better way?" And that question has rung in my ears ever since.

When I began practicing law, I was really fortunate because we were going through a period of rethinking the way we handled disputes. Lawyers were beginning to talk with clients and client groups (users of the processes that we have been discussing) about rethinking the way we resolved disputes. Things like bringing clients back into the driver's seat; looking beyond adversarial processes to collaborative processes; and stepping back from formalization and looking to more relational and informal processes. Not simply talking about legal rights and remedies, but about interests—both business and personal interests (the real drivers of conflict). Moving from processes that take five years and lots and lots of money to flexible, early, expeditious and efficient processes.

These notions are very familiar to our students at the Straus Institute. We use the metaphor of an iceberg, and say that the legal system really focuses on visible part of the iceberg—the rights and obligations of the parties as they would be adjudicated in a court of law. Now this is very important; there may be a need for adjustment through the legal system. The problem is that there is considerable important stuff going on beneath the surface—the interests, emotions, values and other things that often are the drivers of conflict and the keys to settlement.

I began mediating back around 1990 and helped create a community mediation center with lawyers and non-lawyers. I learned very early on that while mediation could be very effective in settling legal disputes, it could also be very effective in attacking all of the real drivers of conflict and dealing with relational concerns. I truly believe that the insights that we derive from the needs, interests, values, concerns, fears and hopes of parties, often have an impact on what we do.

As I mentioned, my primary focus both as a lawyer and later as a dispute resolution professional was in the construction arena and it remains there, though I do other commercial work as well. The construction field recognized a long time ago that alternatives to litigation were critical to effectively managing conflict. By the time I entered law practice, the field had pretty much moved beyond litigation to arbitration, which afforded the possibility of informed expert decision making in a setting tailored to the needs of the industry. But growing frustration with the limitations of arbitration created opportunities for the introduction of mediation—to which I was introduced in 1981 in what may have been one of its first applications in a major construction dispute. Mediation would ultimately become the central feature of what has been called the “Quiet Revolution” in the United States. Meanwhile, engineers were arguing, “Litigation, arbitration, and mediation are all lawyer-dominated approaches. We need other kinds of responses that are business-oriented. We need responses that actually deal with the realities of the job site—before a process becomes lawyered. So let us come together in advance of the lawyers and address issues as they

bubble up on a project.” So you had concepts like dispute review boards, in which experts would offer early analysis and advisory evaluation of issues in dispute; uncannily, such approaches usually resulted in getting things settled very early before they boiled up into legal conflict.

Another “real-time” approach involved having a mediator appointed as a “standing neutral” at the beginning of a project. As a standing mediator, I was brought into the project in the early stages and actually had the opportunity to facilitate discussions among project team members during the course of the job. This way I was able to keep the lid on conflict and resolve a lot of issues as they bubbled up. I was very proud of the fact that I was able to cabin all of the serious problems and transform them into solutions, working with the parties. In one case where I was not able to resolve a complex delay issue, I helped the parties design an arbitration procedure tailored to the dispute. I helped them pick the arbitrators and actually served as a screened mechanism so each party could choose their own arbitrator without the arbitrators knowing who selected them.

Then there was *partnering*, a Japanese concept that was borrowed from other industries and refined by the U.S. Army Corps of Engineers. Project partnering was based on the notion that the ideal means of managing conflict on a jobsite was to start by bringing the entire project team—all of the major stakeholders—before commencing work, to talk about the project and the primary concerns. To discuss the kinds of problems that might arise, how they might be addressed, and who would address them. It afforded an opportunity for people to get to know one another’s objectives and expectations and begin to function with a team mentality. The whole idea was collaboration and making deliberate early efforts to create all those key things we have been hearing about the last day or so: trust, rapport, and mutual respect.

Flashing forward three decades; where are we? Arbitration has moved a good deal closer to litigation model. Indeed, it is often referred to by terms like “abrogation” because it has gradually taken on many of the trappings of court process. This may be what some parties want, but in other cases arbitration is dysfunctional because the parties did not take the opportunity to exercise key choices regarding the process. Mediation is also lawyered process. It is typically a part of the litigation minuet. It may be nothing more than a “whistle-stop” on the road to the courthouse. Can it be effective? Absolutely. Indeed it has become an indispensable element of the process, but it is not like the other kind of mediation process I was talking about, quite the contrary. Meanwhile, although dispute boards appear to be used rather widely on infrastructure projects around the world, one hears very little about the use of standing mediators or (outside of a

handful of state departments of transportation) partnering. If I might be permitted to generalize a bit from the experience of the construction industry, I'd like to ask a fundamental question: "Why aren't we using the skills of mediators upstream, in the context of relationships?"

My co-author on our ADR book, *RESOLVING DISPUTES*, Dwight Golann, did an interesting study a few years ago that illustrates Noah's point that the earlier we could mediate, the more likely we are to have a successful resolution. Dwight looked at the use of mediation in different kinds of relational situations; an ongoing relationship or maybe a relationship that has exploded. Dwight's research indicated that in relationship cases, mediation would result in impasse about 26% of the time. Presumably, that means something has happened to the relationship and it is gone for good. Another 27% of mediations achieve non-integrative terms, which typically means, "I give you some money and say goodbye." But another 30% would involve some kind of integrative term: "We'll exchange something, I'll give you something of value or you'll give me something of value. Maybe you'll apologize, but we won't have a relationship." Finally, in about 17% of cases, relationships could be repaired or saved. That does not sound very high.

