

# TOOLKIT 4

## Resolving Corporate Governance Disputes

### **VOLUME 2 : IMPLEMENTATION**



# MODULE 1

## WHAT SHOULD BE THE ROLE OF THE BOARD?

### DEVELOPING A CORPORATE GOVERNANCE DISPUTE RESOLUTION STRATEGY

The board should be well prepared to handle internal and external disputes. Without adequate preparation, a board's responses to disputes will inevitably be *ad hoc*, increasing the risk that effective dispute resolution processes will not be employed. Just as boards have crisis management plans, so, too, should they have developed and adopted dispute resolution strategies, policies, and processes.

#### Planning Ahead

Planning ahead for potential governance disputes is a step so basic that it can easily be overlooked. Overconfidence or excessive optimism may prompt leaders to think that disputes related to strategic governance decisions are

unlikely. The directors' focus on business issues can blind them to non-business matters, such as potential disputes among themselves. There may be the feeling that, if a problem should arise, it can be easily contained or addressed without any harm to the company. Yet, conflict and disputes do arise, and the cost to the company, its shareholders, and other stakeholders can be huge and, in some cases, fatal.



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

For example, any discussion over a merger, an acquisition or the launch of a new business activity has the potential to trigger disputes among board members, or between the board and external stakeholders, including vocal dissident shareholders. Yet, common boardroom pressures, including a severe shortage of time, are likely to cause executive and non-executive directors to treat the possibility of conflict as a distraction until and unless the escalating conflict has become overt enough that discussing it is unavoidable. Boards tend to overlook or ignore the potential for disputes because of the multitude of other priorities they face. This disinclination to raise the issue, however, constitutes a *de facto* decision to accept whatever will happen.

Organizations, including corporations and their boards, generally tend to be myopic about conflict. They often either do not anticipate conflict, or have a general sense that some kind of conflict may emerge from a given initiative. Further, they may find it difficult to anticipate the conflict's scope or seriousness.

Some of those involved are wary of admitting that a conflict may be brewing, despite their suspicions.

The strong, well-articulated viewpoint of a single powerful leader — such as a CEO or chairman — can

#### QUOTE

##### The Need for Processes to Avoid Litigation

*"Looking to the future, it is critical that boards give greater attention to anticipating and responding to liability risks, which may emerge later down the line. Advancing technologies, environmental issues, and corporate governance are the three areas boards are most concerned about... Yet with the right culture and processes in place, companies will be much more likely to identify and address issues before they become the subject of litigation."*

**LORD LEVENE**  
CHAIRMAN, LLOYD'S

SOURCE: *Lloyd's and Economist Intelligence Unit. 2008. Directors in the Docks. Is Business Facing a Liability Crisis? Available at: <http://www.lloyds.com>.*

so affect those around and under him or her that any dissent is suppressed, creating a “march to folly.” Even though the leader may have only offered an early opinion, expecting to hear dissenting views, it is not unusual for others to simply agree with the leader’s initial, stated position. This phenomenon is known as “groupthink.”

Organizations tend to frame the prospect of conflict as a public relations or political problem. This implicitly assumes that the conflict can be averted or suppressed. The underlying assumption seems to be that, if any opposition to a proposal or decision does appear, it will be demonstrably wrong on the merits alone. This is the organizational equivalent to the phenomenon of

“optimistic overconfidence” in individuals, namely the tendency to overestimate one’s ability to control events as desired.

- Boards and executives often overlook underlying structural problems, values, or interests that can generate conflict around actions or plans that initially appeared straightforward or reasonable. Some of these deeper concerns (e.g., about globalization or climate change) give the impression that they are “not our problem to fix” because they are difficult to address and seldom the sole responsibility of any individual organization. Yet, these concerns can have a critical impact on a practical business decision.
- Planning for a major event in a corporation’s life, such as a merger or hiring a new CEO, may focus on optimistic outcomes without considering the potential for misunderstanding or conflicts that exist when there are new working relationships.

In most cases, an explanation for overlooking or ignoring a conflict’s emergence can be traced to one or more of the reasons outlined above. But there are systemic reasons, too, for explaining a person’s typical reluctance to anticipate conflict:

- *Human nature:* “Ignore it and maybe it will go away.” A common organizational reaction to any unpleasant phenomenon, this may work occasionally, so it should never be discounted entirely.
- *Conservatism:* “No one else is doing it.” Although risk management has progressively been integrated into organizational thinking and added to board activities, corporate governance dispute resolution is still a new field that has yet to be integrated into risk-management thinking and the board’s work.
- *Lack of appropriate skills:* “No one can help with this.” The array of individuals and firms customarily employed to handle conflict (e.g., management, in-house lawyers, outside counsel, risk-management professionals, public relations agencies, and crisis-management firms) includes many talented, vocal, and persuasive people. Yet, while each of these



## EXAMPLE

### Impact of Conflict Avoidance United Kingdom: Shell UK

By 1995, Shell UK had spent four years planning for the deliberate sinking of the Brent Spar, an obsolete, 20-year-old, billion-dollar oil rig. But the plans went awry. Shell discovered that extensive internal analysis of the safest disposal method, the company’s worldwide presence and influence, and even government-approved disposal permits were not enough to forestall a public debacle. Greenpeace’s opposition campaign, which included occupying the rig, found oil industry allies. European governments objected to the disposal plan. Shell personnel and gas stations were attacked, and the company’s profits suffered.

#### COMMENT

The Brent Spar fiasco is a high-profile example of failure to plan for possible conflict and the consequences. The rig was eventually dismantled, with some of it scrapped on land, and other parts recycled for building new offshore installations. The resolution was much more protracted and costly than it should have been because the conflict was completely unanticipated.

*SOURCE: Paul C. Nutt, Why Decisions Fail: Avoiding the Blunders and Traps that Lead to Debacles. San Francisco: Berrett-Koehler Publishers, 2002. pp. 63-68.*

specialties offers expertise in one aspect of conflict prevention and resolution, none of them is properly knowledgeable or chartered to investigate, analyze, and help with governance disputes.

Individuals and groups tend to avoid the anticipation of conflict and disputes — intentionally or not — in the boardroom as in other settings. Since the cost of inaction is likely to be high, the board should ensure that the company has a systematic, strategic approach to address the potential for disputes related to business matters within management and the board.

In dealing with commercial, financial, and labor disputes, the board's role should be limited to ensuring that effective, appropriate policies are in place and that the company has internal and/or external expertise for handling commercial disputes. The actual development and implementation of such policies should be left to the company's management.

In the case of corporate governance disputes, whether internal or external, the board needs to take a much more pro-active role due to the strategic nature of these disputes and their potential impact on the company, including the board. Precisely because the board is at the center of corporate governance disputes, it must be prepared to prevent those disputes and effectively handle them with minimum impact on the company and itself.



TO REVIEW INTERNAL AND EXTERNAL CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 1 MODULE 1.

There are several reasons why a pre-existing strategy is needed to properly address corporate governance disputes:

- First, mutual trust is essential to a well-functioning board. Yet if a dispute occurs, particularly within the board, some erosion in mutual trust will occur almost immediately. This makes it harder to develop constructive solutions quickly, creating the possibility of a downward spiral in trust that can have lasting consequences.



## QUOTE

### Conflict Avoidance in Family Firms

*"Sometimes, the avoidance behavior even goes so far that one denies that any conflicts exist, although often they have already been insidiously weakening the family firm for a long time. Avoidance is only useful in order to interpose a cooling-off period, or when a discussion point is genuinely unimportant. In most cases, however, avoidance leads to frustration and negative feelings. This frequently has a pernicious impact on the family relations, because it causes tensions to rise and a great deal of energy to be wasted. According to research, avoidance also augments the rivalry between the players and diminishes trust."*

#### JOZEF LIEVENS

PARTNER, EUBELIUS LAW FIRM

MEMBER, FORUM'S PRIVATE SECTOR

ADVISORY GROUP

SOURCE: Jozef Lievens, "Collaborative Conflict Resolution — the 'Harvard Approach' Applied to Family Business." 2002 Working paper provided by the author to the Forum.



## QUOTE

### The Board's Role

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

#### MERVYN KING, SC

PROFESSOR

FIRST VICE PRESIDENT, SOUTHERN AFRICAN INSTITUTE OF DIRECTORS

MEMBER, FORUM'S PRIVATE SECTOR

ADVISORY GROUP



### Dealing with Corporate Governance Disputes

Recognizing that disputes will arise and preparing in advance for their resolution — these are important board responsibilities. Adopting a corporate governance dispute resolution strategy will help prevent disputes and handle unforeseen issues.

This involves a proactive approach to decision-making that is far more efficient than the typical reactive, (*ad hoc*) approach, as illustrated by this corporate merger example:

<b>AD HOC APPROACH</b>	<b>PREVENTIVE APPROACH</b>
<b>Board dominant value: Harmony</b> <b>Perception of dispute: Unlikely</b>	<b>Board dominant value: Consensus</b> <b>Perception of dispute: Likely</b>
1. Board discusses possible merger	1. Board discusses possible merger
2. Opposing views are “auto-censored” or over-ridden	2. Internal and external views are actively considered
3. Decision is adopted	3. Decision is adopted
4. Later, a disagreement related to the decision arises and takes the board by surprise	4. Later, a disagreement related to the decision arises, but is rapidly narrowed based on initial discussions
5. Disagreement evolves into a dispute	5. Disagreement is addressed
<b>6. Directors become defensive, and positions harden</b>	<b>6. Board applies techniques to resolve disputes and build consensus</b>
7. Tension and resentment builds on the board Board does not present a united, confident front Shareholders’ confidence weakens Investment analysts signal concerns	7. Consensus is reached Board stands united Shareholders’ confidence remains Investment analysts are attentive but not worried
<b>8. Dispute is “patched”</b>	<b>8. Disagreement is resolved</b>
9. Situation repeated with another decision	9. Situation repeated with another decision
10. Board tensions escalate Shareholders question company’s governance Proxy analysts downgrade company’s governance	10. Board dispute resolution skills improve Shareholders engage constructively in strategic decision-making Proxy analysts upgrade company’s governance rating
<b>11. Negative resentment builds up</b>	<b>11. Positive reinforcement system develops</b>

- Furthermore, if a full-blown dispute is allowed to develop within a board or with external stakeholders, it is likely to be much more difficult to reach an agreement than if the potential for disputes and mechanisms to deal with them had been addressed before parties to the dispute and board members choose sides.
- Last, but not least, planning ahead to prevent discussions and debate from turning into disputes will potentially save the company and all its shareholders both direct and indirect costs, while limiting the dispute's negative impact.

Addressing the potential for disputes that affect corporate authority, and developing an adequate dispute resolution strategy with related policies requires planning. The board must allocate time to complete those initiatives.

The timing for such an exercise must be well choreographed. It should be organized outside the board's regular meetings, perhaps at a board retreat during a relatively calm period. Ideally, the board committee whose jurisdiction covers governance matters should include dispute resolution planning in its activities and present proposals to the full board. It is much easier to have a civil, highly productive discussion about conflicts when there are no major ongoing disputes. This can be done with or without the help of an external third party — possibly a dispute resolution consultant or governance expert.

### Assessing Internal and External Corporate Governance Disputes

Planning involves observing and assessing the current situation and learning from the past. A board could start by asking itself the following questions to better understand past or existing disputes with external stakeholders:

- Has the company experienced any corporate governance disputes with external stakeholders? What were those? Shareholders? Community activists? Others?
- How did the board react to and handle those disputes? Did the full board discuss the dispute? Was a specific committee or individual board member put in charge?

- Did board directors interact directly with the disputants, or was all interaction left to management?
- How did other boards and companies, faced with similar problems, handle them?
- Were the disputes covered by the media? Did the company's communications department play a role? If so, what role? If not, why? Did this department receive specific board guidelines on handling media inquiries about the dispute?
- How were the disputes settled? Did the disputes lead to litigation? Why?



## PRACTICE

### Key Steps in Developing a Corporate Governance Dispute Resolution Strategy

- ▶ **STEP 1:** Plan ahead.
- ▶ **STEP 2:** Assess existing or past internal and external corporate governance disputes.
- ▶ **STEP 3:** Anticipate potential internal and external corporate governance disputes.
- ▶ **STEP 4:** Adopt a corporate governance dispute resolution strategy.
- ▶ **STEP 5:** Decide who will manage the corporate governance dispute resolution process.
- ▶ **STEP 6:** Identify the appropriate internal or external peacemaker.
- ▶ **STEP 7:** Incorporate corporate governance dispute resolution policies into corporate documents.
- ▶ **STEP 8:** Assess the effectiveness of the corporate governance dispute resolution policies.
- ▶ **STEP 9:** Be prepared for litigation should ADR fail.

- Was the company's legal department involved? If so, when? What was its role? Did its contribution help or hinder resolution of the disputes?
- Were outside consultants to the board involved? Should they have been? Why? Why not?
- What were the direct costs of these disputes? Settlement costs? Litigation costs? Communications costs?
- What were the indirect costs of these disputes? Corporate staff time? Disruption of board activity? Board tensions? Disruption of the company's operations? Lost opportunities?
- What was the impact of these disputes on the company? Did the company suffer reputational damage? Were major strategic decisions delayed? Did the company lose customers or clients? Were board members pushed to resign? Was share value affected?
- Does the board and the company have any policies and/or procedures for handling shareholder or other stakeholder disputes over the company's governance

and strategy? Were these policies and procedures applied? What could have been handled better? Could the disputes have been prevented?

- Are there any lessons to be drawn from the manner in which the company deals with other types of disputes, such as commercial or labor? Could existing policies be adapted to corporate governance disputes?

Similarly, the board needs to assess the conflicts and disputes that occur among its members. This exercise could be included as part of a board's self-evaluation process. Discussions could be based on the following questions:

- Has there been effective communication among board members?
- Have there been any tensions among board members? Have these affected boardroom dynamics or the board's discussions and decision-making process?
- Is there a sufficient level of trust among all board directors? Do they all feel they are able to contribute to the debate? Do any directors have the tendency to monopolize discussions? Has this created any frustrations or resentment?
- Are communications between the CEO and the non-executive board members working well? If not, why?
- Is there a solid level of trust between the CEO and the non-executive directors? If not, why?
- What circumstances on the board provoke friction or cause arguments to be left unresolved?
- What is the most common topic of these arguments? Are these arguments related to board procedures or to material decisions? What specific issues lie at the heart of these disagreements and disputes? Do some of these disputes get emotional? Are some of these arguments and disputes recurrent?
- Are some board members more often involved in disagreements than others? Do some directors have



## QUOTE

### Dispute Resolution Governance

*"When a dispute arises, what is in the company's best interest? The answer is to resolve it effectively, expeditiously, and efficiently. It is thus an important governance issue for the board to ask: 'Do we have adequate mechanisms to resolve disputes that may arise?'"*

**MERVYN KING, SC**

PROFESSOR

FIRST VICE PRESIDENT, SOUTHERN AFRICAN INSTITUTE OF DIRECTORS

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SOURCE: Runesson and Guy, *op. cit.*

opposing views — no matter what the topic is? Do disagreements happen mainly among non-executive directors or between directors and management? Are there any tensions between the chairman and the CEO?

- Are there external factors (e.g., meeting location, acoustics, timing, etc.) that seem to contribute to an acrimonious atmosphere instead of one in which resolution is more likely to happen?
- What has been the impact of these disagreements and disputes? Did they paralyze or delay the board's work? Were some strategic decisions stalled? Were the disputes contained in the boardroom? Did some of these disputes leak to the press? How did shareholders and the market react to these disputes? Did these disputes lead to the resignation of executive or non-executive directors? Did they involve litigation? What were the direct and indirect costs of the disputes that brewed in the boardroom?
- Is the chairman or lead director able to recognize disputes and mediate among board members or between the board and the CEO?
- How does the board deal with boardroom dissent? Does the chairman or the lead director play the peacemaker role?
- Is voting on strategic issues sufficient and the most effective way of dealing with opposing positions?

Having an open discussion on what does and does not work in the boardroom, as well as what are the underlying factors that could trigger disputes, is a difficult exercise that can revive past tensions and resentments. Learning how to improve board performance and minimize the negative impact of disputes is, nevertheless, an important initiative.

The board may discuss dispute management strategies in a closed setting under the guidance of the chairman or another director skilled in dispute resolution. Alternatively, as part of the annual board assessment, or in preparation for the annual strategy review retreat, or

the appropriate board committee chairman, may invite an external expert to facilitate discussions. That expert would typically:

- Organize one-on-one sessions with each director to allow those who are not comfortable with openly disclosing their views to express themselves
- Facilitate discussion to bring into the open those issues that have or could lead to disputes
- Help create protocols and procedures to prevent and resolve disputes

### **Anticipating Potential Internal and External Corporate Governance Disputes**

Once the board has discussed and assessed past and current corporate governance disputes, the second step is to review the potential for disputes and how these can be prevented. The board needs to foresee — as best as it can — what situations can lead to misunderstanding and disputes. For example, “what if” directors disagree about the basic strategic direction? “What if” cash flow is down, will there be disputes over which capital investments the company should make? “What if” dissident shareholders oppose a merger with one of the company's main competitors? “What if” personal animosities among directors make focusing objectively on business issues difficult? The “what if” list of circumstances that can erupt into disputes can be very long.

It would be impossible to list and then examine all possible internal and external disputes that could theoretically occur and affect a company. The point is to consider different types of disputes and review the potential disputes that are most probable, given the company's structure, size, ownership structure, business model, external economic and financial circumstances, and the board's composition (knowing that the board can be a fertile field for unresolved arguments that harden into disputes).

Discussions dedicated to anticipating potential disputes should not only take place within the broader context of developing a dispute resolution strategy, but should



## QUOTE

### Anticipating Disputes

*"The parties to a business relationship, at the time they enter into that relationship, should always address the subject of how they are going to handle any problems or disputes that may arise between them. At this point, they have a unique opportunity to exercise rational control over any disagreements that may arise, by specifying that any disagreements be processed in a way that is likely to avoid litigation, preferably by agreeing on a dispute resolution 'system' that will first seek to prevent problems and disputes, and, next, establish a process for resolution of any disputes."*

#### JAMES GROTON

ARBITRATOR, RETIRED PARTNER  
SUTHERLAND, ASBILL & BRENNAN LLP

#### HELENA HAAPIO

ARBITRATOR, INTERNATIONAL CONTRACT COUNSEL  
LEXPRT LTD

*SOURCE: James Groton and Helena Haapio, "From Reaction to Proactive Action: Dispute Prevention Processes in Business Agreements." 2009. Working paper provided by the authors to the Forum.*

- Employees, possibly represented by unions, who will be affected
- Suppliers on which the company is dependent
- State, provincial, or local governments in which the company has operations
- Creditors, especially if access to finance is limited
- Consumer agencies
- Environmentalists and other activist organizations

Analyzing governance dynamics is not a quick process. Part of the foresight and planning required involves visualizing and understanding how the corporation may evolve from a simple organization into a complex one. How can a family-owned business become an enterprise in which the founding family ceases to own or control a majority of the company's shares? Reviewing scenarios such as these and their ramifications will help the board understand its potential vulnerabilities regarding disputes with external stakeholders. Understanding these dynamics provides insights into how they can best be handled through corporate governance dispute resolution policies that can defuse the most sensitive situations and prevent the riskiest disputes.

typically be held prior to any major strategic decision that may materially affect the company and its constituencies.



TO REVIEW SITUATIONS IN WHICH CORPORATE GOVERNANCE DISPUTES MAY ARISE, SEE VOLUME 1 MODULE 1.

When looking into potential external disputes, board members should not focus solely on shareholders, but they should also review potential disagreements with other stakeholders that may affect the company's governance and either influence or limit its operations. These stakeholders could include:

- Customers whose view of the company's products and services could be adversely affected



TO REVIEW HOW CORPORATE GOVERNANCE DISPUTES CAN AFFECT DIFFERENT TYPES OF COMPANIES, SEE VOLUME 1 MODULE 1.

Various strategic planning tools can be used to help anticipate disputes and manage the risk of their occurrence. Familiar to many directors, the SWOT analysis is an especially useful tool. Through this technique, directors can evaluate the Strengths, Weaknesses, Opportunities, and Threats of a given situation and analyze the risk and impact of disputes that could arise in that context. The sequence of questions begins with strengths. Within the context of previous successes, the board can then consider weaknesses, identify new opportunities, and determine how to manage threats inherent to governance disputes. As the directors discuss these details, they align themselves

with shared priorities. This exercise’s difficulty lies in admitting rather than avoiding discussion of existing threats — even if they point to weaknesses in board procedures or specific individuals. In surfacing issues, this exercise should nevertheless not devolve into board members pointing fingers at one another.

Planning in the governance context should not be limited to anticipating the nature and content of disputes. Seemingly small and unimportant matters that affect human behavior also need to be considered and addressed. Insignificant logistical matters (e.g., locations of board meetings, annual general meetings, or even public consultation meetings) can exacerbate

disagreements and prevent constructive discussions and negotiations. In this case, the “what if” brainstorming approach can be a useful exercise. “What if” meeting accommodations are uncomfortable? How will that impact the meeting’s tone and tenor? “What if” the hotel in which directors are lodged is uncomfortable, and people do not have a good night’s sleep? Will that create an environment in which people are more prone to dispute than to resolution? “What if” there are not enough seats for all shareholders at the annual meeting venue? “What if” a group of community activists is systematically turned away or made to wait for months before a hearing with the board or executive management?



## EXAMPLE

### Potential Disagreement with Stakeholders: Investment in a New Food Processing Plant

STAKEHOLDER	PERCEPTIONS THAT MAY LEAD TO DISAGREEMENTS AND DISPUTES
<b>Local Cooperative</b>	“This new plant is going to create competition for local farmers. A demonstration should be organized against this project to protect the farmers.”
<b>Environmental Activist</b>	“This new plant is going to require the destruction of forests, may pollute the nearby river, and substantially raise carbon emissions. This plant should be built in a different location with green technologies! We must launch a campaign to block construction.”
<b>Shareholder A (Institutional investor)</b>	“This is a good investment for the company and will help it grow if the start-up costs are controlled and the product line remains competitive in global markets! We need more information and a meeting with the board.”
<b>Shareholder B (Social action coalition)</b>	“This is a good investment, but we want guarantees that this project will be carried out in a socially responsible manner. If not, we will lobby to prevent it from being built.”
<b>State or local government</b>	“This project can help increase tax revenues and create new jobs. Our tax revenue expectations are far higher than the board deems acceptable.”
<b>Local Community</b>	“This project has divided our community. Whom can we trust? We must demand clear answers.”

#### COMMENT

Considering stakeholders’ interests and taking time to discuss their respective perceptions and misperceptions, as well as to settle possible disagreements, requires a transparent approach, time, and effort. Yet, it is essential to do so to prevent or mitigate disputes that could stall, if not obstruct, an important investment or operational changes.

## Adopting a Corporate Governance Dispute Resolution Strategy

This is another step that sounds simple, but is fraught with complexity. The board's approach to disputes should reflect both the company's culture and more tactical considerations as to what works best in particular circumstances.

In the corporate governance arena, the question also breaks down as to policies for internal versus external disputes. Does the same policy apply to both? While the board may be involved in both categories of disputes, it may determine that for business or tactical reasons, external disputes should be treated differently from internal ones.