Dwight then asked mediators what factors determined whether mediation could be effective in repairing or restoring relationships. None of the conclusions should surprise us. One factor is the amount of time that passes between the emergence of conflict and the mediation. The sooner that mediation can be brought to bear and a facilitator engaged in working with the parties, the better. Other factors were the relative value of the relationship to the parties, including the uniqueness of the relationship, the quality of options, sunk costs, as well as the attitudes of the participants, including principals and counsel. Often lawyers are the best friends of settlement, but sometimes they are not and they have their own agendas, and quite honestly, often nudge clients out of the picture. Finally, there was the mediator's ability to establish relationships with decision makers, and explore business solutions. When, again, is that most likely? Early on.

So, again, let us come back and ask, "What if the skills of a mediator are focused upstream prior to the blossoming of disputes, to reinforce communication, mutual understanding, and relational values?" Well, let us step back for a second and look at different kinds of real-time intervention. We have heard about some wonderful, very innovative examples, both from United States and internationally over the last couple of days. I would suggest that there are at least three major categories, some of the systems, like the one Juergen was talking about this morning, are multi-faceted. Of course, these roles overlap. These forms of "real-time intervention" are ideally framed to align with the tempo, pace, and dynamics of an ongoing relationship. We all know examples like this. You have mediators and

conciliators like my standing mediator example, and you have adjudicators or evaluators, like the dispute board. Then there are ombuds, the kind of role that Helmut plays that is itself multifaceted and complex.

Some years ago, the Straus Institute, CPR, and Cornell University conducted a study of Fortune 1000 companies. We got a tremendous response from Fortune 1000 corporate counsel, and one of the things we learned from this study and others is that the workplace is a rich environment for the development of real-time conflict management.

In a related vein, we are also seeing companies embrace early neutral evaluation, or case assessment, where you have a third party coming in providing some kind of advice in the early stages of a dispute. This intervention may be in a public or private; it might be joint or it might be unilateral or in-house, but in all cases the concept is to invite an agent of reality come in and say, "Here is what's going on," informing decisions about how and when to get disputes resolved. One perfect example of this remains dispute boards. There are different kinds of dispute boards that work in different ways, but in all cases the idea is to get conflict resolved at the earliest possible time.

Then you have programs like Kaiser Permanente's point-of-care ombuds, which is aimed at having someone come and work with the patient in the hospital, find out what the problems are, possibly address issues—not just through a payment of compensation, but potentially moving a room, or changing the team that is working with the patient, or making other systemic changes. There are all kinds of possibilities with a program like this.

When I was President of CPR, it occurred to me that another approach, partnering, but be brought to bear in complex, long-term relationships between information technology providers and companies, which were in many respects similar to the construction projects. You have a lot of the same dynamics: long-term relationships, lots of potential for communication problems, complex performance, etc. We actually got a medical products company to agree to do a pilot project with co-facilitation by an IT mediation and an individual who had extensive experience with partnering in the government contracts/construction arena. What we found was that this approach could be very helpful in clarifying organizational structure; strengthening internal communications; strengthening communications between co-venturing partners; clarifying visions and goals; testing assumptions; incorporating strategic business goals; focusing on reasons for past failures and successes; establishing a process to accommodate change (there is that inevitability of conflict); establishing an issue resolution process and a resolution ladder; and facilitating team building.



When all is said and done, can we build upon our experience to encourage greater use of mediation skills—upstream facilitation—within relationships? As Noah said, one has to couch this and present it in a way that business users will see value. It has to be something that people understand, and must eventually be advocated by someone like Scott Partridge, someone from the C-suite, who can make things happen because he speaks with authority and with the insight of a sophisticated user.

If the way can be found, I believe that upstream facilitation, brought to bear in an ongoing, important relationship, can be of significant value. It is a way of establishing closer individual and organizational relationships, improving communications with business partners, and even within organizations. It is a way of coming to a better understanding of each other's goals, priorities, and ways of dealing with problems. It is a way of managing issues and conflict in the relationship in a constructive way, and helping to explore outcomes that address business objectives and focus on preserving the relationship. Where disputes arise, handling them in such a way as to try to prevent them from escalating into a costly, protracted, and burdensome drain on organizational and individual resources.

So, how might we equip a relational facilitator? Jeremy Lack and others have done a lot of thinking about this in the last year or so. What do we call this person? How do they come into play? How do they interface with systems like the ones we have been hearing about from Scott and platforms like the ones that Juergen has been experimenting with? I would suggest that the ability to establish personal rapport, which is the single most important facet of mediation, and mutual trust are very important, as well as the ability to inspire the same kinds of relationships between parties. I think experience as a mediator with an understanding and skills in facilitating interest-based bargaining as well as distributive bargaining, and having some sense of when those skills ought to be brought to bear, is important. Add to this a strong working familiarity with the relational setting, and an understanding of organization, professional or industry expectations, usages of trade, long term relational dynamics, and the like. A thorough appreciation of the impact and interrelationship of personalities that are going to be involved here is necessary, as well as a penetrating awareness and appreciation of various cultures and their “negotiating codes.” And of course, a working familiarity with process options for managing conflict.