A SWOT analysis can also be a means of selecting the appropriate dispute prevention and resolution processes and techniques. How does each of these processes measure up in a SWOT analysis? What are their relative strengths and weaknesses, particularly in relation to

each other? Do any of these steps pose a threat to the board's operations or the board's dynamic, rather than an opportunity to improve dynamics? What is the priority that should be assigned to implementing these practices? Similarly, how will the board respond to a third-party consultant facilitating its retreat? The SWOT analysis may conclude that such a step will work well, or, alternatively, that certain board members may resent outsiders and, therefore, require a different course of action.



TO REVIEW ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES AND THEIR BENEFITS, SEE VOLUME 1 MODULE 3.

A SWOT analysis may yield different results for various types of companies. The board of a multi-national company with dispersed stock ownership may approach dispute resolution differently than does the board of a family-controlled or family-dominated business. The issues covered by the SWOT analysis likely will vary considerably in these two situations.



## EXAMPLE

### Board Meeting with Dissident Shareholders United States: The New York Times Company

In 2008, The New York Times Company faced criticism from two major dissident shareholders, who challenged the company's investment decisions. Harbinger Capital Partners and Firebrand Partners had amassed just over 19 percent of the common shares, giving them sufficient leverage.

The two investment funds did not want to eliminate the two-tier share structure that allows Arthur Sulzberger Jr., the chairman and publisher, and his family to control the company. But they did want to elect directors who had not been selected by the current management.

The board's nomination committee agreed to meet with the hedge funds' four nominees for directors, raising the possibility of a negotiated deal rather than a proxy fight.

#### COMMENT

By agreeing to meet, the company and its dissident shareholders managed to resolve their dispute. The board agreed to the nomination of two of the four directors proposed by the dissident shareholders.

Boards must plan for potential disputes with dissident shareholders. The board can make it part of its policies to hold regular discussions with all major shareholders and make an effort to find solutions before disputes escalate into proxy fights.

SOURCE: "New Challenge to Times Board: Dissidents with Large Stakes." The New York Times. March 10, 2008. Available at: <http://sites.harvard.edu/fs/docs/icb.topic227581.files/Perez%20Pena%20031008.docx>.



## Planning for Corporate Governance Dispute Resolution

### SWOT Analysis of a Corporate Governance Dispute Resolution Policy: Review

**STRENGTH:** What are the positive attributes of the board's current approach to dispute resolution?

**WEAKNESS:** What are the barriers to implementing an effective dispute resolution policy?

**OPPORTUNITY:** How can the board build on its existing policies and bylaws to strengthen its ability to deal with disputes?

**THREAT:** What could be the consequences of ignoring the potential for a dispute?

### SWOT Analysis of a Dispute Resolution Technique: Third-party Expert

**STRENGTH:** Third-party dispute resolution expert can facilitate board evaluation/retreat and help surface unresolved tensions

**WEAKNESS:** Trust and confidentiality can be an issue when discussing sensitive board matters

**OPPORTUNITY:** The board can resolve issues and improve its performance

**THREAT:** Some board members may oppose this approach and refuse to collaborate

### SWOT Analysis of a Dispute Resolution Process: Dispute Resolution Clause

**STRENGTH:** Improved management of shareholder disputes

**WEAKNESS:** Getting shareholders to sign off on new agreements

**OPPORTUNITY:** Incorporate a dispute resolution clause in shareholder agreements

**THREAT:** Opposition of dominant shareholders

### SWOT Analysis of a Potential Internal Corporate Governance Dispute: Strategy

**STRENGTH:** Main product line controls 65 percent of the market

**WEAKNESS:** Absence of debate on the board/groupthink culture

**OPPORTUNITY:** Expanding in a new line of business

**THREAT:** Chairman (former CEO) and new CEO competing for leadership

### SWOT Analysis of a Potential External Corporate Governance Dispute: Merger

**STRENGTH:** CEO nominated "business man of the year" for turning around the business and avoiding bankruptcy

**WEAKNESS:** Under-performing investor relations department

**OPPORTUNITY:** Strategic merger

**THREAT:** Opposition from dissident shareholders

### SWOT Analysis of a Potential Family Firm Dispute: Expansion

**STRENGTH:** Healthy growth prospects

**WEAKNESS:** Absence of a succession plan

**OPPORTUNITY:** Strategic investor interested in ownership share and expansion

**THREAT:** Founder resistant to change and ceding control

All of these possibilities, and others, will involve a financial analysis to ascertain feasibility. However, this analysis is only part of the equation. The SWOT analysis should precede a detailed financial analysis. The SWOT analysis will help prioritize possible steps and provide additional factors that bear on the financial analysis and, ultimately, any decisions.

### Deciding Who Will Manage the Corporate Governance Dispute Resolution Process

Policies do not implement themselves. If the board's policy regarding internal and external governance disputes favors dispute prevention and ADR approaches, the board must establish processes and procedures to make these policies a reality.



## PRACTICE

### Possible Processes to Incorporate in Dispute Resolution Policies

*Internal corporate governance dispute resolution policies can include:*

- ▶ Planning for board and board committee executive sessions
- ▶ Recommending dispute resolution training for directors and senior executives
- ▶ Scheduling board retreats and committee self-assessment meetings
- ▶ Ensuring that all directors have the opportunity to speak freely at executive sessions and retreats
- ▶ Using a third-party facilitator for assessments, retreats, and other board matters
- ▶ Including ADR-type skills among the qualifications for board membership
- ▶ Identifying certain directors and corporate staff to play peacemaker roles
- ▶ Improving board procedures

*External corporate governance dispute resolution policies can include:*

- ▶ Monitoring regularly external shareholders' interests and activities to ensure that the board understands their priorities and concerns and can be alerted early about potential problems
- ▶ Improving community outreach and philanthropy programs, being proactive
- ▶ Expanding interactions with institutional shareholders to include shareholders' governance and proxy voting specialists
- ▶ Determining policies regarding director meetings with stakeholders, including appropriate legal and staff support for directors
- ▶ Designating specific board members to hear complaints and meet with shareholders or other stakeholders as appropriate
- ▶ Appointing a standing dispute resolution expert/third party
- ▶ Increasing regular disclosure and communication of material information on sustainability and other corporate social responsibility issues
- ▶ Incorporating dispute resolution clauses in shareholder agreements
- ▶ Responding to shareholders' and stakeholders' questions and concerns as they arise

The board needs to ask:

- Who should be in charge of managing and implementing dispute resolution strategy and policies?
- Should the entire board, a board committee, or an individual board member assume this responsibility?
- Should corporate staff from the legal department or the investor relations department play a specific role?
- Should external help and expertise be sought?

A board member, the chairman, a board committee, the CEO, or possibly a senior executive could assume this responsibility. In many situations, ensuring that a board member is encouraged to think ahead, articulate concerns, and press for early management attention will enhance a board's ability to detect a potential problem at a low-enough level of intensity and then resolve it before it becomes more severe. Alternatively, an external expert, consultant, lawyer, or mediator could assist the board in applying and implementing the company's governance dispute resolution strategy.

### Identifying the Appropriate Internal or External 'Peacemaker'

After reviewing the types of governance disputes that may affect the company and how the company could best manage them, the board then must agree on who should be involved in preventing and resolving those disputes before they are litigated in court or considered in an arbitration forum. The board would need to decide: Who should actually mediate or facilitate the resolution of potential and existing internal and external corporate governance disputes? Who on the board is best suited or willing to lead discussions or intervene among contentious directors? Should that same person also deal with shareholder disputes? What if no one is willing to identify him/herself as the board's "peacemaker" or informal mediator? Should external help and expertise be sought? If so, when, where, and for what purpose?

Whether for internal or external disputes, the peacemaker's role will be much more efficient and better accepted by the parties in dispute if that person

had already been selected or appointed before the dispute developed.

Corporate governance peacemakers can be selected from within the company and its board or sought from outside. There are benefits, limits, and implications to these approaches. Typically, internal corporate governance disputes are handled by the board, a board committee, one or two board directors, or a trusted outside advisor. Governance disputes involving external stakeholders may be more effectively resolved with an outside expert's help.

***Internal Peacemakers.*** From within the company, the persons who are in the best position to handle corporate governance disputes are the board's chairman and the chairmen of board committees. Chairmen are naturally positioned to build consensus, prevent conflicts, and ensure proper resolution of disputes. In their capacity as chairmen, they are naturally expected to lead the group,



## GLOSSARY

**Peacemaker:** One that makes peace, especially by settling disputes.

*SOURCE:* [www.answers.com](http://www.answers.com).

**Synonyms for Peacemaker:** intermediary, conciliator, mediator, arbitrator.

*SOURCE:* Dictionary.com website: <http://dictionary.reference.com/browse/peacemaker>.

**Peacemaking:** the process of resolving disputes that could lead to conflict, primarily through diplomacy, mediation, negotiation, or other forms of peaceful settlement.

*SOURCE:* National Defense and the Canadian Forces Available at: [www.forces.gc.ca](http://www.forces.gc.ca).

### COMMENT

For this toolkit, the word "peacemaker" is used as a generic term to describe any individual, expert, or professional involved in the prevention and resolution of corporate governance disputes.

develop organizational principles and procedures, and apply discussion protocols.

for meeting with external stakeholders (including shareholders) often falls to this individual.

The responsibilities of the nominating/governance committee chairman make that person particularly well positioned to create dispute resolution structures, policies, and processes. For example, the responsibility

Even though they may not hold leadership positions, other board members who are recognized for their skills at achieving consensus may also step into, or be thrust into, the peacemaker or mediator role and, thereby, effectively

 **PRACTICE**

**Selecting the Right Corporate Governance Peacemaker**

To better prevent, manage, and resolve corporate governance disputes, companies and their boards should consider appointing peacemakers with the appropriate corporate governance and dispute resolution skills.

The following options can be considered:

**Internal Peacemaker**

- ▶ Independent board director
- ▶ Board committee chairman (e.g., Corporate Governance, Human Resources, or Nomination Committee.)
- ▶ Corporate secretary
- ▶ Corporate governance ombudsman

**External Peacemaker**

- ▶ Standing neutral/expert/third-party (e.g., an institution, a firm, or a specific individual)
- ▶ *Ad hoc* expert/third-party (e.g., an institution, a firm, or a specific individual)

Key to choosing between an internal or an external corporate governance peacemaker is determining who would provide the highest level of trust and comfort to all the parties involved in the dispute. Directors prefer handling their disputes behind closed doors while external stakeholders would rather work with a neutral or impartial external third party.

TYPE OF DISPUTE	PRIMARY CONCERNS	PREFERRED PEACEMAKER
<b>Internal Dispute</b>	<ul style="list-style-type: none"> <li>▶ Confidentiality</li> <li>▶ Insider knowledge of issues</li> <li>▶ Authority</li> <li>▶ Corporate governance expertise</li> </ul>	Internal Peacemaker (e.g., independent director)
<b>External Dispute</b>	<ul style="list-style-type: none"> <li>▶ Independence</li> <li>▶ Neutrality</li> <li>▶ Dispute resolution skills</li> <li>▶ Active listening</li> </ul>	External Peacemaker (e.g., mediator, negotiator, arbitrator, etc.)

contribute to implementing the board's corporate governance dispute resolution policies. In family firms, independent directors typically play an important role in that regard and are often adept at getting owners and their representatives to work together.

Of the executive management group, the CEO may be in the best position to serve as mediator or peacemaker. The CEO, in his/her position as the moving force in the company, may assume the mediator role as he/she seeks to create consensus around corporate strategies. However,

one key criterion for the peacemaker role is being perceived by all directors as neutral or impartial and objective about the disputed matters. This need to recognize and avoid potential conflicts of interest can impair management's ability to effectively mediate an issue. For example, if disputes involve matters of company strategy or questions about selling or merging the company, the CEO and the management group will potentially be at the heart of the dispute, or will have vested interests in its outcome. In such cases, management's ability to be seen as neutral, or impartial and objective, can be impaired. Moreover, the CEO will most likely not have sufficient time to dedicate to mediating disputes.

Although their hierarchical position within the company does not put them in an appropriate situation to mediate most disputes involving the board, senior officers can also find themselves in the position of mediator or peacemaker. The chief legal officer, the corporate secretary, the head of human resources, the



## EXAMPLE

### Managing Family Firm Disputes Brazil: The Role of Independent Directors

As long as the three founding brothers ran the company, they settled disagreements among themselves. As the second generation assumed control and the third generation began to join the company, conflicts became inevitable. After attending a conference on family-controlled companies, three members of the second generation concluded that it was in the company's best interest if all family members left their management positions, including themselves. "You cannot fire relatives," said one. "Our family should govern the company, not manage it." Implementation required the decisive support of the founding brothers and generated resentment among the heirs and in-laws.

A professional management team was hired, and two independent directors joined the board, along with five family representatives. After two years of success, the model was reviewed to allow third-generation family members to join the company, but under well-structured, strict rules.

#### COMMENT

Independent directors in a family firm are often relied on to play the role of internal peacemaker. To fulfill this role, they should receive adequate training. They must also be trusted by all parties engaged in the dispute.

*SOURCE: Leonardo Viegas, Director, Brazilian Institute of Corporate Governance (IBGC); Member of the Forum's Private Sector Advisory Group.*



## EXAMPLE

### Managing Family Firm Disputes Finland: The Role of Independent Directors

Within a large Finnish company, two family branches fought against each other based on historical conflicts between the families. These tensions affected the board. Several decades ago, the chairman then decided to invite the first non-executive independent director to the board. As a strong-minded person, he insisted that the board must not be the battleground for personal grievances. As a result, the family formed a "family council" for the owners to handle these disputes while the board focused on running the company, without, more or less, personal issues being involved.

#### COMMENT

This case illustrates how innovative solutions can be found and implemented to help prevent and handle disputes without interrupting the board's work.

*SOURCE: Olli Virtanen, Head, Finnish Association of Professional Board Members; Member of the Forum's Private Sector Advisory Group.*

head of internal audit, or the head of investor relations, the chief public relations officer — all these persons may indirectly referee heated discussions. This underscores why one or more of these senior corporate staff members should have the appropriate interpersonal skills, the ability to understand circumstances that breed disputes, the skill to recognize the presence of emotionally charged issues, and the experience to mediate among people whose status exceeds theirs or whose demands may be difficult.

Not all individuals are talented peacemakers, trained in dispute resolution skills or willing and interested in taking a leading role in the company's dispute resolution management. The board should, therefore, ensure that it includes among the board's skill profile the right mix of expertise and capabilities to properly manage corporate governance disputes, including one or two individuals who can eventually act as a dispute resolver if the need arises. Moreover, in considering the board's role in preventing and resolving corporate governance disputes, it is advisable for all directors to receive at least basic dispute resolution awareness training. In-depth conflict resolution training should be provided where needed, perhaps to the committee chairman or individual board members whom the rest of the board recognizes will assume the peacemaker role.



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

An alternative option that boards may want to consider is the appointment of a corporate governance ombudsman to deal with potential internal governance issues and facilitate external governance matters.

There are many ways of defining the ombudsman's role, depending on the context and the organization in which he/she operates. Within the corporate governance environment, the ombudsman should be limited to hearing claims, facilitating dispute resolution, and rendering non-binding opinions.

Sitting within the company without being part of the board, the ombudsman would be more familiar with

the company than an outsider but still be perceived as a third-party external to the dispute.

Ideally the ombudsman should be appointed by the board's corporate governance or nomination committee. If the board doesn't have such committees, the audit committee could select the ombudsman.

The ombudsman's appointment can be especially efficient for privately held or family-owned companies that may have difficulties aligning the interests of dominant shareholders, or for those who have had



## GLOSSARY

### Ombudsperson

An ombudsperson is a neutral empowered to receive and investigate complaints about any institution, or business, or to investigate problems between individuals within the institution or business. Sometimes, the ombudsperson may produce a written report of his/her findings. At other times, the ombudsperson is given the authority to facilitate solutions to problems or to make suggestions on how problems should be solved.

*SOURCE: Adapted from Maryland Legal Assistance Network, updated by the Maryland State Law Library (MSLL).*



## QUOTE

### Using Expert Help

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

#### RICHARD REUBEN

PROFESSOR OF LAW, UNIVERSITY OF MISSOURI — COLUMBIA SCHOOL OF LAW

*SOURCE: Richard C. Reuben. Corporate Governance: A Practical Guide for Dispute Resolution. Washington, D.C.: American Bar Association, 2005.*

issues repeatedly with specific stakeholders, such as community activists.

Listed companies that have appointed a chief governance officer to ensure compliance with corporate governance regulations, procedures, and best practices should consider combining this role with that of the ombudsman.

The ombudsman's appointment should not, nevertheless, preclude companies from utilizing other dispute resolution forums. Dispute resolution processes should always remain flexible to settle disputes in the most adequate, appropriate, and effective manner.

*External Peacemakers.* Even though they may have a strong peacemaker within their ranks, boards should also consider drawing on external professional dispute resolution expertise.

Beyond helping the board design an effective dispute resolution strategy and related policies, independent third parties or dispute resolution experts can help:

- Prevent and/or dissipate disputes by facilitating board discussions and retreats outside of standard board meetings
- Prevent and mediate disputes between the board and external stakeholders

An external, neutral, or impartial dispute resolution expert can be especially desirable to mediate or help settle disputes between the board and external stakeholders. No matter how well-intentioned or objective a board director may be, it is unlikely that external stakeholders would fully trust him or her, precisely because he or she is a board member and possibly part of the problem. If a shareholder or any other stakeholder considers the board, its chairman or its CEO to be an opponent, “reactive devaluation” naturally sets in. If the board or one of its members makes a proposal to help bridge differences, that proposal will likely be seen as less reasonable than if a pre-selected expert or mediator had made the same proposal. All proposals contain drawbacks, but the difference in perception can be wide enough to ensure that a proposal made by an external peacemaker will

be viewed as “acceptable, if less than ideal,” compared to the perception of an internal peacemaker's proposal, which will be viewed as totally unacceptable.

To ensure the peacemaker's independence, he/she should neither have any conflicts of interests nor be related to directors, senior management, large shareholders, and stakeholders. To be effective in helping parties find a common, constructive solution to their dispute, the peacemaker needs the trust and respect of all parties and should not be considered biased.

A variety of third parties may fill the role of an external peacemaker or mediator. Besides having the proper dispute resolution skills, these third parties need to have a solid understanding of corporate governance matters and how boards operate, so that they can be sensitive to the issues involved and can quickly understand the parties' positions in finding creative win-win solutions.

An external peacemaker can be a specific individual or a group of individuals. The role can be housed inside a private or public institution. Companies may seek third parties from the following sources:

- Mediation and arbitration centers
- Law firms
- Consulting firms
- Universities
- Research centers
- Institutes of directors
- Corporate governance centers



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

Companies and boards need to feel comfortable with both the type of peacemaker they select and the way they refer to this conflict resolution expert. Rather than using a *pro forma* definition of the third party that may be subject to controversy, the board must agree first on the skills, role, function, and appointment of that external peacemaker. Then the board must clarify this information in writing before disclosing it to the company's shareholders and stakeholders.



## PRACTICE

### Selecting the Right Terms to Designate Peacemakers

There are several designations for an external/third-party corporate governance dispute resolution expert. Boards should use the term they (and their constituencies) think is best suited to their cultural and legal environment.

For example, a family firm in Panama may seek the help of a facilitator or corporate governance advisor to sort out succession planning and related disputes. A large listed South African mining company may consider introducing a corporate governance ombudsman to help manage disagreements and disputes among shareholders and other key stakeholders.

The following titles are options to consider:

- ▶ Expert
- ▶ Advisor
- ▶ Standing neutral
- ▶ Third party
- ▶ Dispute resolution expert
- ▶ Conflict resolution expert
- ▶ Dispute resolution consultant
- ▶ Mediator
- ▶ Facilitator
- ▶ Conciliator
- ▶ Ombudsman/Ombudsperson
- ▶ Negotiator
- ▶ Peacemaker
- ▶ Discussion leader

Terms such as lawyer, arbitrator, or judge should be avoided. These are too formal and too reminiscent of litigation — even if the selected third-party or peacemaker is a lawyer or a former judge.



TO REVIEW THE SKILLS REQUIRED OF A CORPORATE GOVERNANCE DISPUTE RESOLUTION EXPERT OR PEACEMAKER, SEE VOLUME 3 MODULE 1.

Companies and their boards should not wait for disputes to erupt to appoint an external peacemaker. Policies and processes should be in place to identify and perhaps retain the appropriate expert, facilitator, or mediator to be available immediately whenever the need arises. Doing so should be part of the board's own plan to deal with emergencies or unforeseen circumstances that arise.



## GLOSSARY

### Standing Neutral

The standing neutral facilitates communication among parties, helps clarify positions, and eventually (although rarely) renders an impartial nonbinding decision concerning the dispute's subject matter. Either an individual or a panel, the standing neutral should be selected by all the parties involved early in the relationship. This ADR process works effectively because the standing neutral is: involved from the beginning onward; briefed on the relationships among the parties; furnished with the basic documents describing the relationship; routinely receiving progress reports; and, occasionally invited to meet with the parties. He or she must be available at all times and have a good understanding of the problems when they arise to resolve disputes quickly, fairly, and amicably among all parties involved. Three critical elements are essential to the success of the standing neutral approach:

- ▶ Mutual selection and immediate confidence in the neutral
- ▶ Continuous (though low-time) involvement by the neutral
- ▶ Prompt action on any submitted disputes

*SOURCE: Adapted from James Groton and Helena Haapio, "From Reaction to Proactive Action: Dispute Prevention Processes in Business Agreements." 2009. Working paper provided by the authors to the Forum.*

Without such prior arrangements, a company may find it difficult to find the right expert quickly when a dispute suddenly arises. Moreover, parties already locked in a dispute may find it difficult to agree on who that third-party should be.

Introduced in the construction industry, where delays are often costly for all parties concerned, one of the most innovative and promising developments in controlling disputes among parties who are involved in any long-term relationship is the concept of the “pre-selected” or “standing neutral.”

A standing neutral is simply a trusted impartial expert selected by the parties at the beginning of their contractual relationship to assist in the prompt resolution of any disputes.

To be immediately effective and operational, the standing neutral should be available at all times and kept abreast of all major corporate developments. He or she should naturally be familiar with the company’s ownership structure, bylaws, industry, and key stakeholders.

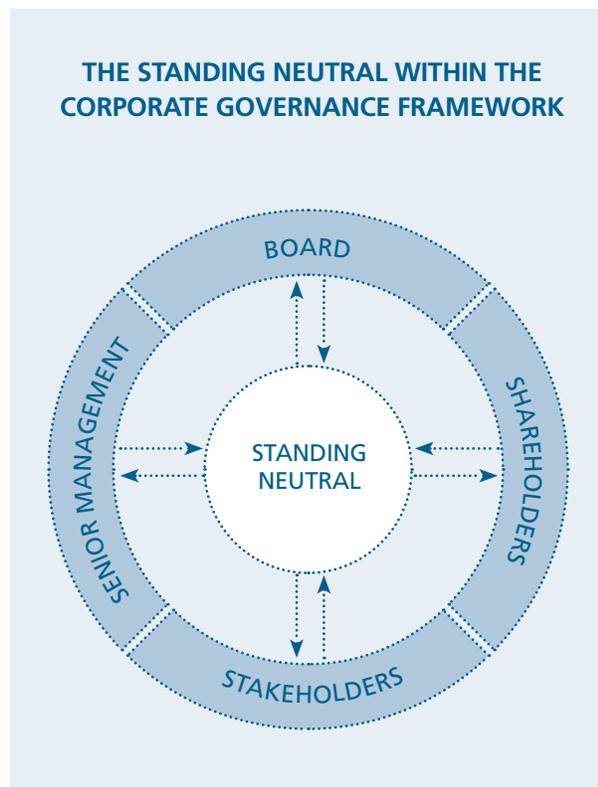
As with the corporate governance ombudsman, the standing neutral could be selected and retained by the board’s Corporate Governance, Nomination, or Audit Committees. This procedure could be adopted at the annual meeting. In some cases, shareholders could even approve the selected neutral.

The use of a standing neutral could have particular applicability in a closely held or family-owned company. In such companies, share ownership can likely pass through inheritance or, as a matter of design, could have limited marketability to either the shareholders or the company itself. As a result of the uncertainties and limitations regarding share transfer and the resulting ownership profile, disputes among shareholders in such situations can easily be imagined. The standing neutral thus can become an effective mechanism for resolution of future disputes.

Even though some initial expenses are involved in selecting, appointing, initially orienting, and periodically keeping the neutral informed, these costs are relatively minimal and could be covered by the board’s operational budget. Beyond a small retainer fee, the standing neutral will only be paid an hourly fee if she/he gets called in for a dispute. In the United States, that fee ranged from \$150 to \$400 in the construction industry during 2009.

There are, nevertheless, significant risks in bringing external peacemakers and a formal mediation process into corporate governance processes. These risks need to be appropriately addressed. The main risks to consider are:

- **Confidentiality.** Corporate boards discuss many confidential matters, and the board’s full trust is rarely given to outsiders — no matter how qualified. Most, if not all, boards would most likely be uncomfortable having an outsider present at board meetings for the purpose of mediating internal corporate governance disputes. To defuse this concern, clarify the role of the external peacemaker and limit his/her intervention to specific board sessions outside of the boardroom. While confidentiality is a core feature of the ADR process, the board’s level of trust can be increased by having the selected third-party sign a confidentiality agreement.



- **Authority.** The board and its chairman may be concerned that its authority could be diminished by a third-party's intervention. This concern can be mitigated by adopting standing rules and policies that specify the external peacemaker's role, functions, and reporting lines, while reiterating the board's duties and accountability. Calling on an external expert would not be perceived as a sign of weakness but merely as applying existing procedures and policies.
- **Positioning.** The parties in dispute may feel threatened and, as a consequence, harden their positions. To overcome this problem, it may work best to refer to the mediation process as a "discussion session," "focus session," or "town hall meeting." The mediator/peacemaker could then be called a "facilitator" or "discussion leader." While the same objectives can be

met in this way, avoid the appearance or terminology associated with formal dispute resolution proceedings.

### Incorporating Dispute Resolution Policies into Corporate Documents

As with other organizational issues, rules and procedures are much more effective if they are established in advance because they prepare boards to react quickly when disputes develop. Once the board has arrived at a consensus over how disputed matters will be handled and by whom, it should ensure that the company memorializes these policies and communicates these to external and internal stakeholders.

The board must consider where to include its dispute resolution policies and statements in its corporate governance documents. Should these provisions



## EXAMPLE

### Sample Corporate Dispute Resolution Pledge

#### United States: Corporate Policy Statement on Alternatives to Litigation

"We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. ADR procedures involve collaborative techniques, which can often spare businesses the high costs of litigation.

"In recognition of the foregoing, we subscribe to the following statements of principle on behalf of our company and its domestic subsidiaries:

"In the event of a business dispute between our company and another company, which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation."

#### COMMENT

The ADR Pledge is a statement of policy aimed at encouraging greater use of flexible, creative, and constructive approaches for resolving business-related disputes. The Pledge is neither intended to impose judicially enforceable rights or obligations nor does it constitute a waiver of any substantive or procedural right or obligation. Its goal is to promote systematic, early resolution and to establish a flexible framework for helping to resolve complex, multi-party disputes. The Pledge sends the message that willingness to negotiate or mediate is not a sign of weakness, but a company policy. By conveying a message that a company will routinely consider negotiation and mediation where appropriate, the Pledge makes it clear that the exercise of such choices does not reflect a lack of confidence in the company's bargaining position. While the Pledge is targeted at business disputes, similar language may be specifically adapted to corporate governance disputes between the company and its stakeholders.

*SOURCE: International Institute for Conflict Prevention and Resolution. Available at: <http://www.cpradr.org/AboutCPR/TheCPRADRPLedger/AboutthePledge/tabid/161/Default.aspx>.*

be inserted in the articles of incorporation, bylaws, statement of governance principles, ethics codes, and/or board committee charters? The answer to these questions depends on the type of company, its particular circumstances, and both the viability and efficiency of other dispute resolution institutions, such as the courts, in the jurisdiction in which the company operates.

In considering whether to document publicly the board's policies on dispute resolution, there are many considerations. For example, provisions in the articles of incorporation can be inserted, changed, or deleted only through shareholder action. For large, publicly held companies, obtaining shareholder approval is a serious, difficult task. Boards should be cautioned about the



## PRACTICE

### Incorporating Dispute Resolution Policies in Corporate Documents

CORPORATE DOCUMENTS	OPTIONS TO CONSIDER
<b>Articles of Incorporation</b> <b>Company Charter</b> <b>Bylaws</b>	<ul style="list-style-type: none"> <li>• Clause mentioning the board's role in planning for appropriate governance dispute resolution processes</li> <li>• Dispute resolution clause</li> </ul>
<b>Corporate Governance Guideline</b> <b>Code of Ethics</b> <b>Corporate Social Responsibility Guidelines</b>	<ul style="list-style-type: none"> <li>• General provisions on effective dispute resolution</li> <li>• Specific provisions on dispute resolution processes in shareholder and stakeholder sections/chapters</li> <li>• Specific provisions on dispute resolution skills and training in board section/chapters</li> </ul>
<b>Board Committee Charters</b> <b>Terms of Reference</b>	<ul style="list-style-type: none"> <li>• Roles and responsibilities in implementing dispute resolution policies</li> <li>• The charters should state responsibilities generally, with specifics left to committee discretion and separate policy statement</li> </ul>
<b>Board Protocol</b>	<ul style="list-style-type: none"> <li>• Internal governance dispute prevention and resolution processes</li> </ul>
<b>Annual Reports</b> <b>Press Releases</b> <b>Websites</b>	<ul style="list-style-type: none"> <li>• Dispute resolution pledges and policy statements</li> <li>• Emphasis on external governance disputes</li> </ul>
<b>Shareholder Agreements</b>	<ul style="list-style-type: none"> <li>• Dispute resolution clause allowing/encouraging disputes to be settled through alternative dispute resolution mechanisms</li> <li>• Clause may describe the dispute resolution process, including the selected third party/institution, the location, and the timeframe for each step</li> </ul>



## EXAMPLE

### Dispute Resolution Clause in Corporate Bylaws

#### Australia: APNIC Pty Ltd.

73. Any dispute arising between or among any Member(s), Executive Council member(s), subcommittee member(s), the Director General, or the corporation as to any matter arising under or out of or in connection with these by-laws, or any agreement entered into between any of the aforementioned parties, or the Memorandum and Articles of Association of the corporation, and whether in contract or tort, ("Dispute") the parties to the Dispute must follow the dispute resolution procedures set out below before commencing legal proceedings (except for legal proceedings seeking interlocutory relief).
74. A party claiming that a Dispute has arisen must notify in writing each other party to the Dispute giving details of the Dispute.
75. Within 7 days after a notice is given under by-law 74 each party to the Dispute ("Disputant") must nominate in writing a representative authorised to settle the Dispute on its behalf.
76. During the 20 day period after expiration of the 7 day period referred to in by-law 75 (or longer period agreed in writing by the Disputants) ("Initial Period") each Disputant must in good faith use its best endeavours to resolve the Dispute.
77. If the Disputants are unable to resolve the Dispute within the Initial Period they must refer the Dispute to arbitration by one arbitrator agreed to by the parties or, if they cannot agree, by the chair of the Institute of Arbitrators Australia, or the nominee of the chairs, and the arbitration will be conducted in accordance with the UNCITRAL rules for the conduct of commercial arbitrations.
78. Any information or documents prepared for the arbitration and disclosed by a Disputant during the arbitration process:
  - a. must be kept confidential; and
  - b. must not be used except for the purpose of resolving the Dispute.
79. Each Disputant must bear its own costs regarding arbitration of a Dispute under these clauses, and the Disputants must bear equally the fees, and any other costs or charges, of any arbitrator engaged, unless a binding decision of the arbitrator states otherwise.
80. The place for any arbitration will be at a time and at an address in the City of the principal place of business of the corporation appointed by the arbitrator, unless otherwise agreed by the Disputants and the arbitrator.

If, in relation to a Dispute, a Disputant breaches any of the provisions of by-laws 74 to 76, each other Disputant need not comply with these dispute resolution clauses in relation to that Dispute.

#### COMMENT

Corporate bylaws must have dispute resolution policies and procedures. Special attention should be given when drafting or amending the articles of incorporation because these cannot be changed except through shareholder action. Restrictive measures in these articles, therefore, should be very limited.

*SOURCE: APNIC. Available at: <http://www.apnic.net/publications/media-library/corporate-documents/corporate/by-laws>.*

advisability of any policies that may change, depending on circumstances and options available, and thus necessitate a change in these articles.

Policy statements, such as governance principles, can easily incorporate the board's feelings about dispute resolution, particularly with respect to external stakeholders. However, boards should be warned that,

in the event it is appropriate to change or amend such policies, they must give careful attention to explaining to the larger public why any change is appropriate.

Board committee charters offer the best venues for articulating that a board committee has dispute resolution under its jurisdiction, thus signaling that the board takes dispute resolution matters seriously. The committee



## EXAMPLE

### Shareholder Dispute Resolution Provisions in Company Codes Colombia: Suramericana

**Article 4.4** MECHANISMS FOR LODGING FORMAL CLAIMS OF INCOMPLIANCE WITH REGARD TO THE CORPORATE GOVERNANCE CODE.

The Company's legal representative shall ensure compliance with the Company's bylaws, legal provisions as well as decisions on the part of the General Shareholders' Meeting and the Board of Directors.

The Company's shareholders and investors may request the Company, whenever they should believe that an infringement has been committed with regard to that provided in the Corporate Governance Code, and in these cases, Company Management through the Company Secretary shall respond in a clear and sufficient manner with the greatest diligence and timeliness.

The Company's shareholders and investors may also file any claims or complaints with the Company's Statutory Auditor with regard to any infringement of that stipulated in the Corporate Governance Code. To this end, the Company shall provide a timely response to any requirements on the part of the Statutory Auditor with regard to the complaint thus lodged and shall implement all those observations that the Statutory Auditor should make if the infringement should exist.

**Article 4.5** MECHANISMS TO RESOLVE CONFLICTS BETWEEN THE SHAREHOLDERS AND THE COMPANY AND AMONGST THE SHAREHOLDERS.

Any dispute arising at any time between Shareholders and the Company or amongst the shareholders, on the grounds of their status of shareholders, and shall be decided by an Arbitration Panel, who shall hear the matter in Medellin. The Arbitration Panel shall provide a legal finding and be made up of three Colombian citizens. The arbiters shall be appointed, pursuant to applicable legislation, which shall also apply to the hearing to be held by the Arbitration Panel, except when the case requires special rules and regulations; should the parties fail to agree on appointing the arbiters, either totally or partially, these shall be appointed by the Center of Conciliation and Arbitration attached to the Chamber of Commerce of Medellin, which shall select the arbiters from a minimum of ten (10) candidates mutually agreed upon by both parties. The Secretary to the Arbitration Panel shall be appointed by the arbiters, once the Panel has been set up.

#### COMMENT

As illustrated by this example, dispute resolution clauses can be inserted in company codes and made publicly available on the company's website. This example highlights the role that the company's statutory auditor may play in receiving claims and complaints from shareholders regarding the company's compliance with its code.

*SOURCE: Suramericana Corporate Governance Code last updated June 2009. Available at: [http://www.gruposuramericana.com/english/GI%20Documents/Corporate\\_Governance\\_Code\\_2009.pdf](http://www.gruposuramericana.com/english/GI%20Documents/Corporate_Governance_Code_2009.pdf).*

whose jurisdiction and responsibilities include dispute resolution may then choose to formalize procedures that can be disseminated to external stakeholders. The public relations value of such steps can be significant, insofar as those stakeholders who feel themselves aggrieved have a clear course of action to pursue.

A commitment to effective dispute prevention and resolution may involve different approaches in the corporate governance documents. For example, to avoid being locked into a single course of action, some companies may find it more appropriate to refer to dispute resolution policies in corporate governance guidelines or ethics codes rather than in the articles of incorporation. Others may find the opposite to be true.

The board should ask itself whether external and internal corporate governance disputes would best be addressed together in the same document or tackled separately in different documents. For example, preventing and dealing with internal governance disputes could be

inserted in board protocols and procedures and in board committee charters. External governance disputes involving shareholders could well be addressed through shareholders' agreements.

Shareholders' agreements are contracts between some or all of a non-listed company's shareholders in which they agree to regulate the exercise of some of their rights as shareholders. These agreements are no longer needed once a company becomes listed and has to comply with securities regulations, which typically protect basic shareholders' rights.

Shareholders' agreements are particularly useful in corporate governance situations in smaller companies or family-owned companies where a company has no majority shareholding, because of the correspondingly high potential for the company to be adversely affected by shareholder disagreements. These agreements help prevent disputes by clarifying the roles, obligations, and rights of the company and its shareholders. They can also help address the concerns of minority shareholders and include topics on which the company's constitution and other bylaws are typically silent. The agreement can specify the company's management structure and include provisions regulating:

- Shareholder exit strategies (including share valuation mechanisms)
- Shareholder warranties
- Confidentiality agreements
- Restraint of trade for directors and/or shareholders
- Agreement specifying or limiting business activities of the company
- Shareholder rights to appoint directors and the number of directors
- Shareholder rights to submit decisions on policies to a vote by shareholders (proxy process)
- Board meeting procedures



## GLOSSARY

### Shareholders' Agreement

When acquiring a company's stocks, major shareholders increasingly sign a shareholders' agreement that describes the company's corporate governance policies and procedures, including bylaws on the sale and purchase of shares and investment policies.

A well-drafted agreement will help the company run more effectively, play an important role in the organization's continuity, and avoid expensive, time-consuming legal wrangles. The agreement will provide details of shareholders' rights and duties. It should cover all aspects of the relationship and the mechanics by which the company is to be operated. The agreement should also protect the respective interests of the parties to the agreement and outline dispute resolution provisions in the event of any disagreement between the parties.

*SOURCE: Clendons Barristers and Solicitors. Available at: <http://clendons.co.nz/newsite/index.php?page=benefits-of-a-shareholders-agreement>.*

- Minimum financial and non-financial reporting requirements
- Dividend distribution policy
- Shareholders' personal rights and obligations
- Policies, management, and procedures
- Protection of minority shareholder interests
- ADR procedures for resolving disputes between shareholders and the board



TO REVIEW ESSENTIALS OF A SHAREHOLDER AGREEMENT, SEE VOLUME 2 ANNEX 1.



## PRACTICE

### Drafting Dispute Resolution Clauses

Elements to consider when recommending, drafting, and adopting a dispute resolution clause include:

- ▶ The clause may include all disputes that may arise, or only certain types.
- ▶ It can specify only mediation and arbitration, or include an escalation of various dispute resolution processes from unbinding negotiation to formal arbitration.
- ▶ The dispute resolution clause should be approved and signed by as many potential parties to the dispute as possible.
- ▶ Timing, location, rules, and institutional setting for the dispute resolution should be specified.
- ▶ Based on standard dispute resolution clauses, the parties should customize and refine the basic procedures to meet their particular needs.

SOURCE: Adapted from American Arbitration Association, "Drafting Dispute Resolution Clauses: A Practical Guide". AAA: 2007. Available at: [www.adr.org](http://www.adr.org).



## EXAMPLE

### Sample Dispute Resolution Clause for a Shareholder Agreement

Australia: Access Business Lawyers

#### *Court and arbitration proceedings*

1.1 A Shareholder must follow all the dispute resolution procedures set out in this clause before commencing Court or arbitration proceedings relating to a dispute, except where the Shareholder seeks urgent interlocutory relief.

#### *Negotiation*

1.2 (a) Any Shareholder seeking to resolve a dispute arising out of or relating to this Agreement must notify the other in writing, detailing the matters in dispute and their suggested means of resolution.

(b) Within fourteen (14) days of the date the notice is given under sub-clause (a) the Shareholders must meet to attempt to resolve the dispute. That meeting must be arranged by the Shareholder sending the Notice.

#### *Mediation*

1.3 (a) If the parties are unable to resolve the dispute by negotiation, as set out in the above sub-clause, they must endeavor to settle it by mediation administered by the Australian Commercial Disputes Centre ("ACDC") before having recourse to arbitration or litigation.

(b) The mediation must be conducted in accordance with ACDC Mediation Guidelines, which set out the procedures to be adopted, the process of selection of the mediator and the costs involved.

#### **COMMENT**

All dispute resolution procedures must be followed before arbitration or litigation, except when seeking a court injunction. Disputes are to be mediated by an agreed-upon independent mediator.

SOURCE: Access Business Lawyers. Available at <http://www.accesslawyers.com.au/system/files/f2/o33/Sample%20Shareholder%20Agreement.pdf>.

A shareholders' agreement should be reviewed and revised periodically to ensure that it is in line with the current business environment, but it should not be revised so often that it causes instability and confusion. New shareholders need to sign the agreement in order for the dispute resolution clause to apply equally to all shareholders.

Dispute resolution clauses in shareholders' agreements could expressly apply to disagreements over company financing, dividends, or the company's management and direction. These provisions could provide a mechanism for more effectively resolving such disputes.



TO REVIEW SAMPLE DISPUTE RESOLUTION CLAUSES FROM AROUND THE WORLD, SEE VOLUME 2 ANNEX 2.

### Assessing the Effectiveness of the Dispute Resolution Strategy

Goals set by the board's dispute resolution strategy are aspirational. How can one know whether they have been met and become a reality? In a business, setting goals should always be coupled with mechanisms for determining whether, or how well, the goals have been met. The board needs, therefore, to establish criteria for determining the success of their approach. In the dispute resolution context, these feedback mechanisms can be more complicated because the goals — and therefore success in meeting them — involve qualitative and quantitative factors.

Where appropriate, and particularly in those situations where the disputes are with external stakeholders, metrics can be created to assess progress toward achieving goals. External disputes lend themselves better than internal disputes to devising metrics that can serve as a guide to the company's progress in dispute resolution. For example, statistics on the number of complaints filed or received concerning governance matters can be developed, accompanied by additional statistics on such disputes' resolution.

However, as a cautionary note, while such metrics can provide information about trends, they may not accurately assess the company's performance in preventing

and resolving disputes. The types of external governance disputes can be varied, and many may be triggered by economic forces. For example, shareholder disputes may increase in volume when the company's share price declines — even if that decline is attributable to changes in the company's fundamental value.

Determining whether dispute resolution goals have been met for internal disputes can be more challenging. Metrics themselves may be meaningless. External governance disputes can be more easily identified and, therefore, counted and categorized. Internal disputes, however, can be more subtle and less susceptible to statistical determination.

Much of the success of internal dispute resolution and prevention involves qualitative assessments. Has debate been robust, but not intimidating? Have directors been able to air their differences publicly? Are appropriate mechanisms in place to prevent disagreement from ripening into a dispute? Do all parties to the dispute perceive these mechanisms as effective and fair? To what extent is the internal or external peacemaker involved? What is his/her effectiveness?

The answers to these questions are qualitative ones. Success in achieving dispute resolution goals is best determined by getting candid opinions from each director. For internal disputes, the annual board or committee assessment, followed by a retreat, may be the best gauge for determining whether goals have been met. Success in dispute resolution is closely tied to board effectiveness. In turn, determination of board effectiveness varies from one board to another.

### Being Prepared for Litigation if Alternative Dispute Resolution Processes Fail

Litigation is generally costly and severely disruptive of the relationship between the litigating parties. Yet, if ADR processes have failed to result in a settlement between the parties to a corporate governance dispute, a company may feel obliged to invoke litigation or, alternatively, be drawn into it by the other party to the dispute. It is, therefore, important that a board's policy on resolving corporate governance disputes, both external and internal, envisage litigation as an option for

dealing with these disputes.

While a company may have no choice when litigation proceedings are started against it, the board can set out a preference for ADR processes in its corporate governance dispute resolution policy and initiate litigation only as the last resort. However, a company's preference for ADR methods must be couched in language that is not perceived as a sign of weakness, thus giving the other side to a dispute an advantage to use the threat of litigation to strike a settlement at the expense of the company's legitimate interests.

A company's general counsel and his or her staff can be of assistance in liaising with potential litigators to represent the company in litigation proceedings. Once the litigation starts, the board and senior management should remain vigilant to avoid, or at least contain, if not defuse, negative publicity and public statements that can adversely affect the proceedings before a court.

Where court procedures envisage initiating an ADR process at any stage of the trial subject to the disputants' consent, the company should give clear instructions to its counsel regarding the terms on which it would be willing to consent to such resolution. Meetings can be arranged with the counsel to review periodically the litigation's progress and discuss trial strategies. ■

## PREVENTING AND MANAGING BOARDROOM DISPUTES

Beyond developing and ensuring the proper implementation of corporate governance dispute resolution policies, the board must prevent and better manage its own disputes. At the onset, this involves acknowledging that disputes may occur.



TO REVIEW SITUATIONS THAT MAY LEAD TO DISPUTES IN THE BOARDROOM, SEE VOLUME 1 MODULE 1.

How does a board turn this goal into reality? The practices and procedures that allow boards to work efficiently represent conscious efforts to develop



### PRACTICE

#### Key Steps in Preventing and Managing Boardroom Disputes

Boards should consider and adopt the following steps, tailoring them to their particular circumstances:

- ▶ **STEP 1:** Encourage an effective board culture.
- ▶ **STEP 2:** Clarify the roles of management and the board.
- ▶ **STEP 3:** Establish orderly board processes.
- ▶ **STEP 4:** Ensure the proper flow of information.
- ▶ **STEP 5:** Allow for discussion, debate, and deliberation.
- ▶ **STEP 6:** Improve communication.
- ▶ **STEP 1:** Apply dispute resolution techniques.
- ▶ **STEP 1:** Step out of the boardroom to gain new perspectives.

These steps are interlinked, so they should be applied jointly and not in sequence.

processes that contribute to the board's success. First and foremost, keeping disputes from being destructive lies in applying good corporate governance practices and initiating steps to minimize the risk of disputes arising in the first place.

#### Encouraging Collegiality and Civility

To prevent disputes, boards must develop a boardroom culture based on collegiality and civility.

Boards have a core democratic characteristic. A board is a group of people, each of whom has an equal vote in the decision-making process. A democratic environment should prevail; no single individual should rule. The environment should foster flexibility and collaborative thinking crucial to forming consensus — and thus a winning majority. Collegiality also promotes respect for one another and for each member's ability to express views, regardless of whether one embraces those views. It permits participants to be more open to new ideas, rather than defensive of their own conclusions.