What are some potential applications? Certainly commercial relationships of many different kinds, international trade partnerships and even international diplomacy. I must conclude, however, by suggesting that these and other questions are ultimately for my students and the next generation as they tackle *Managing Conflict 5.0* or *6.0*. What I am suggesting are things that I see as through a glass darkly, and I am inviting

you to pick up this glimmer of an idea and make something happen. Thanks.

### III. PANEL DISCUSSIONS<sup>2</sup>

**Dr. Alexander Insam:** Now, without further ado, we heard four interesting speeches—four different perspectives on how we can build conflict management systems. I am very happy that we have already received a couple of questions here. I will start with a question to Juergen: how do lower level company employees get to C-level executives to consider these concepts, like conflict management systems?

**Juergen Briem:** That is a really good question. My experience is that many companies in the roundtable are lower employees working as mediators, and the question is how to address it to the C-level. This is one point of our working crew marketing, where we have some concepts, and the question is how can we immerse the C-level into the decision to roll out a conflict management system. Because you can introduce mediation like we did, as an undercover project, and you can go to the management and tell what successful work you have done, but to implement a system you need the support of the C-level and you need the agreement of the C-level because you need to have a budget, you need money, you need resources and headcount, etc. Therefore you must do this with the agreement of the C-level.

**Dr. Alexander Insam:** Thank you, I would like to open up that question at this point because I think that we will have a lot of connections between your speeches. David is the first one to raise his hand, so we will start with him.

**David Huebner:** Oh absolutely, I think it is a great question, I think the polarity is a little off. I do not think it should be percolating up; it should be proselytized downward. If something is a corporate priority, my own view is you cannot tell priorities, what priorities are based on is what people say. Priorities are best judged by what people do. And as the chief executive of an embassy, I decided in advance what the priorities needed to be in my operation and then I spent an extended period of time making sure that everybody in my operation saw me devoting my time to what I was saying was a priority. I think if one is at the point where the guy in the mailroom

---

2. This panel transcript has been modified to conform to the compositional criteria of this Volume. For the complete video of this session, see Pepperdine University, *Pepperdine Law: Managing Conflict 4.0 – Session 4 Q&A*, YOUTUBE (Nov. 25, 2015), [https://youtu.be/F\\_02oJJscHs](https://youtu.be/F_02oJJscHs) [hereinafter Panel Four Video].

has to be persuading the president of the company about ADR, it is clearly not a priority of the president's or of the company's. And not just talking; I think there is a misperception that talk is meaningful; most of the time it is absolutely worthless. It is the action that matters.

**Noah Hanft:** I think the percolation ideally goes both ways. I think it is most important to come from top down, but once the overarching concept is sold in, then through a skip level interviews and really reaching out to people in middle management to get ideas, whether it be related to dispute resolution or anything else, I think having the lower management or middle management feel the ability to actually point out issues and things that can be addressed is very helpful for a company. That way, you get the benefit of ADR proselytizing and addressing specific areas for improvement both ways.

**Tom Stipanowich:** Noah said many things that I came to believe when I was at CPR, and since, on the requisites of an effective program. You have to have support from the top. It is a cultural matter. Let me just say that generally speaking I am really pleased to see the evolution that I think is occurring. It has taken a lot longer than I thought it would. There are things I was thinking about back in the 1990s and we are just now getting to the point of beginning to experiment with and develop them. The twenty-first century pledge probably could not have even been presented back in the 1980s when the original pledge was presented where we were at a different point. You mentioned this morning, you know, the role of women in companies and law firms. We did a couple of studies of just the number of women that are in the ranks of dispute resolution professionals in the commercial arena. Still a very small percentage, which shocked me, but it reflects historic barriers to the entry of women into the legal profession. But it is taking time for a cultural change and I think the same is true of the stuff that we have been talking about here today. At Pepperdine and at Straus, we actually have made a real overt emphasis on managing conflict in all of its forms. The typical student that graduates from our law school with a dispute resolution certificate, which means that they have some grounding in negotiation and mediation, arbitration, and other tools to deal with communication and conflicts, psychology of conflict. Our graduate students are totally immersed; they come from many different countries. This is what is required. It has to be a matter of culture, not just what happens within one organization. If you do not have cultural change, what happens is companies that are well known poster children for effective conflict management, change with a change of leadership.

**Dr. Alexander Insam:** To continue this thought: I saw from many of your presentations that you are also talking about skills, the abilities people need to have to create that change, to move conflict management forward in an organization. Does this mean any employee, any manager, now everyone

really has to learn a new skill or use training programs? What is your view on this? Do we need new corporate learning programs to make this change happen?

**Noah Hanft:** I think training is important. At MasterCard we, even going beyond dispute resolution programs like “how to have a difficult conversation” for managers with employees, focused on helping people communicate better and creating that kind of honest, transparent conversation. I think as companies evolve in this space they do develop conflict management training programs, which I think are very helpful.