A supportive atmosphere does not mean that there is no disagreement or strong feelings. It also does not mean that everyone must like one another or be social friends. Particularly within a diverse, independent group, there will be disagreements, misunderstandings, and, potentially, disputes. However, the collegial environment is the key to overcoming these human frailties by permitting the group to hear different views, argue the merits, and ultimately arrive at a consensus.

Civility complements collegiality. Civility involves adherence to certain manners and practices for the interaction among individuals. A civil environment does not preclude animated behavior, deeply held convictions, emotional speech and action, or passionate feeling. It does, however, mean that personal attacks or embarrassing another person should not be tolerated. A lack of civility can too easily trigger antipathy and anger, thus inhibiting free discussion and debate. Lack of civility also can lead to destructive interpersonal relationships and, in the process, create an additional layer of emotional content, which must be addressed if disputes are to be resolved.

Civility is especially important as boards become more diverse. Diversity facilitates creative problem-solving and provides exposure to a wide range of perspectives. It can foster innovative thinking and remind individuals that differences of opinion are likely, and this expectation increases the capacity to handle conflict.<sup>1</sup> Yet diversity without civility can produce misunderstandings and disagreements based on cultural and other differences.

Being overly preoccupied with civility, though, can create its own problems. To avoid confrontation or embarrassment, people, thinking they are civil, sometimes do not address matters directly, or they avoid discussing certain issues. A preoccupation with civility can sometimes result in a lack of direct speech. To avoid insulting or embarrassing someone, people often use indirection. For example, instead of saying “no,” they may ask, “Should we think about it some more?” While



## PRACTICE

### Factors to Consider for Director Nominations

To promote a collegial environment that facilitates the board’s work, boards, and especially its nomination committee, should consider:

- ▶ Encourage all directors to meet with potential directors before they are nominated and to weigh in on the nomination process
- ▶ Perform thorough background investigations on potential directors and obtain as much information as possible on how the potential directors have functioned in group decision-making settings
- ▶ Avoid nominating people who argue for argument’s sake
- ▶ Avoid nominating people who, because they are fearful of making decisions, prolong debate and resist developing collaborative solutions
- ▶ Seek candidates who have a good balance of skills, including conflict resolution skills
- ▶ Include in the matrix of requisite skills in consensus-building, negotiation, and mediation
- ▶ Encourage all directors to take conflict and dispute resolution training
- ▶ Include in the criteria for board leadership positions the ability to work effectively with people and build consensus



## EXAMPLE

### Board Diversity France: Sodexo

During the assessment of Sodexo’s board operating procedures, which was led by one of its members in fiscal 2003-2004, several suggestions were made. One called for the board to more accurately reflect the group’s international scope and integrate new skills and expertise. In response, and in line with recommendations made by the board and its nominating committee, shareholders at the annual meeting on February 8, 2005 approved the nomination of new directors. As a result, the 14-member board included four different nationalities (French, American, British, and Canadian) and four women.

#### COMMENT

Diversifying the skills and background of directors is an important corporate governance goal to help improve the scope and performance of companies. With multinational boards, the risk of misunderstanding due to language and cultural differences, nevertheless, increases substantially. In this context, civility and collegiality are even more important to defuse potential misunderstandings and disputes in the boardroom.

*SOURCE: Sodexo — Chairman’s Message. 2005. Available at: [http://www.sodexo.com/group\\_en/finance/chairman-message/chairman-message.asp](http://www.sodexo.com/group_en/finance/chairman-message/chairman-message.asp).*

the individual may think others understand that he or she is saying “no,” those who hear the interchange may take the speaker literally. Thus, while civility breeds a collegial atmosphere, people could see it as an impediment to being open and candid. It can also result in attaching different meanings to the same words and phrases. While civil behavior helps create a collegial atmosphere to reach consensus, sometimes it can also have the opposite effect.

### Clarifying Management and Board Roles

Ensuring that directors have a clear understanding of their roles and responsibilities is another important

measure in dispute prevention and resolution. The failure to articulate and understand the respective roles of the board and management constitutes a fertile ground for disputes and impairs the board’s effectiveness.

The director who does not understand his or her role easily becomes an irritating presence, undermining relationships among directors and between the board and management.

Especially detrimental is the situation in which boards, or board committees, extend their roles into management’s purview. For example, a central part of the audit



## FOCUS

### Board Responsibilities

The board’s role and responsibilities typically include:

- ▶ Approving a corporate philosophy and mission
- ▶ Nominating directors for election to the board
- ▶ Establishing an audit committee composed entirely of independent directors
- ▶ Selecting, monitoring, advising, evaluating, compensation, and — if necessary — replacing the CEO and other senior executives while ensuring an orderly and proper management succession
- ▶ Reviewing and approving:
  - Management’s strategic and business plans
  - The company’s enterprise risk management (ERM) program
  - The company’s financial plans, objectives, and actions, including distributions to shareholders, significant capital allocations, expenditures, and other material financial obligations
  - Material transactions not in the ordinary course of business and making recommendations to shareholders when their approval of such transactions is necessary
- ▶ Monitoring corporate performance against strategic business plans
- ▶ Helping to ensure ethical behavior and compliance with laws and regulations, accounting and auditing principles, and the corporation’s own governing documents
- ▶ Assessing its own effectiveness in fulfilling board responsibilities
- ▶ Performing other functions prescribed by law or regulations, or assigned to the board in the company’s own governing documents

*SOURCE: The Conference Board, Corporate Governance Handbook 2007.*

committee's role is to satisfy itself after due inquiry that management has prepared financial statements correctly, that the proper internal controls are in place, and that the independent auditors have performed their jobs properly. When the audit committee goes further and begins to redo the financial statements or conduct its own audit, the situation becomes particularly troublesome, for the committee is overreaching and meddling in management's responsibilities.

The board's role does not include running the company. The board hires people for day-to-day management, oversees and monitors management and corporate activities, reviews and approves (or disapproves) key strategies and policies, and acts on significant matters after having fully informed itself.

Similarly, management must understand its role and that of the board. When management fails to comprehend the board's role and issues, information processes required for decision-making and oversight can easily become deficient. Meeting times are often consumed by irrelevant matters. In addition, gaps can develop — areas which the board believes are part of management's responsibility, but management assumes the board is handling.

For example, the board cannot permit ambiguity to exist as to how much expenditure the CEO can authorize without requesting board approval. Doing so would create room for constant friction between the board and the CEO. Similarly, if the board is not clear about the long-range strategies that it has approved, management can never be sure whether it has taken the appropriate path for the company. In such a case, the board will be disappointed because management has failed to execute the strategy that the board wants, but which it has not communicated. Management will also become frustrated because the board has not provided clear direction.

Clarifying the respective roles of the board and management — beyond simply stating that “the board governs the company while executives manage the company” — is crucial to preventing disputes. With greater clarity, everyone can identify the interests to be served, rather than only have a collection of individual

positions. By making clear a joint board-management goal, competing issues are surfaced. Those that are not appropriate are rejected.

### **Establishing Orderly Board Processes**

Effective board organization and processes is another basic component of dispute prevention and resolution. Boards need a structure in which to work effectively. Board and committee calendars, committee charters, articulation of authority not delegated to management, executive sessions at board and committee meetings, reports from management, enterprise risk assessment, and pre-meeting information flows — these are some of the basic features of good organization. Without a structure and process, communications suffer. When communications suffer, misunderstanding and disputes arise, and there is no effective forum for resolving disputes.

Orderly processes and procedures help create the environment that not only permits but encourages discussion and debate. Unless board meetings are well organized, two things happen quickly:

- First, confusion will reign, and from that confusion will spring misunderstanding and frustrations. What is the business at today's meeting? In what order do we consider things? Is there follow-up from the last meeting? A carefully constructed agenda — in fact, agendas for a full year — ensure a basic order to meetings and that the board will accomplish its full spectrum of functions.
- Second, time will run short, discussion and debate will be compromised, and some important matters will not be considered. Well-organized board meetings provide times on the agenda for director discussion. They permit all board members to have input into agenda and discussion matters. They are open-ended in the sense that they do not cut off debate, and they do not end without all agenda items having been thoroughly considered.

Disorganized, chaotic meetings not only impede the substantive aspects of the board meeting, but also create numerous irritants. Both the substantive failings and the irritating quality of a disorganized meeting feed



## FOCUS

### Disputes Stemming from Deficiencies in Board Organization

Without good organization, including processes and procedures designed to permit a board to do its job, frustrations and anger mount, and disputes emerge quickly. Sources of a dispute stemming from deficiencies in board organization include:

- ▶ Poorly defined delegations of authority to management
- ▶ Lack of consensus over the information that the board must have regularly to monitor the company's results and areas of high risk
- ▶ Inadequate lead time for providing information prior to a board meeting to enable directors to read, digest, and consider the information
- ▶ Insufficient time at board or committee meetings for discussion
- ▶ Restrictions on directors' ability to put items on the board agenda or to bring up matters for discussion
- ▶ Lack of principles of corporate governance that describe the board's role
- ▶ No committee charters that define the committees' jurisdictions and responsibilities
- ▶ Lack of a board calendar with meeting dates and predictable items for consideration
- ▶ Incomplete or inaccurate records of board and committee meetings
- ▶ Ineffective leadership of the non-management directors
- ▶ Unavailability of independent advisors for board and committee guidance



## PRACTICE

### Establishing Appropriate Board Processes

To help prevent disputes and enhance performance, a board should:

- ▶ Establish a calendar of regular meetings and include recurring matters requiring board consideration
- ▶ Encourage order in meetings, but do not cut off relevant discussion or prevent all board members from speaking
- ▶ Initiate executive sessions of non-executive directors so that discussion without the CEO present can occur, or that the CEO cannot monopolize board deliberations
- ▶ Establish and observe protocols for conducting meetings, including procedural rules and behavior expectations
- ▶ Develop procedures for each director to add matters to the agenda or discussion period
- ▶ Encourage directors, particularly new directors, to get to know one another so that they will be able to discuss board matters more easily

frustration and anger. Anger boils over into arguments, which, in turn, grow into disputes. The irony is that, with solid organization and planning, these disputes could have been avoided entirely.

Part of board meeting organization must include a clear protocol as to how meetings will be conducted and the discussion will occur. The prerequisite for such a discussion protocol is that every director must have an opportunity to participate in discussions and debates.

Some boards will establish their own protocols, laying out the chairman's role, procedures for calling on those who wish to speak, debate protocols (rebuttal and counter-rebuttal), and clear rules about how a director will be asked to end their remarks if he/she does not abide by the board's rules.

*Robert's Rules of Order* is one of the most commonly used meeting protocols. Published for the first time in 1876, Henry Martyn Robert drafted these rules to assist an assembly in accomplishing the work for which it was designed.

For boards that wish to avoid developing their own rules for discussion, *Robert's* is one solution. Yet the decision-making process under these rules tends to be focused on the majority's take on things and does not factor in the instability created by unhappy minorities. To prevent frustrations and, consequently, disputes from building, boards are increasingly considering more consensus-based processes to decision-making. In this case, voting would be a last resort for decisions.

Good board organizational processes do more than create an environment for discussion. They also permit the board, first, to receive information easily and regularly, and, second, to establish an orderly, comprehensive system for overseeing and monitoring management's activities.

At a minimum, good board organization should include creating routines for information flow both to and within the board, preparing materials in advance of meetings, and, in terms of logistics, providing an orderly environment in which the board can conduct its business.

Disruption of routines serves as a red flag to boards that something may be amiss, or that some event has occurred, which has prevented management from fulfilling its responsibility to inform the board.

Dealing with a crisis, or making a major corporate decision that has far-reaching consequences for a company, is prone to opposition from certain quarters and invariably results in a split board. The effectiveness of board processes is typically challenged in these situations. Therefore, a board must learn from its past practices in dealing with a split board, and improve its processes.

### Ensuring the Proper Flow of Information

Directors have a fiduciary duty to make decisions after considering of all material information that is reasonably available. When the board lacks appropriate and timely information, its decision-making abilities can become compromised, which, in turn, may lead to arguments and disputes.

## QUOTE

### Boardroom Communication

*"If information is not presented crisply, directors can't stay focused, and decision-making suffers.*

- ▶ *The chair should signal when everyone gets the point.*
- ▶ *Board members should keep remarks concise.*
- ▶ *Directors and officers should be candid.*
- ▶ *Directors should respond within 24 hours to communication from each other or the CEO.*
- ▶ *The CEO should distribute a brief monthly summary of key events in the company and the marketplace."*

#### STUART R. LEVINE

CHAIRMAN AND CEO, STUART LEVINE & ASSOCIATES  
LEAD DIRECTOR, GENTIVA HEALTH SERVICES

SOURCE: Stuart R. Levine. "Wanted: Real Communication II" Directorship, April/May 2007.



## FOCUS

### Ten Basic Principles of *Robert's Rules of Order*

*Robert's Rules of Order* is used by parliaments, boards, and many other decision-making bodies to establish a procedure for discussing and making decisions.

- ▶ All members have equal rights, privileges, and obligations; rules must be administered impartially
- ▶ The minority has rights which must be protected
- ▶ Full and free discussion of all motions, reports, and other items of business is a right of all members
- ▶ In doing business, the simplest and most direct procedure should be used
- ▶ Logical precedence governs introduction and disposition of motions
- ▶ Only one question can be considered at a time
- ▶ Members may not make a motion or speak in debate until they have risen and been recognized by the chair and thus have obtained the floor
- ▶ No one may speak more than twice on the same question on the same day without permission of the assembly. No member may speak a second time on the same question if anyone who has not spoken on that question wishes to do so
- ▶ Members must not attack or question the motives of other members. Customarily, all remarks are addressed to the presiding officer
- ▶ In voting, members have the right to know at all times what motion is before the assembly and what affirmative and negative votes mean

SOURCE: California State University, Chico. Available at: <http://www.csuchico.edu/sac/studentOrganizations/parliamentaryProcedures.shtml>.



## FOCUS

### Breaking *Robert's Rules*

In the book *Breaking Robert's Rules*, authors Lawrence Susskind and Jeffrey Cruikshank explain that deciding on matters is not as simple as voting. They offer the following five steps to improve decision-making so that agreements can be reached and implemented more effectively. These steps could usefully be considered by boards developing their organizational processes:

- ▶ **Convening:** Agreeing to a particular decision-making process.
- ▶ **Assigning roles and responsibilities:** Clarifying who is in charge. Specifying ground rules. Defining the role of the facilitator/chairman.
- ▶ **Facilitating group problem solving:** Generating mutually advantageous proposals and confronting disagreement in a respectful way. Ensuring that a range of solutions (including the ones no one thought of) are considered to address the concern of all participants/members.
- ▶ **Reaching agreement:** Coming as close as possible to meeting the most important interests of everyone concerned and documenting how and why an agreement was reached.
- ▶ **Holding people to their commitments:** Having participants/members do what they are supposed to/agreed to do. Keeping participants/members in touch with each other so that unexpected problems can be addressed together.

SOURCE: Lawrence Susskind and Jeffrey Cruikshank. *Breaking Robert's Rules*. Oxford University Press: New York, 2006.

The right information flow to the board provides relevant facts, identifies issues, and promotes discussion and the exchange of ideas. The lack of comprehensive information may result in disputes.

But what does “comprehensive” information mean? Again, the board’s informational needs are different than those of management. Informing the board requires:

- Understanding the board’s role and then providing the information needed to perform that role adequately
- Compiling, organizing, and distributing information to the board in a timely fashion, particularly in sufficient time before meetings to ensure that board members are well-prepared
- Providing information that is distilled and focused on the most salient points and issues, and avoiding the minutiae

Part of management’s job is to keep the board informed about both the company and the business and, second, to provide background information for every action

item on the agenda before every board or committee meeting. The board and management must agree on what information is necessary, how the information is to be packaged, and what the timetable for receipt will be.

Typically, boards need two kinds of information:

- **Ongoing information.** This type of information contributes to the board’s oversight and monitoring of the company and its business. It also provides proper flow of information, the context for specific proposals that the board may consider. (*See the Practice Box “Establishing the Proper Flow of Information.”*)

Each board will tailor its information packages to suit its needs and communicate its needs to management.

- **Specific information for proposals and actions.** This information helps directors to understand and evaluate proposals for board action so that they can make knowledgeable decisions.

Well-constructed information systems for boards create a healthy bond between board and management. They



## PRACTICE

### Establishing the Proper Flow of Information

For information flows to work best, boards and management should:

- ▶ Agree on certain performance indicators that give management and the board a snapshot into how the business is doing and the outlook for the short, medium, and long terms
- ▶ Complete an Emergency Risk Management analysis after agreeing on which indicators should be used
- ▶ Determine frequency of reports with performance and risk indicators for board dissemination and their publication format
- ▶ Determine other informational materials (e.g., press releases or certain regulatory filings) that may be desirable for the board to receive regularly
- ▶ Choose a format that permits directors to have an “executive summary” of issues and significant facts, with indications in the executive summary as to where greater explanatory detail is provided
- ▶ Agree upon and adhere to a schedule for transmission of all information reports, with this schedule permitting sufficient time for directors to read, review, and consider information before board meetings

establish the basic facts around which discussion and debate can be formed. Relevant, credible information helps the board understand and focus on key issues. It increases board efficiency and creates the basis for shared focus on the company's long-range strategies.

### Allowing for Discussion, Debate, and Deliberation

Boards often deal with complicated facts and situations. They work by collecting information, and then debating that information before making decisions in the best interests of the company and its shareholders. Constructive inquiry, discussion, debate, and decision-making, however, do not automatically happen; they require a conscious effort.

The duty to make informed decisions is part of each director's fiduciary duty of care. Surfacing information typically refers to discovering facts that have a bearing on the decision to be made. For example, a decision to invest \$10 million in such capital assets as machinery would typically require an understanding of management's reasons for the capital asset, how the asset

would be employed, and financial information so that the board can understand the economic implications of their decision.

Facts by themselves, however, are only useful when they are incorporated into analysis. Analyses, in turn, combine different perspectives and ideas to understand and evaluate a situation. For example, when ideas are exchanged, the decision to proceed with the \$10-million capital investment can involve such "ideas" as strategies, sustainability, and impacts on constituencies (e.g., employees). Ultimately, corporate directors' jobs involve applying their best judgment to matters involving the company. Ideas, coupled with facts, and analysis shape judgments.

Deliberation and debate are integral processes for stimulating the flow of ideas, analyzing information, and formulating judgment needed to make a decision. Deliberation and debate are valuable processes for a board; they deserve taking steps to encourage them. Mediation techniques — such as promoting discussion, encouraging the exchange of ideas, and bringing



## GLOSSARY

### From Discovery to Dispute

Discussion, debate, and disagreement are constructive activities for a board. Yet, if these disagreements harden into disputes, they will inevitably interfere with the board's work and affect strategic decision-making.

**Discovery** tends to emerge in conversation and discourse. Directors discover different ideas and perspectives for looking at the same problem. Discovery also involves learning about the ramifications of particular decisions or courses of action. Boards have a fiduciary duty to be informed before making decisions; the discovery process aids directors in performing that duty.

**Debate** occurs after discovery. Debate is a healthy activity for boards, resulting from directors bringing different viewpoints to board deliberations. Debate is a defining characteristic of those boards in which directors think and act independently.

**Disagreement** occurs when, following discussion and debate, opinions are formed, and some parties are less inclined to reach the same conclusions as others.

**Dispute** occurs when disagreement has hardened. No consensus exists, and no resolution emerges. If not resolved, the dispute can devolve into serious rifts within the board, causing a paralysis. If the board cannot be clear in its directives to management, the company's direction may suffer and the business may suffer.

appropriate information to bear on an issue — become very helpful in encouraging the exchange and discussion of views that nourish directors’ decision-making.

Similarly, the free flow of ideas depends as much on active listening to different views as it does in expressing them. Some impediments to being receptive to new ideas or to others spring from surprisingly mundane circumstances. Reasons that people do not listen well, or focus on what others are saying, include:

- Inattention
- Failure to be prepared for meetings by ignoring information delivered in advance
- Distractions because of other concerns
- Language barriers
- Logistical issues, such as poor acoustics, meeting table sightlines, or uncomfortable meeting facilities
- Health issues, such as hearing loss, effects of medication, or other sensory impairments
- Discomfort and crankiness resulting from hunger, lack of caffeine, or other amenities that impact physical well-being and comfort

Many of these problems may seem basic or obvious. Some might even seem trivial. Can it be that something such as a cup of coffee or an afternoon snack — certainly not things one associates with business leaders — can make a difference in the quality of debate and discussion? The answer is yes. All of the things listed above can affect the quality of discussion by interfering with the ability to focus, concentrate, listen, and speak clearly. When the environment is comfortable and the tone encourages creative problem-solving, individuals will ask probing questions, challenge assumptions, and make suggestions that contribute to innovation and informed decision making.

Sometimes impediments to discussion involve structural and organizational issues. For example, when meetings



## PRACTICE

### Promoting Discussion, Debate, and Deliberation

The following practices can help promote discussion, debate, and deliberation in the boardroom:

- ▶ Establish director standards that require maximum possible attendance at board and committee meetings
- ▶ Create a board (and board committee) calendar that establishes in advance meeting dates, times, and places, and that schedules for management presentations, and board discussion of topics that all agree must be considered periodically
- ▶ Ensure that each director can have matters put on the agenda for board and committee meetings
- ▶ Avoid defined times for discussion periods so that discussions aren’t arbitrarily cut short
- ▶ Include executive sessions with non-management directors as part of every board and committee meeting
- ▶ Use executive sessions as fora for discussion of any matters that a director may wish to raise
- ▶ Establish clear protocols for discussion sessions that ensure that all directors have an opportunity to participate
- ▶ Include dissenting members’ views in board meeting minutes to show that all positions have been heard and that the board values open discussions
- ▶ Ensure that the tone of discussion sessions remains civil and collegial
- ▶ Elect as board or committee chairmen those individuals who are skilled at leading meetings and encouraging discussion

have a defined beginning and ending time, debate may be cut short so that the meeting can end on time. Applying “best practices” for board organization helps guarantee times and venues for board discussion and deliberations.

Consulting with directors in preparation for meetings will ensure that they are more willing to engage in open debate and listen to each other’s perspectives.

Other impediments to debate and discussion can exist even with excellent board organization. Even though they may be successful, prominent, and distinguished people,

board directors are subject to the same human frailties and foibles as other people. Often, the impediments to expressing ideas may be personal inhibitions, such as:

- Discomfort in appearing to be the sole objector
- Concerns about the appearance of being non-collegial, or of not being a team player
- Discomfort in challenging the CEO or another dominant personality on the board
- Avoiding issues that have emotional sensitivity



## PRACTICE

### Improving Communications among Directors

#### *Through Informal Settings*

- ▶ Ensure that opportunities exist for directors to know one another in comfortable surroundings.
- ▶ Arrange a dinner for all directors before each board meeting.
- ▶ Consider assigning places for each director to sit at dinners, and change the seating arrangement to ensure that each director has an opportunity to sit next to — and therefore to talk with — each director over a year.
- ▶ Schedule a board retreat at a location outside the company’s offices, perhaps in a resort or other setting that encourages relaxed conversation.
- ▶ Make sure that the retreat includes such opportunities as lunches, dinners, and cocktail hours to permit informal conversation.
- ▶ The non-executive chairman, or if the chairman is a member of management, the lead director, should meet over a meal at least once annually with each director individually to hear the director’s views about the company and board and to allow issues about which there is tension or irritation to surface.
- ▶ The CEO should also meet over a meal at least once annually with each director to hear thoughts and ideas that the director has about the company, management, and the CEO’s performance.