**Juergen Briem:** A short example of our work for the workshops is that every workshop we run starts with a short role-play, and we ask everyone to think about being in a difficult situation. What requirements must a person have that you would want to talk? We ask them to write it down and then we collect the papers before we start workshop technique. We summarize, and in every workshop it is the same picture; there are some ideas that the person they talk to must know about conflicts and techniques, but this is only small—just few points. The most point is the personal attitude of a person. You can have thousand of trainings, but if your attitude is not good and does not fit the discussion and the environment, you cannot go into the conflict management. This is a basic and therefore we go and look for the attitude that the people have and try to improve their attitude. Sometimes you can learn it, but you should already have this in your personality. You can increase it and you can work on it, and this is the basis of all what we do in conflict management.

**Dr. Alexander Insam:** Do you have a special feeling or have you defined the right attitude for SAP somewhere so people can understand or grasp that?

**Juergen Briem:** Yes. This may be a SAP-specific attitude, but I do not think so. You have to be empathetic and of the opinion that you are in the same range as your talking partner; I’m not better and he is no less, we are on the same level in the discussion, even if we are in hierarchical differences. If it is my boss, we are on the same level in the communication, and this is a prerequisite for a good communication. He can make decisions, yes, but in a discussion we are on the same level. And this is something that you can show, and can make it transparent, so everybody can look at himself to test, “How is my attitude?” And this is the basic, and then you can learn and educate techniques and tools and whatever, but this is the basis. I think if this is a basis of the corporate culture you have, then you will grow on this basis in a real good conflict management, but this must be deep in the organization, founded in the organization and in the culture of the company.

**David Huebner:** I agree completely. I would add one other institutional, cultural dynamic, which is both in my embassy and in the law firm I ran, the primary challenge I encountered was the stigmatizing of conflict. Conflict was avoided because if you were seen to be engaged in a conflict, you are by definition a problem. In cultures that artificially suppress conflict, conflict festers and exacerbates. So I think the culture has to really be focused on de-mystifying and de-stigmatizing disagreement so that disagreements can then be dealt with, and particularly in the embassy I had a series of what I considered very funny conversations with senior staff who occasionally would come and suggest I was being disagreeable. I kept suggesting that that is actually the point because we need to be discussing candidly and directly these issues so we can then move past them.

**Dr. Alexander Insam:** So allow people also to disagree?

**David Huebner:** Right. To create a safe environment in which respectfully articulated disagreements can be addressed.

**Dr. Alexander Insam:** So it seems to me like the challenges you pointed out are to find the right language, attitude, and we heard from Jeremy the other day that framing and phrasing is important; how our brain perceives what we hear, so it is also about speaking the right words and you can certainly train that. We heard about the appreciative feedback training you have at SAP, and I also hear that it's okay to disagree, but you have to do it respectfully and it has to be part of your culture and you have to de-stigmatize conflict and see conflict as opportunity so that you get positive impacts when you disagree and you want to explore those opportunities.

**David Huebner:** And you need to be honest. How many people in the room are practicing lawyers? [Hands raised.] How many of you have secretaries or assistants? [Hands raised.] How many of you write honest reviews of your secretary? [Laughter.]

**Noah Hanft:** I was just going to amplify and wholly agree with David's comment. I think it is incredibly important. There are so many companies that have essentially a passive aggressive culture where disputes or disagreements are just simply are not addressed, and I work for a CEO who came into our company about six years ago and he just would have no tolerance for it. The message was you never could say, "Well let us take it off line." If there was a clear difference, it would be, "Let us hash it out here, and openly address different viewpoints, and come to a decision." I think that is so important, in terms of kind of putting conflict on the table as something that is a reality in business, and then addressing it.

**[Audience]:** I am just little concerned because I think there is a cultural assumption here that individuals come out and speak their opinion, and opinions would be welcome, because truth, as you see it, is to be honest, and I think that when we talk about these things in front of creating relationship, these cultural assumptions are dangerous, and the question is how do you

make sure that you can get to the whole truth before you jump into retelling? There is an assumption about value and culture that is going to affect your relationship immediately. If someone does not like your opinion and does not like your truth, no matter how accurate and correct you are, there is nothing that can stop what people think, so the question is how do you get permission to have that type of conversation, and let us face it, in some cultures you cannot do that and so you cannot assume any of the stuff just because when you are working with a Caucasian, western, etc.

**Dr. Alexander Insam:** So if we understand you correctly, what you are saying is twofold: first, it is important to get permission to disagree and probably voice different opinions, and secondly, it might be a cultural challenge to do that in different cultures.

**[Audience]:** And emphasizing again that concept that the assumption itself—I need to know who lost the voice. What I find so helpful about group dynamics is discussing the process before we do anything about substance. So when you discuss these issues of: how can we agree to disagree, how can we work together, how do we know who gets a chance to speak, how do we know that both views can be heard in a way that everybody feels comfortable with, because it will not be a direct conversation. In some cultures when you have been ambassador, you are a very status ambassador, such that others would never tell you what to do. Even if you say, “My door’s open; I want you in here,” they would not feel comfortable with it. So I think that is the thing about crimson; it is all about group dynamics.

**David Huebner:** Now I do not disagree with what I think is beneath there. I think I get distracted when you start talking about truth and process because I think that battling over “truth” can be counterproductive in managing certain disputes. Often, it is not about identifying what is true or not, or who has got the better opinion, it is about finding a way to work together and get past disagreements. In terms of process I also tend to get distracted because I am very outcome focused and I have seen people waste a huge amount of other people’s time trying to create processes clinically, as though a process can then be imported into non-organic environments. I think what you are talking about, though, is relationship building within an institution, within a culture, and there is no one-size-fits-all template for that. You have got to figure it out as you go. And am not speaking theoretically, I started my career working in the Japanese Government in Tokyo. I spent four years building a law office in Shanghai. I managed a large international law firm with a couple hundred partners where most were not American. So I think sometimes I glaze over about culture because it is often an excuse for ambiguity and wasted time. I think if one’s in an operational environment

you learn the culture, you operate in the culture, or you fail. At the end of the day what I am more interested in is does it work rather than can I articulate a particular process.

**Noah Hanft:** I think it is a great question and a great conversation. I think there are two sides to the coin. There is the intra-company cultural issues and inter-corporate, or inter-company, issues. I think companies develop cultures. I work for a CEO, we move people around from Singapore to Belgium and all over the world, and there was a MasterCard culture and, obviously there are some cultural differences of background and the like, but once you have a corporate culture that has unique qualities and the ability, the permission is there. There is not the same kind of concerns that you have if you are having a similar kind of honest, open conversation with someone from another company. That, potentially, is a very different conversation.

**[Audience]:** I was just going to bring up the view from the trenches, as a mediator and arbitrator, sometime when I do an employment dispute and plaintiff's counsel explains that the employee was wrongfully terminated, they got glowing reviews, fours out of fives on performance evaluations year after year, and clearly there is a pretext for their being terminated because it cannot be true, what the company is now saying, which was that they were incompetent. What I came to understand, and I was thinking about this last night, from yesterday's conversation, is that at least American companies are very reluctant to say something negative; they want to positively reinforce the good and kind of play to the strengths of the employee and they give very subtle signals about opportunities for growth, rather than saying what it is, which is "You are deficient in this area, you need to improve." And it is an unintended consequence of that style of management that people do not see the handwriting on the wall and, given an opportunity to bring a claim forward, particularly in arbitration where the company's going to pay for the process, they take it. Lots of people who simply do not realize that they were correctly terminated will then go ahead and clog up the system and give bad statistics to arbitration and arbitrators because so many of these complaints really are defensible and they do get defended but consumers, the employees, do not understand.

**Dr. Alexander Insam:** Thank you. I think it is a very important link to performance management. You talked also about contributing, and we have remuneration topic coming up in your speeches, so how should good conflict management be linked to performance management and the benefits and compensation system in contrast with what they commonly do right now to make that link?

**Noah Hanft:** I think compensation needs to be tied to objectives, so I think it is important to build in to employees' objectives what you are looking for, what the attributes are, what the actual milestones are, and what

are the need to accomplish to meet objectives. Then, for compensation, there are a number of factors that go into it. I think that the ability to see issues, resolve issues, and recognize the importance of dispute resolution is all part of what makes an effective employee. It should be built in; different companies build it in to objectives in different ways. Sometimes it is compensation is based exactly on objective results, sometimes there are softer elements to it. At the end of the day the company, I think, that is successful will find ways to recognize those employees that are adapting to the space and practice the skills we are talking about.

**Dr. Alexander Insam:** Let me ask a provocative question. You are the CEO and you normally have objective for your salespeople, the sales and what they are making out of pocket, and you get one of those salespersons and he is very successful; he is making millions from his customers, but he is very bad on his team so he has experienced a lot of conflict. Two people already left the company because of him, and he never went to one of the trainings that you adopted from SAP. Now, what is his final score going to be at the end of the year?

**Noah Hanft:** Frankly, that comes up all the time. You have an employee that is very effective on the sales side and gets things done, but breaks a lot of glass, does not get along with people, even further on the continuum, commits ethical violations. When it is on that far end, we would let the employee go, and we have let employees go that were actually very effective on the sales side. If it is a trainable kind of offense, then you actually point it out and it has an impact on their compensation. Give the employee the opportunity to address the issues, but at the end of the day if that does not work, they need to exit the company.

**Dr. Alexander Insam:** Okay, but I understand at first you think it is trainable, which would be a positive assumption in the first place. Let us say we will cut your bonus in half, not that you were not performing on the sales side, but we thought you were not performing on our cultural and conflict management side.

**Noah Hanft:** Well you may find a different assignment for an employee.

**Dr. Alexander Insam:** Any more views on that performance management and compensation?

**David Huebner:** In the law firm in which I was active, the partnership tried to use compensation to modify behavior. It is a very blunt instrument. If there is the kind of problem you are positing, you do not wait until compensation is set for the following year; there is a whole series of other interventions before you get to compensation. Just my only addendum.



**Dr. Alexander Insam:** From my own experience I can tell you that as blunt as it may seem, I often experience exactly that in the professional services; people just behave according to what is in their target agreement or goal agreement. They also tend to prioritize their timetable accordingly. When training is coming up, that is always the first question to be asked, “Do I do my billables or do I go to the training?” So I think it has a very great effect on change of culture because the first thing people start to worry about when they are professional services people is the billable hours, everything that is not billable is not priority number one. I see the same thing in many companies depending on two goals of the department — that they tend not to care about such things as HR or leadership or culture and diversity. I think it is factoring into performance management and to compensation and rewards.