#### *Through Formal Settings*

- ▶ Directors and management should determine information flow about the company, (its businesses, performance, and risk), and materials for board action.
- ▶ Each board and committee meeting should include an executive session among non-management directors to raise any issues of concern or interest.
- ▶ The non-executive chairman or lead director should communicate privately to the CEO the results of any executive sessions or meetings at which the CEO was not present.

- Fear of appearing ignorant or uninformed
- Peer pressure
- “Groupthink,” a phenomenon in which people focus more on conforming their views to what they believe is the group’s consensus view rather than promoting debate on the problems or issues that must be confronted

A director, who for any reason feels inhibited about expressing himself or herself, will become frustrated and his or her input into the decision process may be lost. Frustration easily festers and becomes anger, creating dissonance among directors. Unresolved dissonance can easily lead to dysfunction.

### Improving Communications

One major cause of dispute is a failure to communicate effectively. Boards should take affirmative steps to improve communications among directors and between the board and the CEO. Some of these steps are basic. They involve making the effort to put people in contact with one another and provide an atmosphere that encourages open discussion.

The communications process is vital. It serves the purposes of raising issues, promoting discussion, and both identifying and focusing on long-term interests. Good communications form a basis for building trust. People who trust one another are more apt to work collaboratively and flexibly, both of which are also ADR techniques.

Some people communicate well in a group; others require private settings and one-on-one conversation. Some communications occur in formal settings, while other communications occur in casual, social, or quasi-social situations.



TO REVIEW IMPLICATIONS OF EMAIL COMMUNICATIONS FOR NEGOTIATION, SEE VOLUME 2 ANNEX 3.

### Applying Dispute Resolution Techniques

Recognizing that disagreement is inevitable, boards must understand how to incorporate dispute resolution

techniques adroitly into their structure, doing so in a manner that facilitates constructive operation and does not impede the board’s work.



FOR A REVIEW OF BASIC ALTERNATIVE DISPUTE RESOLUTION PROCESSES, SEE VOLUME 1 MODULE 3.

Formal ADR processes cannot be directly applied in the boardroom. These processes would disrupt the board’s ongoing work and run a significant risk of positions hardening, with potential embarrassment and lingering resentments as a legacy. Yet techniques borrowed from mediation and constructive negotiation can provide management tools that can reduce the risk that disagreements will evolve into disputes.



### FOCUS

#### Dispute Resolution Techniques for the Boardroom

The dispute resolution techniques that best lend themselves to a board’s culture and the environment in which directors meet, deliberate, debate, and take action include the following:

- ▶ Identifying interests, not positions
- ▶ Uncovering factual information relevant to the problem
- ▶ Surfacing a dispute’s emotional issues that have not necessarily been brought into the open
- ▶ Using procedures that encourage collaboration and emphasize flexibility
- ▶ Promoting discussion and encouraging the free flow of ideas
- ▶ Facilitating the parties’ construction of their own solutions to the problem, rather than having solutions imposed on them
- ▶ Using a third-party, either someone on the board or a neutral outsider, when appropriate, to facilitate and broker the communications process and facilitate a resolution



## PRACTICE

### Techniques for Defusing Disputes in Boardrooms

Practical dispute resolution communications techniques — borrowed from processes such as mediation and constructive negotiation — can help boards prevent disputes and resolve disagreements. To build trust, cooperation, and consensus, directors should practice the following:

- ▶ **Listen actively** — Listen closely as people communicate, and demonstrate your genuine interest by asking questions, summarizing key points, and linking relevant ideas and experiences
- ▶ **Use open questions** — Ask questions that require more than “Yes” or “No” answers. Open-ended questions encourage speakers to reveal their concerns and interests. Such questions usually begin with words like: Who..? Why...? What...? How...? When...? Where...?
- ▶ **Clarify reasons** — Encourage cooperation by clarifying shared goals and confirming objectives. Do this early in meeting discussions
- ▶ **Be aware of body language** — Show your interest and desire to communicate through friendly, open, and attentive facial expressions and posture. Notice others’ body language
- ▶ **Speak on behalf of yourself** — Use “I” statements, so that listeners understand that you are not making universal statements but only expressing your opinions, sharing personal observations, and offering alternatives. Others may have different experiences, perceptions, and ideas. Phrases that demonstrate respect for differences include: “I noticed...”, “I suggest...”, or “From my experience...”
- ▶ **Focus on constructive ideas** — Contribute and encourage constructive alternatives. Recognize others’ positive ideas through constructive feedback, and explain why their proposals are useful. If more helpful contributions are needed, be specific in your requests. Ask for practical suggestions to improve specific situations
- ▶ **Stay calm** — Stay calm as you work professionally and diplomatically to defuse tension. At times, others will discount the value of your ideas, no matter how carefully you phrase your thoughts. People become defensive for many reasons, including circumstances beyond your control. In such cases, acknowledge and respect different views. You have offered your perspective based upon your experiences. Offer to meet at another time, when emotions have cooled, to continue the discussion
- ▶ **Avoid misunderstanding** — Paraphrase other board members’ statements to ensure proper understanding of their position. Allow them to acknowledge that your summary of their remarks is correct
- ▶ **Allow others to “save face”** — Help others “save face” by reformulating their statements in less confrontational terms to unlock disputes. “Saving face” is especially important in some cultures, but generally speaking, no one likes to be publicly embarrassed — especially in the boardroom. To “save face,” directors may take a defensive position although they actually don’t oppose a decision

Not all of these techniques are necessarily suited to or employed in resolving disagreements or disputes.

Dispute resolution techniques borrowed from negotiation and mediation can help create the desired collegial environment — to encourage discussion, debate, and the free flow of ideas — but they can also help develop an orderly process for decision-making and consensus formation on specific issues with which the board has to contend. This, in turn, improves the board’s all-around performance.

### Stepping Out of the Boardroom

Even with a good board culture and effective board processes, disagreement sometimes gives rise to disputes, and consensus remains at best elusive. When it becomes clear that disagreement will harden into a dispute, or when a dispute materializes, the board may decide to take steps openly to build consensus and resolve the disagreement immediately.



FOR A REVIEW OF TYPICAL DISPUTES THAT MAY ARISE IN THE BOARDROOM, SEE VOLUME 1 MODULE 1.

The processes to handle disagreement or dispute that may work best for the board are board executive sessions, board assessment or evaluation meetings, and board retreats. These provide excellent platforms for identifying interests, surfacing issues, promoting discussion, and facilitating collaborative decision-making. Even though these processes *de facto* can be assimilated into ADR processes, they are palatable to directors because they are perceived as normal, constructive board activities that facilitate the ongoing business of the board. In many companies, these processes have become staple practice and thus fit neatly into the board calendar of activities. Although the board’s annual calendar should indeed include each of these processes, they should nevertheless provide sufficient flexibility, so that the matters to be discussed or investigated are not necessarily rigidly controlled in advance:

- **Executive Sessions.** An executive session is a meeting (or part of a meeting) of the board without the presence of senior executives or other staff members.<sup>2</sup>

Certain regulatory restrictions may apply on when and how executive sessions can be set up. Despite a certain awkwardness and even resistance that may occur when senior executives, including the CEO, are asked to leave the room, the following are discussions that can typically be held solely among directors:

- Annual meeting with the auditor
- Evaluation of the executive director, and establishing the executive director’s salary
- Conflicts between two board members or serious criticism of one board member by another
- Investigation into concerns about the executive director, or report from a management consultant
- Review remuneration policies

Some organizations establish a type of “semi-executive session” during which the executive director is present, but no other corporate staff members. Such sessions may include discussions related to:

- Lawsuits, complaints, or grievances
- Individual senior executives
- Evaluation of the executive director with the executive director

An effective way to avoid the feeling that “an executive session means bad news” is for board chairmen to routinely put executive sessions on every agenda, or on four agendas per year. That way, the board can meet privately without having to raise tension simply by calling an executive session.

The meeting’s minutes should indicate that the board met in executive session, and report on the discussion topic, although the specifics may be confidential and appear only in a set of confidential-to-the-board minutes. Furthermore, a director attending the executive session should be designated to communicate to the CEO the results of the executive session.

- Board Assessments.** There is no magic formula for a board (and board committee) assessment, but the objective is to elicit from each board member her or his candid views about how the board operates and its effectiveness as a group. Assessments are not evaluation scorecards or grading sheets. Instead, they are a means of raising underlying issues and testing whether the board is in concert on key matters or whether directors have different perceptions and views of these important issues. They can identify areas in which the members of the board agree, and those where disagreements or misunderstandings are prominent. Typically, the assessment involves a written survey or confidential interviews of each board member. The key to a successful survey is to create an environment in which respondents will be candid. To create this environment, respondents must trust that they will never be identified by name to anyone else on the board or in management.

Some boards view board assessments as yet another exercise imposed by the stock exchange or other regulatory agency. If viewed as a necessary evil, assessments will not serve their purpose. A constructive board assessment should help the board evaluate and improve its effectiveness.

The potential pitfall in using a survey is that the questions asked may not address the issues the directors are concerned about and the questions may be worded in ways that suggest answers. Therefore, in addition to careful construction of the questionnaire, the survey must provide ample opportunity for directors to identify matters not included in the formal questions, and to amplify answers on questions.



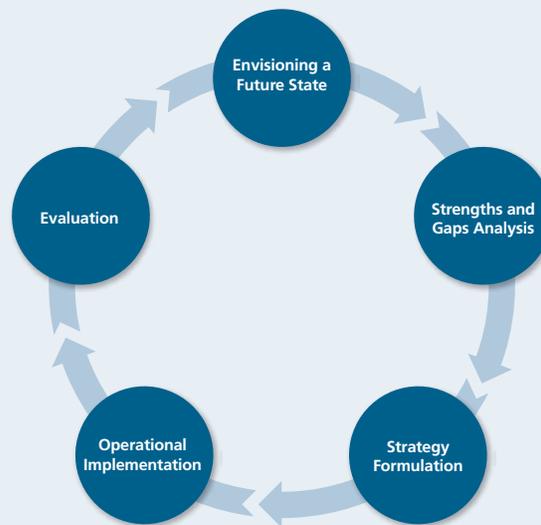
TO REVIEW SAMPLE BOARD ASSESSMENT TOOLS AND QUESTIONNAIRES, SEE VOLUME 2 ANNEX 4-6.

Dealing with individual behaviors can be difficult for many board members. People are often uncomfortable complaining about their peers. No one wants to embarrass a colleague by seeming to speak ill of him or her in front of the rest of the group. When interviews are used, respondents must, therefore,

be assured that their responses cannot be attributed back to them and that they will not be personally embarrassed by what anyone else in the group may say about them. Interviews should involve a protocol for issues that should, at a minimum, be addressed. However, respondents must also have the opportunity to raise or expound upon any issues they choose.

Whether a survey or the interview technique is used, for it to be effective, it must be followed by both a report to the full board and a forum to discuss issues raised and resolve disputed matters that have been identified. The written report must be true to the promise that no remark or issue can be attributed to its source. Similarly, a good practice is that, if something is revealed that could be personally embarrassing, only the person who is the object of such a comment should be shown the comment.

### PROBLEM SOLVING AND STRATEGIC PLANNING RETREATS



Retreats provide regular venues for problem solving and strategic planning. The board's strategic planning process typically includes five phases.

SOURCE: Adapted from Global Corporate Governance Forum, 2008. Corporate Governance Board Leadership Training Resources" Part 3 Module 1. Strategic Leadership." IFC: Washington, D.C.. 2008.

Board assessments are not self-executing. They are one-half of a process seeking to build consensus and resolve disputes. Once the assessment surfaces and identifies issues of concern, the retreat becomes a venue for group discussion of the assessment results and formulation of action plans by which disagreement and disputes can be resolved.

- **Board retreats.** This session's purpose is to focus on matters such as strategy in a setting that does not have the time pressures or other distractions involved in regular board meetings and their typically lengthy agendas. Generally, participants identify common concerns early in the process. With a clear focus on the corporate vision and mission, they analyze options, prioritize interests, and formulate strategies. The outcomes include agreements on future priorities and increased focus within the board.

Some boards prefer to have the chairman, a trusted member of management, or a service provider, such as the board's law firm, conduct the assessment. The problem with these approaches, of course, is that the facilitator's preferences are known to members of the board, discouraging innovation and candor.

To help make board assessments and retreats more effective, the board can decide to call on an external expert or facilitator. This neutral or impartial third-party provides objectivity to the process, giving all participants assurances that the proceedings are not skewed against one position or another. If one or two strong personalities, for example, are allowed to dominate on the board, a good facilitator may ensure that dissenting opinions are at least fully heard during assessments and retreats.

Skillfully handled, the facilitator can identify, with the full group's affirmation, issues in dispute and issues that have been resolved. This process permits a collaborative resolution to matters in dispute. The debate and discussion are public. As points are resolved, the facilitator can openly ask the group for its affirmation, with a written record memorializing the consensus derived. ■

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## Endnotes

1 Mannix, E. and M. A. Neale (2005). "What Differences Make a Difference?" *Psychological Science in the Public Interest* 6(2).

2 Definition adapted from Board Café, "Should the Board Hold Executive Sessions." Compass Point Non Profit Services: 2009. Available at: <http://www.compasspoint.org/boardcafe/details.php?id=88>.

# MODULE 2

## HOW TO MAINSTREAM CORPORATE GOVERNANCE DISPUTE RESOLUTION?

### REVIEWING THE CORPORATE GOVERNANCE DISPUTE RESOLUTION ENVIRONMENT

Corporate governance disputes can be resolved more quickly through ADR at less cost than by using traditional court litigation. It may take several years before a complaint is placed on a court register, or “docket,” and even more time before the case is considered and resolved. Courts may lack expertise in corporate governance or be overwhelmed with their

caseloads. Given this environment, ADR approaches are far more efficient opportunities for settling corporate governance issues. Disputants assume greater ownership over how the dispute is considered and settled since they actively drive the process; this contributes to the efficacy and efficiency of ADR. Arbitration and mediation outcomes can be a “win” for both sides. Disputants may stand a greater chance of continuing their business relations with one another after the ADR process is completed because the conflict’s intensity tends to be less adversarial than that in court cases.



#### EXAMPLE

##### Corporate Governance Dispute Resolution Through Arbitration Russia: Yukos

Shareholders in Yukos, the bankrupt Russian oil company, demanded in February 2010 \$100 billion in compensation, the largest legal claim ever. To handle the case, the investors chose a private panel of three arbitrators at The Hague. Their use underscores the rise worldwide in using ADR approaches to resolve commercial disputes.

“Arbitration is going to get even more important,” said Philip Croall at the UK law firm Freshfields Bruckhaus Deringer. “The reasons for this are essentially practical and pragmatic: while not being as procedurally formal and complex a process as court-based litigation, it offers the best — and in many cases only — means of effectively and reliably resolving these cases.”

#### COMMENT

Cross-border disputants are turning to arbitration for complex cases that involve multiple jurisdictions and national laws.

SOURCE: Michael Peel and Jane Croft, “Case Closed.” Financial Times, April 15, 2010. Available at: <http://www.ft.com>. This abstract from the Financial Times was produced by the toolkit authors.

An assessment by the World Bank’s 2010 *Doing Business* in Colombia, Mexico, and Brazil found: “Arbitration is robust in each of the three countries. Indeed, it not only provides a superior alternative to the poorly rated court systems, but it may provide superior alternatives to courts in general, even in the more advanced economies, for reasons of expertise and availability of the decision-maker, and privacy in private commercial matters.”<sup>1</sup> The assessment continues to state that “strong signs for Colombian dispute resolution in terms of investor protection, corporate governance, and bankruptcy procedures should not be discounted because of the weak local court system for enforcing contracts.”<sup>2</sup>

Courts, regulators, and stock exchanges are exploring, implementing, and refining ADR procedures and rules requiring disputants to consider arbitration or mediation before initiating court proceedings.

As a result, ADR processes are becoming more common and more formal, with the outcomes more predictable. The business case is strengthening as the scope of ADR processes extends beyond commercial disputes to include matters involving shareholders.



TO REVIEW THE BENEFITS OF ALTERNATIVE DISPUTE RESOLUTION PROCESSES AND TECHNIQUES, SEE VOLUME 1 MODULE 3.

As a result, corporate governance ADR expertise is growing in tandem with the rise in demand as more organizations provide an increasingly diverse range of ADR services.



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

Yet, to mainstream the use of more effective out-of-court dispute resolution for corporate governance disputes, the appropriate legal, regulatory, and policy frameworks must be adopted and operating to provide

all stakeholders with the requisite level of incentives, understanding, and comfort to both adopt corporate governance dispute resolution policies and seek third-party ADR expertise when appropriate.

Implementing a comprehensive corporate governance ADR framework may be cumbersome and involve:

- The legislator enacting laws facilitating the use of ADR processes — especially mediation
- The judiciary supporting the use of ADR — especially through court-annexed mediation



## FOCUS

### Success Factors in Implementing an Effective ADR Framework

**Existing laws and regulations:** Creating a legal environment for resolving commercial disputes. Does the country comply with international standards and protocols?

**Practice of dispute resolution in civil cases:** Functioning of (commercial) courts and other legal institutions and professional associations (e.g., bailiffs, attorneys); number of procedures needed for contract enforcement; time needed for enforcement; court fees and legal fees; access to justice; geographical access to the courts; corruption; other strengths and weaknesses; etc.

**Culture of dispute resolution:** Litigiousness; social acceptance of the settlement; rate of settlement within and outside the courts; trust in the judiciary; perceived and real corruption; approach to legal and judicial reform; economic and social background; legal and cultural background; etc.

**ADR experience:** Existence of traditional or modern alternative methods; successful and unsuccessful attempts at introducing ADR; public awareness of ADR and particularly mediation; former ADR trainings; the pool of trained and trainable mediators; etc.

**Perceived need:** Broad-based support for introducing mediation and identifying the areas where this process would be particularly helpful. When do the parties give up on court proceedings and why? What disputes are perceived appropriate for mediation? Is the country obliged/pressured to modify its system (by international organizations, neighboring countries, etc.)?

**Key stakeholders and political support:** Key groups and individuals holding stakes in ADR and their declared and potential support for the project. These may include: the judiciary, ministry of justice, small and medium enterprises (SMEs), bar associations, and business organizations. What are their strengths? Weaknesses? Successes? Key opponents? Areas requiring capacity-building?

**NGOs and international organizations interested or involved in ADR:** Past, present, and future projects with an ADR component. Areas of common interests, possible financial contributions or projects involving economies of scale (e.g., mediation trainings).

**Sustainable financing:** Available sources; restrictions and goals of donors; the project's financial needs; etc. The project's duration is not likely to be shorter than three years.

*SOURCE: Lukasz Rozdeiczner and Alejandro Alvarez de la Campa, Alternative Dispute Resolution Manual: Implementing Commercial Mediation. Washington, D.C.: IFC, December 2006. Available at: [http://rru.worldbank.org/Documents/Toolkits/adradr\\_fulltoolkit.pdf](http://rru.worldbank.org/Documents/Toolkits/adradr_fulltoolkit.pdf).*

- Regulatory bodies fostering and implementing corporate governance dispute resolution through regulations and listing rules
- Policy-makers and corporate governance institutions advocating effective corporate governance dispute resolution through best practice codes, guidelines, and awareness-raising events and workshops

Some countries have taken a multi-pronged approach in developing a comprehensive corporate governance ADR framework. Brazil, for example, is working on multiple levels to use ADR to address corporate governance disputes.

To assess the existing corporate governance dispute resolution environment, consider the specific problems



## EXAMPLE

### Corporate Governance Dispute Resolution Frameworks Brazil: A Comprehensive Multi-Level Approach

- ▶ **Arbitration Law.** Arbitration was institutionalized in 1996 (law number 9.307 of September 23, 1996). This arbitration law is based on:
  - The 1958 New York Convention on the Recognition and Execution of Foreign Arbitral Awards (ratified in 2001)
  - The 1976 Inter-American Convention on International Commercial Arbitration (ratified in 1985)
  - The 1985 UNICTRAL “standard law” on commercial arbitration
- ▶ **Market Arbitration Panel.** On July 27, 2001, the Sao Paulo Stock Exchange (BM&FBOVESPA) instituted the Market Arbitration Panel, aiming to offer an appropriate forum for the resolution of listing and corporate governance disputes that may arise in the two, upper-listing segments Novo Mercado and Level 2 of corporate governance.
- ▶ **Mandatory Adhesion to the Market Arbitration Panel Rules.** Companies listed on the Novo Mercado and Level 2 corporate governance segment, as well as their controlling shareholders and directors, are required to adhere to the Market Arbitration Panel Rules.
- ▶ **Mediation Law.** There is a Mediation Bill (PLC 4827/1998, dated 12/07/2006) pending congressional approval (as of November 2010). The bill’s intent is to unclog the Brazilian judicial system, renowned for being bureaucratic, costly, and slow. The new law would require mediation to be compulsory in most cases. There will be a 180-day period for the parties to reach an agreement. If agreement is not reached, normal legal and court processes will follow. Prior to this law, a corporate governance matter may come to trial in Brazil any time between a few months or several years.
- ▶ **Corporate Governance Code.** The Brazilian Code of Best Practices issued by the Brazilian Institute of Corporate Governance (IBGC) has introduced a provision on arbitration and mediation in its fourth updated version published in 2010.
- ▶ **Corporate Governance Dispute Resolution Training.** IBGC has introduced in 2010 a module on corporate governance dispute resolution in its standard corporate governance training curriculum for directors.

#### COMMENT

Brazil’s framework demonstrates the comprehensive approach needed to incorporate national ADR policies and statutes into international codes while developing capacity through a corporate governance institute, IBGC, to have competent professionals for third-party roles in ADR forums.

with the resolution of corporate governance disputes within the country and the ADR-enabling environment. This review should evaluate:

- International standards and agreements
- Existing laws, regulations, and court proceedings
- Current practices for corporate governance dispute resolution
- Culture of dispute resolution
- ADR experiences and precedents
- Perceived need to introduce mediation
- Key stakeholders and political support
- NGOs and international organizations interested in ADR

In reviewing a country's existing corporate governance dispute resolution environment, some key questions should be considered, particularly those identifying the possible "drivers" for introducing and utilizing ADR:

### **Considering Dispute Resolution Traditions**

A country's exposure to traditional mediation may impact the development of an effective corporate governance dispute resolution environment. In several developing countries, ADR has deep roots as a means by which societies resolved conflicts long before centralized governments established formal judicial systems. Disputes were typically settled by elders as conciliators/mediators internally within the local community. In this environment, an informal style of mediation was accepted.

In Indonesia, for example, third-party conciliators were used throughout the archipelago to resolve disputes. In Ghana, village chiefs used mediation to handle commercial and social disputes. India embraced *lok adalat*, village-level people's courts, in the 1980s. Trained mediators sought to resolve common problems that, in an earlier period, may have gone to the *panchayat*, a council of village or caste elders. In Latin America, there has been



## QUOTE

### **Traditional Mediation and Arbitration in Ghana**

*"Most Ghanaians know that 'mediation' as a portal for dispute resolution is our creation. And so is arbitration.*

*"These ideas of ADR are not new to our traditional judicial system. They are central, not alternative to our own juridical paradigm. It would seem, therefore, that the full recognition and acceptance of some of the finer aspects of our own home-grown principles of dispute resolution, should make attempts to expand the reach of those concepts to modern court structures an easy process."*

**DENNIS ADJEI-BRENYAH**  
COLUMNIST, GHANA WEB

SOURCE: Dennis Adjei-Brenyah, "Some Reflections on Ghana's Search for Alternative Dispute Resolution." March 2, 2010. Available at: <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=177621>.