**Noah Hanft:** I think it is another thing that definitely comes from the top. If you get an email from the CEO saying, “I note that you have not completed your code of conduct training by such and such date, please address this immediately,” it gets done. It then becomes a priority.

**Dr. Alexander Insam:** We have an interesting question here, regarding the organization of how this should be done. I will phrase it a little more open. How do you think the organization of company conflict management should be implemented? Who is responsible for that?

**Juergen Briem:** I am in the HR organization and my manager is the HR director, reporting to the board, and for the work we do in the conflict management that is absolutely okay. I am not an HR person; I come from sales and from software development so I am accepted as a person within the organization, but from the organizational perspective, for internal conflicts, you should go through the HR organization. If you have more lawyers involved, you should go through the legal department. In the roundtable we have these two situations, HR organized and legal organized, and the focus of legal organized conflict management is mostly business-to-business conflicts, and the HR organized conflict management is focused on the workplace conflicts. The question is, and we discuss it in the roundtables, can we combine these two? Up to now, no one has developed this, and I am really interested in what models we can develop to combine these two models: workplace conflicts and B-to-B conflicts.

**Dr. Alexander Insam:** Tom, I was thinking about this when I listened to your portion about the partnering approach that you perceived. It seemed to me on the one hand, the examples you showed seem to make sense for business-to-business conflicts, but also, especially when you brought up the IT examples, probably for IT projects. I still have a question: how does the partnering approach add value to effective project management?

**Tom Stipanowich:** My own limited experience suggests that there are things that project managers cannot accomplish on their own, and insights

and dynamics that third party facilitators can bring into long-term relationships both between and within organizations. The problem as I see it is in putting forward a convincing value proposition. People say, "Well, we do these things ourselves without facilitation," and so the question is framed in a different way, basically saying, "Well we don't need any kind of intervention because this is built in. You know, business people handle business issues, we're perfectly capable of negotiating and team building and the lawyers can handle the conflict." I agree with Noah that the Scott Partridge approach that we heard about yesterday is very much akin to the kind of thing that have seen in partnered projects, but ultimately what you have got are matched pairs of people that are working on behalf of their organizations, and not just lawyers. I do believe there has got to be, at some level, a locus within legal to do it, like Scott, but you have got to have someone who sees the broader possibilities and says, "Well, we've got to have champions or representatives who form teams with whoever the joint venturer is," or, in Scott's case, the competitor that they are sitting down and working with. You have these matched pairs of people or matched teams that are working along. Now a facilitator could work with that group if necessary or desirable, and in some cases maybe they do not need the facilitator, but to me, in an ongoing relationship; that is the kind of thing you want. Notice it is not a reactive application of legal expertise, it is a proactive and managerial approach. It may be focused in the legal function but it reaches out into the business function and it is, in your case, extremely sophisticated. It could take many different forms but it has to be integrated in some organic way.

**Noah Hanft:** I agree with Tom. The biggest impediments to all of this is silence, and I talked about law department partnering with the business. If it is on the employment side it probably should reside principally with HR, but if there is not a partnership with law the lawyers are going to say "Oh, God, the HR people really screwed this up royally." That is not going to work. If you think about Tom's innovative thinking about partnering, and you think about the typical joint venture that often goes awry, it should be the business people, the MNA people that own the deal, that are focused on having a standing neutral. This is something the CPR is looking at right now: how to get the transactional lawyers rather than the litigators involved in preventative lawyering in these kind of commercial situations. Once you start thinking the lawyers own it, or HR owns it, then you kind of run into trouble. It has to be everyone's responsibility.

**Tom Stipanowich:** I almost graphed that in the slideshow. You know this notion that you have this yawning chasm that has developed because business folks say, "Okay, at some point it is not my worry bag; that is legal.

I'm going to dump it off," and so what has developed is you have a lot of situations that I think prematurely end up in the laps of lawyers. A creative approach—one has been thought through like the one we heard about yesterday—avoids that and actually takes advantage of the best of both perspectives.

**Dr. Alexander Insam:** I hear a lot of companies these days in Germany, I do not know how about in the U.S., build one company strategic program; so it is one SAP or one KPMG, and everybody wants to come together to avoid being locked in those side levels. The challenge I see there is that people feel insecure about what they really have to do now on a day-to-day basis because they should basically involve everyone else who is able to help them with a problem, but where is the limit to that? And what is my responsibility in the end, or what is my day-to-day job, and when do I involve somebody, and when do I not? That creates a lot of insecurities, so how are we going to deal with this?

**Noah Hanft:** So companies struggle with this issue, not only in terms of dispute resolution. How do you find that balance between collaboration and teamwork and accountability? That is really what we are talking about, and I think it is important that people have clarity as to what their responsibilities are, but also that they understand the big picture, and recognize that it may be Tom's objective to get something done, but I am going to be assessed on whether I assist him in meeting his objectives. That is where cross-objectives and corresponding objectives really help.

**Dr. Alexander Insam:** Okay so we are back to the metrics and the goal setting. So you are advocating that we might also have to review our goal setting and include more team goals that we have not yet thought of to enable that sort of cross-aisle thinking?