## QUOTE

### **ADR Practices in Indonesia**

*"As it happens in other Asian countries, Indonesia has been practicing ADR in traditional communities for a long time. In the traditional community Pasemah, South Sumatera for example, customary dispute resolution uses Jurai Tue or Sungut Jurai as the third-party conciliator. In West Sumatera, that person is known as Kerapatan Adat Nagari or Kerapatan Ninik Mamak and functions to settle disputes based on their customary rules."*

**MAS ACHMAD SANTOSA**  
VICE SECRETARY GENERAL AND MEMBER INDONESIA NATIONAL STANDING COMMITTEE OF ASEAN LAW ASSOCIATION  
SENIOR LECTURER OF ADR  
UNIVERSITY OF INDONESIA LAW FACULTY

SOURCE: "Development of Alternative Dispute Resolution (ADR) in Indonesia." December 1, 2003. Available at: [http://www.aseanlawassociation.org/docs/iw4\\_indo.pdf](http://www.aseanlawassociation.org/docs/iw4_indo.pdf).

a revival of interest in the *juece de paz*, a legal officer with the power to conciliate or mediate small claims.<sup>3</sup>

Having an embedded culture of resolving disputes through mediation, a well-established ADR framework or a longstanding tradition of resorting to ADR processes such as Switzerland — these are without doubt important assets for effectively introducing out-of-court corporate governance dispute resolution practices. (See “Switzerland: Effective Mediation and Arbitration.”)

### **Assessing the Dispute Resolution Legal Environment**

Approaches in introducing or strengthening a corporate governance dispute resolution framework may vary from country to country. In general, surveys show that utilization of ADR approaches is growing more rapidly in common law (e.g., the United States, Australia, Canada, and England) than in civil law countries (e.g., France, Germany, Austria, Denmark, Belgium, Germany, Switzerland, and Yugoslavia).<sup>4</sup>



## EXAMPLE

### **ADR Traditions**

#### **Switzerland: Mediation-Arbitration Practice**

Mediation success rates typically exceed 70 percent and may exceed 80 percent. Arbitration clauses increasingly require mediation to be conducted as a preliminary step before arbitration. “Med-arb” clauses (which provide that the mediation process will give way to arbitration should the parties fail to agree) are increasingly common and will probably become generalized.

Switzerland’s tradition of med-arb cases is reflected in its statutes, court decisions, and practice. The established nature of the practice is demonstrated by the relatively large number of arbitrators and counsel who have dual skills as a result of the tradition of conciliation or mediation in court cases. One example that has influenced Swiss lawyers is the highly successful report hearing, in which the Zurich Commercial Court expresses a preliminary view after a first set of submissions so that the parties, guided by this view, can decide to settle the case out of court (if the view appears sound) or to pursue a court trial (if it appears likely that the court’s preliminary view might be changed by the submission of more information).

As to statute, the draft federal Act on Civil Procedure contains provisions on mediation. This federal act will replace cantonal codes of civil procedure, which already provide mandatory conciliation proceedings before a case may be brought to court. The main Swiss chambers of commerce have issued a common set of mediation rules, which can be combined with their arbitration rules.<sup>1</sup>

### **COMMENT**

Some countries have a long-standing tradition of resorting to ADR reflected in their laws, court decisions, and practices. This environment can facilitate the use of ADR processes for corporate governance disputes. On the question of enforcing med-arb clauses, there seems to be little doubt that the court will enforce med-arb clauses strictly as agreed. Generally, when faced with agreed pre-arbitration time limits or conditions, the course has enforced them strictly according to the parties’ intent. Therefore, the onus is on those drafting arbitration clauses: if they wish to include mandatory mediation before arbitration, they should state this clearly. Providing a time limit for mediation before arbitration begins is helpful in this regard.

<sup>1</sup> The mediation and arbitration rules can be found at: <https://www.sccam.org/sm/en/index.php> and <http://www.swissarbitration.ch/> respectively.

SOURCE: Pierre-Yves Tschanz, “Arbitration: Switzerland. A Suitable Forum for Med-Arb.” December 13, 2007. *International Law Office*.



## GLOSSARY

### Common Law

Body of law based on custom and general principles and that, embodied in case law, serves as precedent or is applied to situations not covered by statute. Under the common law system, when a court decides and reports its decision concerning a particular case, the case becomes part of the body of law and can be used in later cases involving similar matters. This use of precedents is known as *stare decisis*.

### Civil Law

Body of law developed from Roman law. The basis of law in civil law jurisdictions is statute, not custom; civil law is thus to be distinguished from common law. In civil law, judges apply principles embodied in statutes, or law codes, rather than turning to case precedent.

SOURCE: Britannica Concise Encyclopedia



## FOCUS

### International Agreements on ADR and Arbitration

AGREEMENT	ACTION	ACTION
<b>New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards)</b>	Enables enforcement of arbitral awards in any member-state	142 nations
<b>Washington Convention (International Centre for Settlement of Investment Disputes)</b>	Enables enforcement of arbitral awards in any member-state  Provides a forum for conciliation and arbitration of disputes  Establishes rules of procedure	155 nations
<b>United Nations Commission on International Trade Law</b>	Establishes rules of procedure  Produced a model law on international commercial arbitration for countries seeking to adopt internationally understood arbitration laws	60 nations

SOURCE: Modified from chart in U.S. Department of Commerce, *Alternative Dispute Resolution Services in West Africa: A Guide for Investors*. Washington, D.C.: Government Printing Office, 2003. Available at: <http://www.fdi.net/documents/WorldBank/databases/benin/westafricaguide7212003.pdf>. Texts of agreements available at: [www.uncitral.org](http://www.uncitral.org).

In many circumstances under a common law system, up to 90 percent of all civil litigation cases are settled before they go to trial. This would indicate that settlement by mediation is not a step too far away from the existing system and, as such, is easier to establish. For example, Canada undertook a two-year trial to assess the value of compulsory ADR. That study concluded that stakeholders reaped considerable benefits in using ADR and that “courts need not fear adverse effects of compulsory mediation, [that] it may benefit the stakeholder in the litigation system.”<sup>5</sup>

Some countries have mandatory mediation for disputants. Canada, Australia, and Singapore are three examples. The rationale is that “citizens of all countries will accept regulations if they believe as a result of that regulation, ‘Society’ will be better off.”<sup>6</sup> However, any ADR legislation must fit with the broader business environment. Australia introduced ADR into the New South Wales courts systems under legislation that had a three-year “sunset” clause, which provided an opportunity to determine ADR’s worth.



## EXAMPLE

### International Standards for Mediation European Union: Mediation Directive 2008/52/EC

The key components are:

- ▶ The Directive obliges Member-States to **encourage** the **training of mediators** and the development of, and adherence to, **voluntary codes of conduct** and other **effective quality control mechanisms** concerning the provision of mediation services.
- ▶ The Directive gives every Judge in the Community, at any stage of the proceedings, the right to suggest that the parties attend an information meeting on mediation and, if the Judge deems it appropriate, to **invite the parties to have recourse to mediation**.
- ▶ The Directive enables parties to give **an agreement concluded following mediation**, a status similar to that of a Court judgment by rendering it **enforceable**. This can be achieved, for example, by way of judicial approval or notarial certification, thereby allowing such agreements to be enforceable in the Member-States under existing Community rules.
- ▶ The Directive ensures that mediation takes place in an atmosphere of **confidentiality** and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails. This provision is essential to give parties confidence in, and to encourage them to make use of, mediation. To this end, the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties.
- ▶ The provision of the Directive on **periods of limitation and prescription** will ensure that parties that have recourse to mediation will not be prevented from going to court as a result of the time spent on mediation. The Directive thus preserves the parties’ access to justice should mediation not succeed.

#### COMMENT

This Directive is an important step forward in mainstreaming ADR approaches — especially mediation — in the European Union. Policymakers will need to do more than just ensure the directive is properly translated into national laws and regulations; they must also raise awareness about ADR’s benefits for effective implementation.

SOURCE: European Union Directive on Mediation. April 23, 2008. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEM/OI08/263&format=HTML&aged=0&language=EN&guiLanguage=en>.

In either event, it can be very useful to have a clear perception of ways in which ADR may be introduced. In some jurisdictions, the introduction of ADR requires legislation; in others, a best practice code or exchange listing rules may be the introductory vehicles.

### ***Looking up International ADR Standards and Agreements***

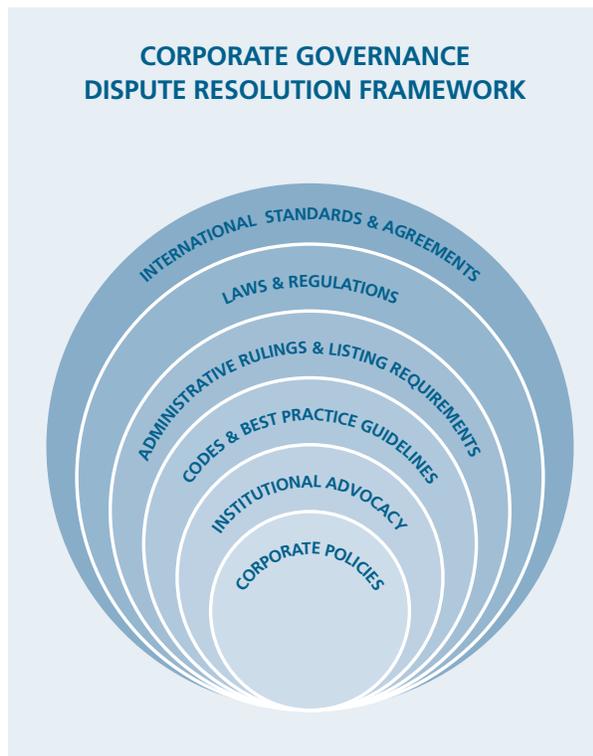
The enabling environment for the use and practice of ADR and the enforcement of arbitral awards is structured, in part, by international agreements, which include both multilateral and bilateral accords focused primarily on commercial disputes. These set out rules, establish forums, and may bind signatories to modify their national laws and regulations to align with the agreement's provisions. (See "International Agreements on ADR and Arbitration.")

In Europe, the use of ADR has been embraced in 2008 through a directive<sup>7</sup> designed to encourage the use of voluntary mediation as a cost-effective and more expeditious alternative to civil litigation in cross-border civil or commercial disputes. Modeled on different elements of several national legal structures, this directive applies to all EU member-states, with the intention of making it unnecessary for a corporation with a presence or a dispute in more than one EU country to try to harmonize the different procedures itself. ■

## STRENGTHENING THE CORPORATE GOVERNANCE DISPUTE RESOLUTION FRAMEWORK

The corporate governance dispute resolution framework can be strengthened at various levels, including ADR and corporate governance laws, regulations, and best practice standards. In a well-designed framework, each element supports and aligns with the others.

Legislation provides the underlying basis for constructive interpretations of ADR results when courts review cases. Administrative rulemaking fleshes out the invariably ambiguous terms, which later may be added to a new statute. Directives by supranational bodies provide some impetus for national legislative action, but also help to ensure consistency in ADR implementation. Best practice codes apply the expertise of directors, business managers, lawyers, mediators, negotiators, arbitrators, and other professionals who may be less influential in enacting statutes. Guidelines and policy institutions can provide examples and assurances to “early adopters.” They also may provide the essential structure and “home” for services to support ADR.



For effective development and implementation of ADR in corporate governance, every element of the policy framework is needed.

### Introducing Laws and Regulations

In introducing a change to current practices, all parties will have to be convinced of the arguments and incentives for supporting ADR. This is especially difficult if ADR has not been mandated by law and relies on voluntary adoption. Laws are not essential or technically required to practice ADR and mediation, but the benefits of introducing a mediation law are two-fold:

- Provides users and practitioners with a greater level of comfort in resorting to mediation
- Establishes a commonly agreed definition of mediation and other ADR processes

ADR terms and processes suffer some ambiguity as a result of the huge variety of circumstances under which they can be practiced. Specific statutory language defining precisely what is meant by a term such as “mediation” and its particular purpose and jurisdiction can later avoid confusion.



TO REVIEW REFERENCES TO SAMPLE MEDIATION LAWS FROM AROUND THE WORLD, SEE VOLUME 2 ANNEX 7.

If ADR or mediation is already in a country’s laws and is used for commercial dispute resolution, then ADR mechanisms for corporate governance may be introduced as part of this broader legal framework.

For example, Australia’s government mandates compulsory ADR for some laws. By 1998, ADR, principally mediation, was provided through 28 different acts or regulations, including the Corporations Act (2001) and the Financial Services Act (2001). Laws require disclosures of internal and external dispute resolution procedures. In July 2000, the courts were granted the power to refer matters to mediation, notwithstanding the lack of a party’s consent. Such compulsory provisions exist alongside mechanisms for voluntary mediation.

ADR and mediation mechanisms may be slowly embedded into a legal system. For example, in Delaware, in the 2008 Civil Rule 1, “every civil case ...[is] subject to compulsory ADR.” The format may be agreed on by the parties; if there is no agreement, then mediation is the default format. In February 2010, the Delaware Court of Chancery itself was given the power to arbitrate in certain business disputes. Additionally, in May 2010, voluntary ADR was recognized in law and enforceable in court.

Law can have a larger or smaller role in comparison to other processes, and a statutory scheme can be enacted specifically for corporate governance, or for broader regulatory purposes.

One advantage of specific legislation for corporate governance ADR is that it is easier to obtain majority support for legislation and craft the appropriate statutory language. Several countries have adopted, or appear near to implementing, legislation covering a wide variety of cases, including a greater focus on corporate disputes. For example, Italy has adopted a statute on mediation of intra-company disputes, clearly an aspect of corporate governance.

By contrast, a broader approach may exhaust legislators’ attention, a rare commodity, and require too many reforms that cannot be adequately accommodated by the legislature’s calendar when other issues are competing for attention. Achieving a “critical mass” is necessary for major corporate law reform, and attaching corporate governance ADR terms to a “must pass” bill, such as

appropriations legislation, may be the best opportunity to advance ADR through statutes.

Statutes addressing different aspects of corporate governance are many and vary widely. Relatively few statutes, however, give explicit consideration to thorough dispute resolution systems.

The drafting, adoption, and implementation of laws is a lengthy, cumbersome process. Specific provisions related to the effective resolution of corporate governance disputes are therefore best established through regulations and administrative rule-making and then promoted through best practice codes and guidelines.

### Introducing Administrative Rulemaking and Listing Requirements

Since administrative rulemaking differs from one country to another, there are few general principles. As part of an overall framework for introducing corporate governance dispute resolution, however, rulemaking and listing requirements cannot be ignored.

After legislation governing one or another kind of corporate governance issue is passed, the administrative agency provides detailed interpretations of often vague statutory language. These “directions” help to ensure statutory compliance.

Securities regulators and stock exchanges established their own systems and services to support more effective dispute resolution by:

- Mandating that brokers and issuers use the exchange’s arbitration process to resolve their disputes
- Requiring listed companies to adopt dispute resolution clauses in their bylaws as part of good corporate governance practices

This trend may be the most important development in mainstreaming effective corporate governance dispute resolution; already, it has spawned many variations.

For example, Jordan’s Amman Stock (ASE) issued in September 2004 a Dispute Resolution Directive to



## GLOSSARY

### Administrative Rulemaking

In administrative law, rulemaking refers to the process that executive and independent agencies use to create, or promulgate, regulations. In general, legislatures first set broad policy mandates by passing statutes, and then agencies create more detailed regulations through rulemaking.



## EXAMPLE

### Sample Corporate Dispute Resolution Clause Mandated by Listing Rules Brazil: Natura Cosméticos S.A.

The Novo Mercado, the specialist index of well-governed companies of the BM&FBOVESPA Stock Exchange, requires companies to include an arbitration clause in their by-laws. The arbitration by-laws of Natura Cosméticos S.A. provide:

**Article 40** - The Company, its shareholders, directors, and the members of the Board of Auditors are compelled to solve, by arbitration, all and any dispute or disagreement that may appear between them, related or deriving, in special, of application, validity, effectiveness, interpretation, violation, and its effects, of the dispositions at the Law No. 6.404/76, at the Company's By-law, at the rules edited by the National Monetary Advice, by the Brazilian Central Bank and by the Securities Commission, as well at other rules applicable to the working of the capital market in general, beyond of those constant of the New Market Listing Regulations, of the New Market Participation Agreement and the rules of arbitration of the Market Chamber of Arbitration.

#### COMMENT

Companies such as Natura Cosméticos S.A. who have introduced arbitration clauses in their by-laws have actually never or rarely needed to resort to arbitration. One main reason: preparing for disputes helps prevent disputes.

*SOURCE: Natura Cosméticos SA, By-laws 2006, Brazil, 2006. Accessed at [www.natura.et/investor](http://www.natura.et/investor).*



## EXAMPLE

### Stock Exchange Arbitration Pakistan: Stock Exchange Arbitration Committees

Pakistan's Islamabad, Karachi, and Lahore stock exchanges are self-regulatory organizations (SROs) empowered to take cognizance of complaints against their respective members under the approved rules and regulations. Each exchange has its own arbitration committee, which looks into the grievances/disputes between investors and members. Arbitration committees, after perusing the documents and providing the parties an opportunity of being heard, pass an arbitration award in accordance with the exchange's relevant rules and regulations.

#### For further details:

*Karachi Stock Exchange (Guarantee) Limited: Regulation 29. Available at: [www.kse.net.pk](http://www.kse.net.pk).*

*Lahore Stock Exchange (Guarantee) Limited: Regulation 5.01. Available at: [www.lahorestock.com](http://www.lahorestock.com).*

*Islamabad Stock Exchange: Regulation 29. Available at: [www.ise.com.pk](http://www.ise.com.pk).*

#### COMMENT

Most stock exchanges have now introduced dispute resolution mechanisms to provide issuers and investors with an effective forum should a dispute arise. This is key to supporting investor confidence.

impose ADR on its members and participants. ASE reported that it handled 20 cases through June 2010 with a value exceeding JD1.3 million. In Pakistan, the Karachi, Islamabad, and Lahore stock exchanges all have arbitration procedures for disputes involving their members.

By having their own specific rules, stock exchange arbitration panels can provide a more expeditious,

affordable, and informal alternative for resolving disputes, with the added advantage of using arbitrators specialized in the matters brought up for discussion.

Creating an ADR system within securities regulations or stock exchange rules establishes “instant legitimacy” for corporate governance ADR and helps divert caseloads from more contentious and expensive methods of a trial through the judicial system.



## EXAMPLE

### Securities Arbitration Rules

#### India: Securities and Exchange Board of India

MUMBAI, August 10, 2010: The Securities and Exchange Board of India (SEBI) issued guidelines aimed at strengthening the arbitration process at stock exchanges and expediting the resolution of disputes. The arbitration committees help settle disputes between a client and broker, or disputes among brokers.

Under the new rules, the stock exchanges have to maintain a panel of arbitrators and the number of arbitrators in that panel will have to be commensurate with the number of disputes so that each person handles a limited number of cases. This will help in speedy disposal of cases.

While considering a candidate for the arbitration panel, the stock exchanges will have to take into account his/her qualification in the area of law, finance, accounts, economics, management, or administration, and his experience in financial services, including the securities market.

The person included in the panel will have to give a declaration that he has neither been involved in any act of fraud nor been found guilty of any economic offence. He will also have to disclose the names of dependants associated with the securities market as a member, or sub-broker. Besides, the bourses will also be required to appraise the performance of the arbitrators and reconstitute the panel based on the appraisal once a year.

The arbitration reference will have to be concluded by way of issue of an arbitration award within four months from the date of arbitrator appointment. However, at the discretion of the managing director or executive director of a stock exchange for sufficient cause, they could extend the time for issue of the arbitration award by two months on a case-to-case basis.

If the aggrieved party is unhappy with the arbitration award, he can appeal it to the stock exchange's appellate panel of arbitrators. However, the appeal must be filed within one month from the date of receipt of the arbitration award.

### COMMENT

In several countries, securities regulators are reviewing stock exchange dispute resolution systems and seeking to strengthen the processes. This includes ensuring timely resolution of disputes and being able to draw on a pool of expert arbitrators.

*SOURCE: "SEBI Issues Arbitration Guidelines for Stock Exchanges." Economic Times, August 13, 2010. Available at: <http://economictimes.indiatimes.com/markets/stocks/market-news/Sebi-issues-arbitration-guidelines-for-stock-exchanges/articleshow/6302391.cms>. Securities and Exchange Board of India guidelines are available at: <http://www.sebi.gov.in/circulars/2010/cirmrd24.pdf>.*



TO REVIEW SAMPLE STOCK EXCHANGE  
ARBITRATION TRENDS AND RULES, SEE VOLUME 2,  
ANNEXES 8, 9, 10, AND 11.

### Introducing ADR through Codes of Best Practice

A code of best practice has significant advantages. First, a responsible industry group can develop such a code itself, taking full advantage of industry expertise while remaining relatively free of political interference. Codes are flexible, giving disputants room to maneuver while allowing for amendments to reflect changing circumstances. Moreover, codes make sense, too, since corporate governance issues may not lend themselves to statutory prescriptions.

A specific code can be drawn for dispute resolution, or clauses related to dispute resolution can be inserted into existing corporate governance codes. Not mandatory, and

often not issued by a governmental entity, a code can be supranational or local. Codes should embody the views of what constitutes good ADR practices, communicating fairness, accountability, transparency, and responsibility.

As with laws, codes can help provide a commonly agreed definition of ADR processes. Yet, to ensure that codes remain relevant and adequate, they must be reviewed and updated regularly. This will ensure that, if at a later stage an ADR law is passed, there are no contradictions in the terms and perceptions that could lead to confusion and uncertainty. Review mechanisms with deadlines for periodic assessments are typically included in a code's provisions.

If a code is carefully developed with the conspicuous participation of all relevant stakeholders, the resulting document can become highly persuasive to government officials, legislators, regulators, and targeted users.

Corporate governance codes have been adopted worldwide. Policymakers "increasingly argue that codes embodying these principles not only protect investors against fraud and poor stewardship but also may help reduce the corporate sector's cost of capital."<sup>8</sup> Codes address all types of companies, or focus on listed companies, banks, state-owned enterprises or family firms.

Addressing effective dispute resolution in corporate governance best practice codes can:

- Raise awareness of the risks and negative consequences of corporate governance disputes
- Broaden awareness of the benefits of ADR techniques and processes to prevent and resolve corporate governance disputes
- Provide guidance on effective dispute resolution
- Foster corporate adoption of dispute resolution policies
- Encourage dispute resolution training for directors
- Influence legislation and rulemaking



### EXAMPLE

#### Introducing Corporate Governance Dispute Resolution

##### Brazil: Corporate Governance Code of Best Practice

The Brazilian Code of Best Practices (4th version) issued by IBGC includes the following clause:

#### "1.8 Mediation and arbitration

In cases successful negotiation cannot be reached between the parties involved, the conflicts between shareholders and administrators and between administrators and the organization should be resolved, preferably through mediation, and, failing that, through arbitration. It is recommended that such mechanisms be included in the Articles of Incorporation/Organization, or a commitment be made and signed between the parties."

#### COMMENT

Corporate Governance Codes are excellent tools to help mainstream corporate governance dispute resolution practices and foster subsequent training for directors.

SOURCE: IBGC, Code of Best Practices of Corporate Governance, Fourth Edition. São Paulo: IBGC, 2010. Available at: <http://www.ibgc.org.br/CodeBestPractices.aspx>.

The South African and Brazilian corporate governance codes champion corporate governance dispute resolution best practices through provisions in their codes. King III, the revised South African code issued in 2009, states unequivocally that ADR is an essential component of good corporate governance and a tool to manage and preserve stakeholder relationships.



TO VIEW THE SOUTH AFRICAN CORPORATE GOVERNANCE CODE (KING III) PROVISIONS RELATED TO DISPUTE RESOLUTION, SEE VOLUME 2 ANNEX 12.

While being based on the “apply and explain” approach, King III’s provisions have been strengthened in legal terms by the requirement that companies listed on the Johannesburg Stock Exchange must apply the code. Principle 8.6 states: “The board should ensure disputes are resolved as effectively, efficiently, and expeditiously as possible.” In paragraphs 39 and 40, the code states: “The board should adopt formal dispute resolution processes for internal and external disputes.”<sup>9</sup> ■

## SUPPORTING THE IMPLEMENTATION OF CORPORATE GOVERNANCE DISPUTE RESOLUTION

ADR is a relatively new concept in many countries, and its application to corporate governance disputes is even more novel. Providing for a comprehensive framework is essential but not sufficient to mainstream the use of effective corporate governance dispute resolution practices.

Even if a comprehensive framework is in place, several obstacles prevent the systematic use of ADR processes — especially mediation — to effectively resolve corporate governance disputes. These include:

- **Knowledge.** ADR and its benefits among corporate lawyers, boards, and shareholders are not well understood.
- **Awareness.** Most mediation examples that people cite involve either family or neighborhood small claims cases. Corporate governance disputes are not known to be mediated.
- **Trust.** Like other ADR processes, mediation is not considered as serious and formal as court procedures; hence, the enforceability agreements are questioned.
- **Strength.** Cultural issues related to “saving face,” such as using a collaborative method, are often understood as “giving in.”
- **Data.** Difficulty in providing results impairs the ability of businesses to objectively evaluate which method to use.
- **Experience.** Mediators and established mediation services may not have handled corporate governance dispute.

There are many alternatives to introducing ADR for corporate governance disputes. In Europe, the rise in ADR usage followed the growth in commercial mediation, but many in the business community remain unaware of the benefits.

In the United Kingdom, the Jackson review of litigation costs found that mediation’s benefits are neither highly appreciated nor widely realized.<sup>10</sup> This review stated: “The most important form of ADR is mediation. The reason for the emphasis on mediation is twofold. First, properly conducted mediation enables many (but certainly not all) civil disputes to be resolved at less cost and greater satisfaction to the parties than litigation. Secondly, many disputing parties are not aware of the full benefits to be gained from mediation and may, therefore, dismiss this option too readily.”<sup>11</sup> The Lord Justice recommended preparing an authoritative handbook and launching education initiatives to maximize the use of ADR.

The support and engagement of policymakers, legislators, regulators, the judiciary, and professional institutions are essential in implementing and mainstreaming ADR for corporate governance dispute resolution.

Many strategies can be used to reach and convince corporate governance stakeholders about ADR’s value. In the short term, these may include:

- Focus groups targeted at key stakeholders
- Expert advice for interested parties
- Conferences and other events to facilitate dialogue, networking, and coalition-building
- Publications, surveys, and promotional material
- Direct communications with key parties (including meetings with legislators, regulators, industry groups, lawyers, board directors, and shareholder groups)
- Heightened media/public relations campaign, including articles in print and broadcast media and the use of relevant social media

This involves the identification of key leaders, stakeholders, and possible partners who see the need and, acting as a catalyst, are prepared to support the introduction of corporate governance dispute resolution. Such “change agents” are typically willing to speak out and work towards widespread use of ADR in corporate

governance disputes. The most important attributes they can bring to achieving change are passion, conviction, and confidence in others.<sup>12</sup> “True change agents are willing to take bold action — and accept the consequences,” write former GE Chairman and CEO Jack Welch and management consultant Suzy Welch. “They know that leading change can be messy, with few clear-cut answers about how events will play out. They understand that pushback accompanies any change initiative and that they will take the brunt of it if things go wrong.... Finally, change agents have something about them that galvanizes teams and turns people.”<sup>13</sup>

Identifying individual leaders or “ADR champions” is particularly important. They are likely to have a combination of these attributes:

- Political connections
- Ability to facilitate change
- Good understanding of the judiciary, ADR, and its benefits
- Support and acceptance as a community and business leaders

Such leadership was evident in South Africa where the use of ADR was supported and promoted by the IoDSA and such prominent leaders in corporate governance as Professor Mervyn E. King through the seminal and influential King reports.

### Raising Awareness

Until ADR approaches for corporate governance dispute resolution are fully embedded in local practices, there is an ongoing role for communicating the business case for ADR. Doing so will enable boards, shareholders, and other stakeholders to draw on the existing ADR process and apply effective dispute resolution techniques.



TO REVIEW HOW PROCESSES AND TECHNIQUES CAN HELP RESOLVE CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 1 MODULE 3.

Well-designed communications strategies contribute to the successful implementation of a good corporate governance dispute resolution framework. These strategies should focus on:

- Increasing knowledge of ADR and communicating these approaches’ benefits to corporate governance disputes
- Strengthening commitment for ADR from policymakers, judges, lawyers, and business leaders who have successfully addressed governance disputes through ADR approaches.



## FOCUS

### Supporting the Introduction of Corporate Governance Dispute Resolution Alternatives

The following stakeholders are key to raising awareness and building support for the use of corporate governance ADR:

- ▶ Ministry of Justice
- ▶ Judges and commercial courts
- ▶ Regulators and stock exchanges
- ▶ Directors’ associations
- ▶ Chambers of commerce and other business organizations
- ▶ Institutional investors and shareholder associations
- ▶ Bar associations and other lawyers
- ▶ NGOs and international organizations
- ▶ Arbitrators and mediators (or arbitration and mediation’ association)

*SOURCE: Adapted from Lukasz Rozdeiczner and Alejandro Alvarez de la Campa, Alternative Dispute Resolution Manual: Implementing Commercial Mediation. Washington, DC: IFC, 2006. Available at: <http://rru.worldbank.org/Toolkits/AlternativeDisputeResolution/>.*



## Why Devote Attention to Alternative Methods of Corporate Governance Dispute Resolution?

KEY PARTIES INTERESTED IN ADR	INTEREST IN AND MESSAGES RELATING TO ADR
<b>Legislators and Regulators</b>	Legislators and regulators seek to establish and maintain well-functioning markets by providing the proper legal framework to ensure the proper application of the law, the protection of investors' rights, and the timely resolution of issues. ADR will provide better access to justice and improve the business climate.
<b>Court Systems and Judges</b>	Court resolution of disputes is limited to the court's jurisdiction. Court systems may be slow and cumbersome, or overwhelmed by their case workload. Courts do not always have sufficient staff and expertise to deal with complex corporate governance disputes. Judges may benefit from a reduction in workload and the courts' improved efficiency.
<b>Lawyers and Counsel</b>	They will be concerned about ADR's impact on their practices. Lawyers can become peacemakers with appropriate training and guide their clients towards more effective dispute resolution. This is an opportunity to create a new market niche.
<b>Directors Associations</b>	Establishing professional standards and guiding directors in the exercise of their duties. Effective dispute resolution is part of good corporate governance practices.
<b>Mediation Centers</b>	Corporate governance disputes undermine confidence in the company, potentially harming its competitive position and share price. Such disputes may threaten the company's ability to attract capital by deterring investors, impairing the capacity to grow and prosper. Normal legal recourse is costly, slow, not easily accessible for smaller shareholders, and limited to a legal result in one particular legal jurisdiction. With appropriate training in the field of corporate governance, mediators can extend their practice to corporate governance dispute resolution.
<b>Media</b>	The media are particularly important, since they inform a broad community of government leaders, heads of businesses, stakeholders, and such opinion-makers as university professors. The media can help raise awareness on alternative ways to better resolve corporate governance disputes.

SOURCE: Adapted from Lukasz Rozdeiczer and Alejandro Alvarez de la Campa, Alternative Dispute Resolution Manual: Implementing Commercial Mediation. Washington, D.C.: IFC, December 2006. Available at: [http://rru.worldbank.org/Documents/Toolkits/adrladr\\_fulltoolkit.pdf](http://rru.worldbank.org/Documents/Toolkits/adrladr_fulltoolkit.pdf).

- Showcasing success stories. Success stories are particularly useful in broadening awareness and acceptance of ADR. Typically, interest in ADR arises when a particular dispute takes too long to resolve, goes unresolved, or encounters costly, seemingly insurmountable court-related obstacles. This creates a sense of urgency to “do something” as the costs of the protracted dispute escalate — but what? Those who have identified the need to establish a plan to manage internal and external corporate governance conflicts, or reduce court backlogs, will invariably share their views. To motivate stakeholders, concise, well-prepared, pertinent arguments are needed to demonstrate the business case for ADR.
- Changing cultural perspectives and creating reputation incentives for the use of effective corporate governance dispute resolution. Applying ADR processes and techniques rather than taking cases to court should be perceived as a sign of strength rather than weakness.
- Advertising the availability of corporate governance dispute resolution services to provide training, advice, and other assistance in resolving disputes.

The success of ADR must be demonstrated while ensuring that any systemic defects are identified and rectified. To facilitate this monitoring process, evaluation measures must be developed. Monitoring,



## QUOTE

### Business Reputation Acts as an Incentive for Parties to Honor ADR Outcomes

*“In Argentina, Colombia, and Peru, any firm that fails to arbitrate a dispute after agreeing to do so or refuses to pay an award — quickly becomes known as an unreliable business partner. Thus a firm’s concern about its reputation provides a powerful incentive to participate in alternative dispute resolution and respect the outcome.”*

#### ADR CENTER INDIA BLOG

SOURCE: ADR Center India Blog, “Common Drawbacks.” August 11, 2009 post on the ADR Centre India Blog. Available at: <http://cppradr.blogspot.com/search?updated-max=2009-10-20T17%3A17%3A00%2B05%3A30&max-results=7>.



## EXAMPLE

### Raising Awareness

#### Tonga: Improving Mediation Awareness

In the island nation-state of Tonga, ADR and mediation were little known concepts in 2007. A program led by Chief Justice Anthony Ford — assisted by IFC and LEADR (a non-profit Australian organization that promotes ADR approaches) — helped broaden and deepen knowledge about ADR. “IFC-funded radio broadcasts and talk-back shows on mediation... IFC [also] funded mediator training in Samoa for three Tongans... Since June 2008, “10 civil cases have been referred to mediation, eight of which were settled successfully. Each would have taken three to five years if they had gone to a court hearing.”

#### COMMENT

A court-supported program with external support shows how creative uses of the media and other initiatives effectively build ADR awareness.

SOURCE: K. Stingemore, IFC Works With Tonga, a ‘Doing Business’ Top Performer, to Improve Mediation Awareness. Washington, D.C.: IFC, 2008. Available at: [http://www.ifc.org/lifcext/pacificdf.nsf/AttachmentsByTitle/PQFY08Qtr2/\\$FILE/Pacific+Quarterly\\_Second+Qrt+FY08.pdf](http://www.ifc.org/lifcext/pacificdf.nsf/AttachmentsByTitle/PQFY08Qtr2/$FILE/Pacific+Quarterly_Second+Qrt+FY08.pdf).

evaluation, and a continuous improvement program will help to integrate ADR into the local environment and determine initiatives for continual improvement in ADR usage.

Ongoing data collection and dissemination of the successes of ADR for corporate governance dispute resolution in the local environment is important. Valuable data would include records of corporate governance dispute cases, information on the reduction in court backlogs, the time taken for dispute resolution, the costs, and disputants' satisfaction levels with ADR.

In his seminal book *Leading Change*, Harvard University Professor John Kotter outlines how success in implementing change depends on convincing up to three-quarters of key stakeholders.<sup>14</sup> This takes time and effort and yields only a 30-percent success rate. Successful change tends to follow an eight-step process: establish a sense of urgency; form a powerful guiding coalition; create a vision; communicate that vision; empower others to act on the vision; plan for and create short-term wins; consolidate improvements while building momentum for change; and, institutionalize the new approaches. "Until new behaviors are rooted in social norms and

shared values, they are subject to degradations as soon as the pressure for change is removed," he warns.

McKinsey management consultants Carolyn Aiken and Scott Keller caution that "influence leaders' aren't a panacea for making change happen." In their view, "success depends less on how persuasive a few selected leaders are and more on how receptive the 'society' is to the idea. In practice, it is often unexpected members of the rank and file who feel compelled to step up and make a difference in driving change. That's why we warn against overinvesting in influence leaders..."<sup>15</sup> Equally important to the reform process is stakeholder ownership, a point stressed by Columbia University researcher Shanta Sukhu. The process must reinforce the perception of all participants that "they are heavily involved in the process — from what to change to how to go about it, to how it will be measured — change is not imposed."<sup>16</sup> Early buy-in from stakeholders, coupled with their sense of personal ownership, as Kotter notes, matters the most.



## QUOTE

### Mainstreaming Mediation Practices

*"At first, mediation was viewed with some skepticism — particularly from clients who could not see how it would succeed where traditional negotiations had failed. Now clients appreciate the benefits that a neutral facilitator can bring, although some remain skeptical — but the pressure from the English courts ensures that they engage in ADR in any event."*

**JOSEPH TIRADO**

HEAD OF ARBITRATION AND ADR, NORTON ROSE LLP

SOURCE: Forum 2008 survey on mediating corporate governance disputes.



## FOCUS

### Change Management

Management consultants Emily Lawson and Colin Price suggest four basic conditions that are necessary in changing behavior:

- ▶ **Compelling story:** there's a point behind the change that stakeholders agree with
- ▶ **Role modeling:** CEO and colleagues behave in the new way
- ▶ **Reinforcing mechanisms:** systems, processes, and incentives must align with the new behavior
- ▶ **Capability building:** skill-building is required to make the desired changes

SOURCE: Emily Lawson and Colin Price, "The Psychology of Change Management." McKinsey Quarterly, June 2003. Available at: [mckinseyquarterly.com](http://mckinseyquarterly.com).

In more and more countries, explicit legal policy encourages parties to negotiate or mediate their differences with considerable effect, as the comment (in an adjoining box) from a senior UK lawyer illustrates.

Research has shown that most people learn primarily from examples set by others who are more innovative, but who are also part of the same occupational community and otherwise very similar. Corporate governance dispute resolution service providers — directors associations, chambers of commerce, corporate law firms, and consultants — play a central role in advocating effective out-of-court dispute resolution.

The IoDSA, for example, when recommending to its members the use of mediation to resolve disputes, clearly believes it is a part of its members' and directors' duties. This has the effect of placing the weight of a recognized body behind a strong statement. Companies of all sizes in South Africa are accustomed to receiving policy direction from the IoDSA. This makes the responsibility to consider mediation not merely vague and up to the company, but, instead, a professional responsibility for each director as an individual. By so doing, the IoDSA has raised the profile of mediation and added impetus.



## QUOTE

### Supporting Effective Corporate Governance Dispute Resolution

*"A director has a duty to act in the best interests of the company. Mediation will avoid unnecessary delays, eliminate long periods of uncertainty and reduce costs substantially, which clearly would be in the company's best interests. Should negotiation between disputing parties fail, the IoD believes that every director owes the duty to his company to consider mediation as the next logical step towards dispute resolution."*

**INSTITUTE OF DIRECTORS SOUTHERN AFRICA**

SOURCE: "Director's Duty" specification issued by the IoDSA. Available at: [www.iodsa.co.za/products\\_services.asp?CatID=241](http://www.iodsa.co.za/products_services.asp?CatID=241).

Chambers of commerce may be influential, too, in developing policies by creating an environment where businesses can flourish. Worldwide, they have helped establish ADR or mediation facilitation centers. For example, in Colombia, the Chambers of Commerce of Bogota and Medellin have separately established arbitration and mediation centers. These centers have proven to be successful in providing non-litigation-based dispute resolution services.



TO REVIEW THE ROLE AND SERVICES OF CORPORATE GOVERNANCE DISPUTE RESOLUTION PROVIDERS, SEE VOLUME 2 MODULE 3.

Many corporate governance disputes involve other types of stakeholders in addition to directors. Thus, a parallel focus on finding and working with counterparties such as institutional investors and shareholder associations is equally important.

The long-term generation of support for and trust in ADR requires the development of training and other education programs. These efforts should address such topics as: "What is mediation?" "Why mediate?" "What are mediation's benefits?" "How does ADR relate to a directors' duty to act in the company's best interests?" The development of exemplary case studies focused on corporate governance disputes and dispute resolution processes — their level of success and satisfaction — are particularly relevant to these discussions.



TO REVIEW SAMPLE CORPORATE GOVERNANCE DISPUTE RESOLUTION TRAINING MATERIALS, SEE VOLUME 3 MODULES 2 AND 3.

### Fostering Court-Annexed Mediation

Courts are also encouraging ADR procedures as an integral part of the judicial system. Judges are concerned about the backlog of cases that stretch their resources beyond capacity, undermining the quality of judicial deliberations and leaving all the parties feeling poorly served.

In a wide range of countries, court-annexed mediation has effectively been used for the early resolution of disputes, including in the corporate governance field.

A court mediation program may be either based in the court or involve referral by the court to outside ADR



## EXAMPLE

### Using ADR for Corporate Governance Disputes Uganda: Court-Annexed Mediation

Based on a key study of the impact of ADR in the Horn of Africa and on Justice Geoffrey W. M. Kiryabwire's own observations, Uganda's introduction of ADR and, in particular, mediation for corporate governance disputes has been successful and emulated in several other African nations.

"The 1995 Constitution laid the foundation stone for ADR in Uganda by promoting reconciliation in all matters handled by the judiciary," Kiryabwire writes. "It enjoins judges to speed the trial process and settle disputes on the basis of substance and not technicalities. The 2000 Arbitration and Conciliation Act described new judicial powers of referring cases to mediation.... Shortly after they piloted a mediation scheme whereby all cases filed in the Commercial Court [including corporate governance cases] were referred compulsorily to a Centre for Arbitration and Dispute Resolution (CADER) at no cost to the parties. By the end of 2005, the Commercial Court was disposing 60% more cases than in 2001; the pilot has been deemed such a success that it has been rolled out to the other divisions of the High Court."

Case backlogs were a serious problem, particularly in the Commercial Court. In 2008, there were only four judges available at the Commercial Court. "[I]n 2007, there was an average of 1,742 cases assigned per judge, all of whom work without clerks and other support staff typically encountered in western legal systems, according to Kiryabwire.

"The general tendency in Uganda over the years was to litigate disputes with the view to getting a legally binding decision. In 2003, Uganda began a pilot project at the Commercial Court to test the efficiency of sending some cases to compulsory mediation. The cases were referred to the CADER, which uses newly trained law graduates as mediators. The decisions reached were made legally binding by court orders.

Uganda's steps to court-annexed mediation (in summary) include:

1. Create a set of rules so mediation works within the court system. This was done by amending the Civil Procedure rules in 1998, adding a new rule on "Scheduling Conference and Alternative Dispute Resolution."
2. Create awareness of the new rules and ADR's benefits.
3. Establish a pilot project. International donors funded the two-year project in Uganda. . .
4. Evaluate the project's success and disseminate information about its success/failure.
5. Ensure general training in the area of mediation and the availability of competent mediators.

#### COMMENT

Uganda illustrates the many stakeholders involved in implementing ADR procedures and ensuring success, beginning with a constitutional provision.

*SOURCES:* A. Greco, "ADR and a Smile: Neocolonialism and the West's newest Export in Africa." 2009. Available at: [http://works.bepress.com/cgil/viewcontent.cgi?article=1000&content=anthony\\_greco](http://works.bepress.com/cgil/viewcontent.cgi?article=1000&content=anthony_greco). Justice Geoffrey W. M. Kiryabwire, "Mediation of Corporate Governance Disputes Through Court-Annexed Mediation — A Case Study from Uganda." Available at: [www.ifc.org](http://www.ifc.org). The article outlines the steps by which Uganda introduced court-annexed mediation as part of the legal process.

B. Brainch, "Justice Sector Reform in Sub-Saharan Africa — Commercial ADR." 2006. Available at: [www.disputeresolutionkenya.org/pdf/Commercial%20ADR.pdf](http://www.disputeresolutionkenya.org/pdf/Commercial%20ADR.pdf).

programs run by bar associations, nonprofit groups, other local courts, or private ADR providers. Some courts require litigants to use mediation in what are known as mandatory mediation programs. The mediation session's purpose is unchanged regardless of whether litigants enter the program voluntarily or by court mandate. The court mediator may be a lawyer trained in mediation and compensated by the parties, or serve as a volunteer. Judges, magistrate judges, or court ADR professionals also serve as mediators in some court programs.<sup>17</sup> Court-

annexed mediation may be voluntary or mandatory and may be initiated prior to or during court proceedings.

In Germany, court-annexed ADR was introduced for civil litigation by legislation with the introduction of Section 15a to the German Introductory Code to the Code of Civil Procedure and Section 278 of the German Code of Civil Procedure. Since 2005, Finland has allowed court-annexed mediation through its "Act on Court-Annexed Mediation." Indonesia is yet another



## PRACTICE

### Practical Considerations for Court-Annexed Conciliation

Vichai Ariyanontaka, a judge of the Central Intellectual Property and International Trade Court in Thailand, provides some practical guidance:

- ▶ Conciliation is conducted in a conference room not in the court room. Formalities are dispensed with. Secrecy is enforced. The public and the press are barred from witnessing the conciliation proceedings.
- ▶ Non-disclosure agreement is made. Without prejudice condition is added to facilitate the invention of options for compromise.
- ▶ Although the law allows conciliation without attorney, in practice the conciliator never discourages the presence of an attorney. Attempting to do so is likely to have an adverse effect on the trust of the parties in dispute towards the conciliator. The decision to exclude an attorney should come from one of the parties. The conciliator should say that attorneys are welcome.
- ▶ Caucuses with each of the parties to the exclusion of the other are helpful, sometimes to dilute some of the less-than-reasonable claims or increase some of the more-reasonable offers. Although the law allows for the use of caucuses, it is best to obtain the parties' consent first.
- ▶ An atmosphere of joint effort to solve the problem is perhaps the best environment to create in conciliation. Parties are invited to present options to settle the dispute. Each option caters for the parties' mutual interests. The conciliator must be sensitive to each party's needs and legitimate interests.
- ▶ The conciliator needs to be careful about objectivity and neutrality. Instead of making a statement in the affirmative. Asking a question is more "politically correct" and may achieve the same result.
- ▶ Refreshments, coffee breaks, (good) working lunch or even a few jokes of the day do help the atmosphere in a negotiation. Miracles sometimes happen during these "time-out" periods.
- ▶ It is arguable whether there is wisdom in forcing a litigant to appear in conciliation with the threat of contempt of court. This device is sometimes used in consumer claims where the defendant is a corporation.
- ▶ Under a recent amendment to the Civil Procedure Code, conciliation is compulsory in small claims disputes.