**Tom Stipanowich:** I do not know exactly how to frame this, but you heard me mention partnering as it was originally was conceived, and that many people at the time thought partnering was the wave of the future in the construction industry. They thought we were moving upstream, and that we were going to create a world in which we establish platforms for managing conflict in these long term relationships. It did not happen. I think part of the problem is that partnering was very superficial in many cases; to use a construction metaphor, it was almost like a façade, as opposed to real architecture. It was simply, "Let us have a 'feel good,' beat-the-tom-tom session," but then it was just a veneer and it was not integrated with the project and the project principals' expectations. I think at its best there really has to be some hard thinking and some confrontation in terms of likely issues that are going to arise. I think that also goes to goal setting; really talking about the agendas and where there is tension among parties or agendas. I am speaking rather vaguely here, but I think that is part of

creating a viable and sustainable solution; you have got to move beyond that kind of superficial veneer approach and make it organic.

**Dr. Alexander Insam:** It seems that there are shortcuts here.

**David Huebner:** I do not think it is vague at all; I think it is a core point. As I alluded to in my brief remarks, when I started at the embassy, the first thing we focused on was trying to articulate a unified strategic plan for the entire enterprise so that we did not have fifteen or sixteen little subgroups all butting heads without a common set of objectives against which they could all be measured, including measuring cooperation. To me it is: set the common goals, make sure everybody understands them, deal with the silos by creating teams that cross those lines, and the third one, which addresses something embedded in a question from the gentleman in back earlier, there has got to be a way to escape the tyranny of the process if the process is not working. That is the most difficult part to create—the safety valve, or the end run, or the whistle blowing so that you can identify when the system is broken down somewhere before the whole train pancakes.

**Dr. Alexander Insam:** I would very much like to add the idea that, although we always like goal setting to be very positive, perhaps we have to allow ourselves to reflect on the permission to actually make mistakes. Because when we make mistakes, we learn and usually we are also able to then do better than we used to. If we do not allow ourselves to make mistakes and if we constantly fear failure then we will do nothing and just retain the status quo.

**David Huebner:** I am glad you raised that because it was a point I forgot to mention earlier, my only disappointment about the conference, Tom, is we keep talking about things that work. My own view is success is a very poor instructional device. I have always learned more from my failures. When I am in a supervisory position, I often talk about my own previous mistakes, what I learned from those misfires, and how they made me better today, because part of creating this safe space is de-stigmatizing failure. I use Shaquille O'Neil, and the stats are probably outdated: He had two great records. He missed more free throws than anyone in history, but he also made more. There is a really good lesson in that, and as a manager I think one needs to create an environment where appropriate failure is not punished and, more importantly, where appropriate failure is not hidden because that is the worst thing in my view.

**Tom Stipanowich:** Let me disagree with that, David. Not really disagree, I agree with you in the main, but let me just say this: in terms of where we are in our field, why do we place the emphasis on success stories? To the extent we have overemphasized it, so be it, but Noah mentioned that

there is a great deal of caution in the ranks here. As one corporate counsel put it to me, my client does not like to walk across a busy street alone, they want to do it in company. They do not want to take unnecessary risks; they prefer to rely on the tried and true for some of the cultural reasons that we have been talking about. So the fact is when there is a success story, like what Scott was telling us about, or Jürgen this morning, and others we have heard about, it is important to promote that. I think that is one of the roles and goals of CPR and other organizations and Straus, because without trumpeting those kinds of exemplars, we do run the risk of simply repeating the same behavior. It is so easy for us just to keep drifting in the direction we have been going. So I will agree with you but I will also add that comment and say if we erred on the side of overemphasizing success I think that is one of the reasons—because there is a real need for more success stories.

**David Huebner:** I agree absolutely. There is an internal and an external here. Externally I agree with you completely. You want to share best practices. I think within an organization it is toxic if the managers attempt to create a sense of their own infallibility because it sends a signal to people around them that they cannot make mistakes, and if they do, they need to hide them. And that is toxic.

**Noah Hanft:** You know to that point, I mentioned our CEO, my former CEO at MasterCard. He came into what was a very, very risk averse environment, and he very aggressively encouraged risk taking, but he called it thoughtful risk taking. He went out and said to all the employees in town halls, “If you make a mistake, as long as it is a thoughtful mistake, as long as you take a thoughtful risk, you will not be punished.” That really opened up innovation and change and was a really positive message. It took some time and scared the hell out of the lawyers, but it is a very, very powerful message.

**Dr. Alexander Insam:** I actually have one more question about the presentations that I see here. Jürgen, what is hidden behind the lighthouses?

**Juergen Briem:** There are many contact points and one is called “Leuchttuerme,” or Lighthouses. This contact point is only offered in Germany. It is an employee-driven group where you can go to get support when you are in a burnout phase. It is supported by the health department. The lighthouse employees will support each other on a colleague base; if you are running into psychological problems, sometimes before you are in the burnout phase or if you come back from long-term sickness, when you return to the company you will be accompanied by the lighthouse colleague. There are many conflicts in this area—when employee come back from what might be a six month leave of absence; there is a real fear about what colleagues expect of you and if you can work at the same speed as you

worked before. There are many conflict scenarios and there are the lighthouses supporting this.

**Dr. Alexander Insam:** Before we close this session we will have the opportunity to ask a remaining question offered before the lunch break. I will ask each of you for your final statement. Looking into the future of the problems we just discussed, what are your thoughts right now, what is the next important step we should take, when people go home from this conference?

**Tom Stipanowich:** That is right. I think things may be possible today that were not possible a few years ago. As I say, I have had the benefit of having had a career that paralleled a sea change that we have experienced in the United States and throughout the world with a whole variety of different manifestations—to different degrees and in different ways. We are all engaged in these conversations that were unprecedented in many ways, and the level of activity, almost frenzy, that I see in the last few years is dramatically accelerating. I think that the internet, listservs, academic programs, and all of the different international groups that engage our attention on a daily, almost hourly, basis are having a big impact on the visibility of these issues, both the breadth and the depth of the conversation. Where that leads us, I do not know. I have discovered that things are never as terrible as you think they might be, nor are they as great as you think they might be. It will be somewhere in that middle-muddle that Don Philbin was talking about yesterday. The other thing is that I believe there is a metaphor or an idiom, a Chinese idiom I love that says, “The moon waxes only to wane, the water rises only to overflow.” That is a lovely way of describing the cycles of life, and also the fact that there are these consequences that we may not intend that we realize as we come to experiment with new things. So it creates new circumstances, new dynamics, and in a sense we revisit all of the issues that the generation—or a couple of generations before—dealt with, and I think we are in the middle of different cycles and different systems at any given point in time. I take some comfort from that. It is not a matter of frustration as it is acceptance, and it is a very exciting time to be here. I have gone on too long, but I have to say that I feel so blessed, so privileged, to be a part of what is one of the most dynamic, engaged, and diverse communities that there is, and the best part is that it is international, so I am just trying to be in the moment with all of this. Thanks.

**Noah Hanft:** Well I cannot be nearly as profound as Tom. Let me start with this, you know that I, too, share a mixture of optimism and some moderate concern. On the optimistic side, I joined CPR a year and half ago and I have been overwhelmed by this community with so many passionate people that believe in what we are trying to accomplish. When we say we

269

disagree and joke about it, the degree of consistent agreement is overwhelming. You know at CPR we are trying to do an awful lot and I am not trying to go through a sell job, but I do have materials if anyone is interested in how to participate, please let me know. I will say that we have had over a 30% increase in corporate membership. Corporations are focused on the space; they are concerned about it, they realize the importance of it, and I think that is critical. I see a lot of reason to be optimistic and I think some of the innovative things like partnering and deal facilitation are really important opportunities. I want to put the one caveat in and that has to do with fragility. Tom mentioned it, and I think we all talk about the fact that when an ADR champion, whether it be a general counsel or someone else, leaves the company, sometimes it is a setback and things like aligning the law department and the business department and figuring out partnering and HR partnering with the law department and other companies driving this, all of those things will help nurture the continuation of the process so that the fragility that I think is a concern is addressed. I think the opportunities far exceed the challenges and I am excited about being in this space.

**Juergen Briem:** I totally agree. My view into the future is that we will have partnering in companies; that we establish cultures of working together on a human basis, not on a technical basis; we use employees not as a resource, but as human beings; and we accept failure and mistakes, and we may learn from them. Hopefully what we have founded in Germany with the roundtable of companies is around the world in the near future. These roundtables can connect people on the topic of conflict management and teach them how to solve conflicts in such a way that helps us realize our vision. Our vision of the roundtable is that one day we will have conflict management in companies in the manner we have sales, procurement, legal, and HR. There will be a component called conflict management in the company and it will be accepted in the company and will be absolutely normal. We have to use a stadium for this conference here because there are so many participants that have come here. I am really thankful to be a part of this great conference.

**David Huebner:** Great, thank you. For those of us who are over thirty-five, my closing suggestion is we keep learning best practices and upping our game so that we do not foul the waters for those coming up behind us. For those under age thirty-five, I would suggest you become more comfortable than many of your seniors with ambiguity and dissonance and qualified outcomes and experimentation. All of the great things you are hearing are really cool, but they are not etched on a tablet on a mountain somewhere. You need to keep experimenting and keep coming up with new approaches; do not subject yourself to the tyranny of templates; do what works, and if it does not work, bury it in the backyard and try something else. I will preface my final point by saying that my family is German,

which certainly influenced my views in certain areas. I remember my grandfather saying several times, “Always remember that in front of every silver lining is a thick dark cloud.” So my final point is: I think it is incumbent on all of us to deal with some of the Achilles heels of the more formal ADR processes, which carry a risk of undermining a lot of the good work—i.e., the uneven quality among practitioners and neutrals, the profound lack of transparency, and in many cases the absence of accountability. I think we need to deal with those, although they are not sexy topics.

**Dr. Alexander Insam:** Thank you, David. The good thing about being a moderator is having fun at work so thank you very much for your contributions I really enjoyed our discussion. I would like to leave you with two pictures that unite us. The first picture is this: when you were born you had just won the biggest race of your life. You are the one who made it, the others did not; you made it against millions—against all odds. And the second picture is: all of you walked into that room today before you sat down. Now try to remember how often you failed to walk before you learned to do it. Compare that to the efforts you are now making regarding conflict management. Are you giving conflict management, as your attempt in your professional lives, the same power and emotion that you were giving your chance to learn how to walk? I am pretty sure if you do repeat that, and if you regain that strength, your winning strength, then everything is going to be great at *Managing Conflict* 5.0. Have a great day. Thank you.