*SOURCE: Vichai Ariyanontaka, "Court-Annexed ADR in Thailand: A New Challenge." This paper was presented at LEADR's 7th International Alternative Dispute Resolution Conference, July 27-29, 2000. Available at: <http://asialaw.tripod.com/articles/adr.htm>.*



## EXAMPLE

### Mediation of Shareholder Disputes Hong Kong: Practice Direction

In 2010, the Chief Justice of Hong Kong issued a Practice Direction for the application of the Hong Kong Companies Ordinance, which sets out the provision for voluntary mediation in shareholder cases. Where the petitions are purely disputes between shareholders, not involving the interest of the general body of creditors of the subject company or affecting the public interest, the court encourages the parties to consider the use of mediation as a possible additional means of resolving their disputes in a cost-effective and more expeditious manner. At any stage of the petition, if a party wishes to attempt mediation, this may be initiated by serving a notice (“Mediation Notice”) on the other party or parties, inviting them to agree to mediation. Under the Practice Direction, where a Mediation Notice has been served, an unreasonable refusal or failure to attempt mediation may expose a party to an adverse costs order. Whether a party has acted unreasonably would be determined having regard to all the circumstances of the particular case.

#### COMMENT

Hong Kong’s highest judge sees the value of mediation for shareholder disputes. When one party serves a notice before the courts seeking mediation, the other parties may be penalized if they provide unreasonable reasons for their refusal.

*SOURCE: Practice Direction 3.3 Voluntary Mediation in Petitions Presented under Sections 168A and 177(1)(f) of the Companies Ordinance, Cap. 32. (January 2010). As cited in: Law Reform Commission (Ireland), Alternative Dispute Resolution: Mediation and Conciliation. November 2010. Available at: [http://www.lawreform.ie/\\_fileupload/Reports/r98ADR.pdf](http://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf).*

example of a country applying court-annexed mediation through the introduction in 2003 of its Supreme Court Ruling No.2/2003 on Court-Annexed Mediation.

Court-annexed mediation has also successfully been introduced in Asian and African countries for early resolution of conflicts.

In India, arbitration and mediation have long been legal options but were seldom used until recently. On November 25, 2009, in a renewed effort to promote ADR centers within the country, the Chief Justice opened the first court-annexed arbitration centre in New Delhi. The Delhi High Court Arbitration Centre (the Centre) is autonomous with representatives of the judiciary, bar, and the government as part of its governing structure. This development follows the establishment of similar mediation centers at the district courts in Delhi in 2005. The mediation centers are reported to have handled close to 23,631 cases as of February 2010 with a success rate of around 72%.<sup>18</sup>

Uganda illustrates the point that there are many ways to introduce ADR mechanisms into an existing legal environment, leading to the conclusion by Justice Kiryabwire that “the experience in Uganda will show that court-annexed mediation can work in the settlement of corporate governance disputes.”<sup>19</sup>

Together with administrative rulemaking, court-annexed mediation is maybe the most effective approach to streamlining the use of ADR processes for the resolution of external corporate governance disputes as they provide for an institutionalized framework and the level of comfort required by shareholders and other parties to such disputes. ■

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## Endnotes

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# MODULE 3

## WHO CAN PROVIDE CORPORATE GOVERNANCE DISPUTE RESOLUTION SERVICES?

Boards should be prepared to prevent and handle both internal and external corporate governance disputes in the most effective way possible with minimum harm to the company and its stakeholders. Whether they are reviewing their dispute resolution policies, seeking dispute resolution training for themselves and senior management, trying to prevent potential disputes before taking an important strategic decision, or effectively addressing a dispute, directors may need to draw on external corporate governance dispute resolution expertise.

### SEEKING THIRD-PARTY DISPUTE RESOLUTION EXPERTISE

Seeking corporate governance dispute resolution expertise can provide the following benefits:

- *Reinforce a board's credibility by demonstrating commitment to fair, expeditious resolution.* By hiring an ADR expert, the board sends a strong signal that it wants to have the appropriate expertise and be

well-informed about approaches used to ensure a fair, expeditious, and enforceable settlement. The board also demonstrates that it is open-minded and flexible in how the dispute should be addressed.

- *Evaluate existing policies, practices, and procedures. Suggest reforms where needed.* An outside adviser can review existing approaches to dispute resolution, compare those against best practice, and suggest revisions. These recommendations will be based on both an independent assessment and the experiences that the ADR expert has had helping others to implement improvements in dispute resolution policies, practices, and procedures. Basing their counsel on “lessons learned,” ADR experts build support among skeptical or ill-informed board directors. Directors may fear these “experimental” initiatives will waste resources and distract them needlessly. They may worry that the disputants will become more resistant to settlement as their frustrations intensify the longer that the dispute remains unresolved. Having directors’ “buy in” for ADR approaches long before a dispute erupts helps to both expedite the ADR process when it is eventually utilized and to promote a mutually fair outcome.



#### QUOTE

##### Timing

*“There is no particular time at which a case can, or should, be referred to ADR. It may occur when settlement negotiations have become deadlocked, or at any stage before or during litigation or arbitration up to and including at trial. The benefits, particularly in terms of costs, are obviously greater the earlier it happens.”*

**HOGAN LOVELLS LLP**  
ALTERNATIVE DISPUTE RESOLUTION

SOURCE: Hogan Lovells LLP. Available at: [http://www.hoganlovells.com/files/Publication/dfe782b0-2cee-4480-8ecf-548b287d0cd6/Presentation/PublicationAttachment/be8b2a76-54fa-48f1-86ca-581b0ba6975a/Alternative\\_Dispute\\_Resolution.pdf](http://www.hoganlovells.com/files/Publication/dfe782b0-2cee-4480-8ecf-548b287d0cd6/Presentation/PublicationAttachment/be8b2a76-54fa-48f1-86ca-581b0ba6975a/Alternative_Dispute_Resolution.pdf).

- *Explain ADR approaches — the strengths and weaknesses.* ADR is not as widely understood by board directors and senior management as are judicial proceedings. Given the widespread use of somewhat comparable approaches in traditional societies, there may be confusion in differentiating modern-day techniques from the long-standing practices of tribal elders, for example. A third party could help answer questions and expedite the learning process for directors and senior managers through targeted training. All parties to the dispute must fully comprehend ADR terms, the processes, enforcement mechanisms, and their rights and responsibilities.

- *Achieving consensus among directors.* Directors may disagree about the utilization of ADR approaches or the terms of a dispute resolution settlement, leaving the board frozen in inaction. A third party can help to find consensus by guiding the directors' discussion, clearing up misunderstandings, sharing cases illustrating how other boards addressed the same issues, or actively working to negotiate an agreement among opposing directors.



TO REVIEW THE BENEFITS OF ALTERNATIVE DISPUTE RESOLUTION PROCESSES AND TECHNIQUES, SEE VOLUME 1 MODULE 3

- *Facilitate dialogue among parties in dispute.* A third-party neutral tends to have an easier time approaching the parties if he or she is perceived immediately, first, to have no bias towards any of the disputants' points of view and, second, to be free of allegiances to the board, the company, or other stakeholders. In the contract, the third party typically attests to being free of conflicts of interest or discloses such conflicts (existing and potential) so that the board can determine whether the individual should be disqualified. The third party's ability to retain confidence is particularly critical in building trust early as a means of, first, gaining the parties' commitment to the ADR process and, second, finding a solution rather than continuing to be mired in an impasse that becomes increasingly hostile. Trust involves adherence to strict confidentiality terms; these must be carefully delineated in the contract signed by the board and the ADR service provider.
- *Define and narrow scope of the dispute.* Disagreements can be resolved more quickly if extraneous concerns and arguments are defused or eliminated early so that the parties can focus on those core issues that fueled the dispute. This phase of discussion between the parties and the ADR expert facilitates settlement of noisome procedural issues, eliminates common misunderstandings, defines expectations, and establishes rapport. Trust-building emerges when mutual progress is achieved by eliminating early, for example, the "clutter" around the "real" issues in dispute. This initial stage is particularly critical because businesses are anxious to settle cases early to

avoid litigation, contain liability, and hold costs to a minimum.

- *Establish an informal or formal process for parties to negotiate a solution or comply with a third-party decision.* The neutral third party could help calibrate the ADR process to the dispute(s) needing resolution. Based on their experiences, ADR service providers can recommend specific procedures matched to a dispute's scale and complexity. In this way, they help boards maximize resources and eliminate inefficiencies.



## QUOTE

### Why Seek Third-Party Dispute Resolution Advice?

"When disagreement rises to the level of a concrete dispute, views can become hardened, so much so that it can become difficult to listen fully to the other points of view being presented, even when they include concessions to one's interests. Psychologists have come to call this phenomenon 'reactive devaluation,' meaning that in conflict situations, we tend to devalue what the other side is saying, even if it is a concession to our preferences. Whether it is consciously or subconsciously, we tend in conflict to view the concessions suspiciously, and keep waiting for 'the other shoe to drop.'

"Many dispute resolution scholars believe one of the reasons mediators can be effective in facilitating conflict management is because they are able to provide a third-party presence that enables disputing parties to get over problems of reactive devaluation. Facilitators in corporate board disputes can provide the same function, serving as a vehicle for the expression of ideas, opinions, and options that may be unacceptable if brought forth directly by a disputing party."

#### RICHARD REUBEN

PROFESSOR, UNIVERSITY OF MISSOURI SCHOOL OF LAW

SOURCE: Richard C. Reuben, *Corporate Governance: A Practical Guide for Dispute Resolution Professionals*. Washington, D.C.: American Bar Association, 2005. Available at: [http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Mediating\\_Corp\\_Gov\\_Disputes\\_ADR\\_CG\\_Guide\\_Reuben/\\$FILE/Corporate+Governance+-+Reuben.pdf](http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Mediating_Corp_Gov_Disputes_ADR_CG_Guide_Reuben/$FILE/Corporate+Governance+-+Reuben.pdf).

- *Monitor and help ensure compliance by parties to settlement terms.* After the settlement, a neutral third party could continue to review compliance with the agreed-upon outcome and address any disputes that may arise in executing the settlement's terms. The dispute may also underscore the need for revisions to a company's ADR policies and procedures, which the ADR service provider also could help oversee.

Since the use of ADR techniques in corporate governance is a new endeavor for boards, senior management, and

stakeholders, among others, directors may be inclined to engage outside advisers, despite their own proficiency and experience, as an additional layer of due diligence.

Before seeking third-party dispute resolution expertise, and preferably before the dispute erupts, the board must determine its actual needs based on the roles it envisages for the external facilitator, advisor or peacemaker. In defining its needs, the board should also reflect on how its decision-making process may need to accommodate outside participants, particularly in terms



## PRACTICE

### Areas to Consider in Determining Whether and When to Seek Third-Party Expertise

**Expertise:** How much knowledge does the board and/or senior management have about the following areas?

- ▶ Nature and potential impact of internal or external corporate governance disputes
- ▶ Settlements of similar disputes by other companies through ADR
- ▶ Relevant laws, regulations, and best practices
- ▶ Techniques used to gather all parties involved in a conflict to define the issues and agree on a resolution process outside the courts
- ▶ Knowledge and understanding of the potential parties involved in the dispute and other stakeholders

**Experience:** Does the board and/or senior management have proven experience in successfully containing, if not resolving, disputes involving corporate governance issues?

**Workload:** Does the board and/or senior management have sufficient time and staff to dedicate to the dispute resolution process? Are there other foreseeable distractions that may arise, which will reduce the time and resources that could otherwise be dedicated to proper dispute resolution prevention and resolution?

**Conflicts of Interest/Trust:** Will the board and/or senior management be seen as sufficiently independent by the disputants to ensure that the process will be fair, objective, and thorough to inspire confidence by the parties that their interests will be respected and well-served? Can an outside adviser provide sufficiently independent and neutral case evaluation? Objectivity can be particularly difficult to maintain when preparing for a high-stakes litigation battle.

**Board's Ability to Work Effectively:** Boards should consider how the inclusion of outside providers of ADR services will affect their ability to make decisions effectively. Policies and procedures governing board decision-making may have to be amended to ensure that outside advisers can become part of the process without compromising their independence. Confidentiality restrictions and access to board documents are among the changes that directors must contemplate to fully integrate outside advisers so that they can work effectively.

**Accountability:** Above all, directors must consider how to ensure that a proper, optimal balance is maintained between authority and accountability for directors and officers with the inclusion of outside advisers.

of delegating authority, building trust, safeguarding the confidentiality of information, and delineating liability and warranty terms and conditions.



TO REVIEW THE FACTORS THAT MAY HELP GUIDE THE SELECTION OF ADR SERVICES, SEE VOLUME 2 ANNEX 13.

Boards must also ensure that outside advisers can operate independently to be objective in their analysis, intervention, and recommendations. In providing special access to boardroom deliberations, boards must be careful not to compromise that independence. This arrangement should be clearly delineated in the contract signed with the ADR expert. The board may want to establish a special committee to oversee the selection, engagement, and negotiation of the terms of reference for the third-party dispute resolution expert.



TO REVIEW THE BASIC TERMS TO BE DISCUSSED BEFORE ENGAGING IN MEDIATION, SEE VOLUME 2 ANNEX 14.

Once the board and senior management have inventoried their specific needs — current and anticipated — they should next seek outside expertise that can satisfy those requirements.

Corporate governance dispute resolution service providers typically play four broad roles: advisor, educator, facilitator, and/or peacemaker. Not all providers offer



## QUOTE

### Seeking Diversity

*“One way of injecting energy into the process is to apply diversity to the appointment of neutrals, arbitrators, or mediators. It forces us to actively look for the right skills, talent, [and], reputation for the particular dispute.”*

#### IN-HOUSE ATTORNEY

INTERNATIONAL FORTUNE 500 COMPANY

SOURCE: Available at: <http://www.negotiationlawblog.com/2010/03/articles/conflict-resolution/negotiating-gender-bias-in-adr-the-commercial-client-speaks/>.

all these roles, and since corporate governance dispute resolution is in its infancy, boards may find limited choices in their jurisdiction. Finding and engaging qualified individuals is not an easy task. Boards should allocate sufficient time to research potential candidates, organize interviews, and make a decision.

Corporate governance dispute resolution services may be offered by:

- Corporate law firms and consultants
- Institutes of directors and corporate governance centers
- ADR providers (e.g., mediation centers, chambers of commerce, and firms)
- Universities and business schools
- Regulators and stock exchanges



TO REVIEW THE ROLE OF REGULATORS AND STOCK EXCHANGES IN HELPING RESOLVE CORPORATE GOVERNANCE DISPUTES, SEE VOLUME 2 MODULE 2.

Each type of provider offers unique strengths but is invariably limited by particular weaknesses. As the board has done in conducting its own “SWOT” (meaning strengths, weaknesses, opportunities, and threats) analysis of its immediate and potential needs, the directors must do the same in evaluating and selecting potential candidates who will guide and support them in effectively addressing and handling corporate governance disputes. Through this analysis, the board may determine that they require a different provider for each need.

Corporate governance issues touch on laws, the application of rules, and human dynamics. Understanding how corporations work and the responsibilities that directors shoulder are crucial criteria in selecting professionals.

A service provider’s expertise in corporate governance matters does not alone automatically qualify it to act as a mediator, facilitator, or corporate governance dispute resolution expert. Conversely, even seasoned mediators are not necessarily trained or equipped to handle corporate governance disputes. In seeking third-party expertise,

special care must be paid to the type of work that the individual, firm, or organization has done specifically in corporate governance dispute resolution. It is crucial to determine whether the expert has the requisite knowledge, experience, skills, and personality traits.



TO REVIEW THE SKILLS REQUIRED FOR EFFECTIVE CORPORATE GOVERNANCE DISPUTE RESOLUTION, SEE VOLUME 3 MODULE 1.

### Corporate Law Firms and Consultants

Boards rely increasingly on independent counsel to help comply with best practices and changing legal and regulatory requirements. When internal or external governance disputes arise, a board's first reflex is often to seek input from its law firm.

#### Law Firms

Law firms have advised boards and board committees on governance issues and represented parties in external corporate governance disputes. They may have staff who perform board assessments for clients, and some boards have retained counsel on a continuing basis. As a result, lawyers, usually senior, who counsel boards, or who sit on boards, have acted without the formalities in the role of a mediator in internal governance disputes.

Lawyers may also serve as mediators and arbitrators, and some law firms have made ADR a specific practice area. In some jurisdictions, lawyers have even an ethical obligation to counsel clients about the multiple ways of resolving problems. Lawyers and their firms need to understand how the purpose, key concepts, and information flows of ADR differ from those of more conventional legal practice. If the firm is global, having offices worldwide may help to pull in expertise from different jurisdictions as needed. Yet, lawyers with the appropriate ADR skills should also have a corporate governance background and experience working with boards, either as an outside counsel or as a director.

Law firms are nevertheless not always the best-suited providers of corporate governance dispute resolution services. They tend to be highly competitive internally, which is a source of their excellence. But the competition may also generate internal conflicts when, for example,



### QUOTE

#### Ongoing Independent Counsel Is More Routine for Boards

*"Some boards now retain counsel to attend all meetings and advise them on an ongoing basis, having concluded that the benefits of independent advice more than outweigh concerns about additional costs and potential inefficiencies. They believe that independent legal advice is unquestionably needed for the numerous ongoing tasks and that, when a crisis erupts, everyone benefits from having a second set of knowledgeable lawyers available immediately to advise the board."*

SOURCE: Francis G. Coleman, "The Case for Independent Counsel." Directorship. February 1, 2008. Available at: <http://www.directorship.com/the-case-for-independent-counsel/>.



### EXAMPLE

#### Dispute Resolution Service Providers United States: Foley Hoag LLP

We begin by investigating and analyzing what really is at stake for our clients and for their opponents, what resources are available to address the underlying issues, and what business resolutions can be tailored to address those interests. We also work to identify the tangible and intangible costs of litigation and non-litigation resolutions, the likely outcomes of each approach, and the possible results.

If our client elects to use ADR processes, we work to position our client to make the most of such proceedings. We assist in developing creative negotiating strategies and draft presentations to educate the neutral facilitator and the opposition's business executives; then we help structure the process. Once the proceeding is underway, we participate actively to achieve a mutually acceptable resolution.

#### COMMENT

This example illustrates the process a law firm would pursue in using ADR approaches.

SOURCE: Foley Hoag LLP. <http://www.foleyhoag.com>.

they have a wide range of clients with opposing interests. Furthermore, outside counsel requires start-up time to mobilize their resources and advance along the learning curve. When seeking a law firm's services, boards should incorporate this preparatory work into the schedule.

### Consultants

Boards may also want to draw on consultants whose practices touch on aspects of corporate governance. They have more flexibility and the costs of their services may be comparatively less than the fees that law firms charge. But not all consultants will have the breadth, expertise, and inclination to mediate or arbitrate corporate governance disputes.

The term "consultants" covers a broad, but often vague range of services that third parties may offer, and the scope of their services varies, often depending on the individuals who work in the firms and their particular

expertise. For that reason, generalizations about consultants can be misleading because a firm may have someone with the specialized qualifications required for corporate governance disputes. Organizational consultants and executive coaches, some of whom may be part of firms offering a broad range of human resource services, have expertise in team-building and strengthening leadership skills. Their work and expertise lies principally with senior management, but not necessarily with the board and the issues that directors, rather than management, face. Specific individuals in these firms may have experience working with boards, but they may not, however, have a sophisticated understanding of corporate governance requirements or familiarity with mediation techniques or arbitration procedures. Similarly, compensation consultants and human resource firms basically provide advice in their areas of expertise. Their expertise is valuable in providing information and recommendations about executive compensation, but their focus and experience are not necessarily in negotiating and bringing parties together to resolve their dispute(s).



### EXAMPLE

#### Dispute Resolution Service Providers India: Seth Associates

The firm represents its clients in dispute resolution through ADR and conducts both domestic and international arbitration matters before various forums, relating to all areas of general and special practice, including finance, commerce, contractual, intellectual property rights, cyber laws, building, construction, as well as industry and employment related disputes. The lawyers and technical experts of our firm have the requisite expertise of handling high-stake arbitrations, including those pertaining to supply contracts, building, and construction contracts, and turnkey projects.

#### COMMENT

The information a law firm typically provides on its Websites provides a good starting point for evaluating a firm and developing questions for an initial meeting with the firm's attorneys.

SOURCE: <http://www.sethassociates.com/firm-experience.html>.



### QUOTE

#### Law Firms and ADR

*"We recognize that litigation and arbitration are no longer the only processes for clients seeking legal remedies to enforce or defend their commercial positions. We are, therefore, increasingly providing advice on pre-litigation matters and working alongside our non-contentious teams as risk managers. ADR is an integral part of our practice and an area where we have great expertise. We regularly undertake mediations, expert determinations, adjudications and bespoke processes to resolve disputes. A number of our lawyers are also accredited mediators."*

**HERBERT SMITH LLP**

SOURCE: <http://www.herbertsmith.com/Services/PracticeAreas/Disputeresolution>.



## Corporate Governance Dispute Resolution Providers Strengths and Weaknesses of Law Firms and Consultants

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"><li>▶ Experience advising boards and board committees on governance issues</li><li>▶ Experience representing parties in external corporate governance disputes</li><li>▶ Experience serving as negotiators for settlement of corporate disputes</li><li>▶ Broad knowledge of ADR processes</li><li>▶ Client-focused business model</li><li>▶ Pre-established trust relationship with client</li></ul>	<ul style="list-style-type: none"><li>▶ Inadequate expertise and experience, or one-person office may not have a formal network, particularly global one, to tap expertise</li><li>▶ Conflicts of interest with existing or potential clients or a willingness to please to obtain follow-up business</li><li>▶ Experience may be limited to specific corporate governance compliance issues, not broad-based corporate governance practices.</li><li>▶ Senior partner may pass day-to-day engagement of ADR process to junior staff attorney, who wields less clout given perceived reputation and “power”</li><li>▶ Trained to litigate and reluctant to apply ADR processes</li><li>▶ Focused on the dispute’s legal dimension</li></ul>

### **Boards could typically seek the following corporate governance dispute resolution services from law firms and consultants:**

- ▶ Counsel on using ADR processes and policies
- ▶ Help in preparing for an ADR forum and client support during mediation and arbitration proceedings
- ▶ Facilitation of difficult discussions among board directors
- ▶ Facilitation of discussions between the board and external stakeholders
- ▶ Advice on ADR clauses in shareholder agreements
- ▶ Negotiation and mediation of corporate governance disputes
- ▶ Neutral expert evaluations (e.g., share valuation)



## EXAMPLE

### Dispute Resolution Service Providers Philippines: Institute of Corporate Directors

The institute (ICD) provides orientation and training in all aspects of the practice of corporate directorship. ICD may also assist in the formulation and implementation of corporate governance improvement programs in specific boards where its associates serve. It is a membership organization.

#### COMMENT

Boards should assess the training needs of their directors and senior managers to ensure that key decision-makers have sufficient expertise to guide and evaluate ADR approaches. Custom-tailored programs may be more relevant, particularly if training is needed to deal with an immediate dispute.

SOURCE: [www.icdcenter.org](http://www.icdcenter.org).



## FOCUS

### Corporate Governance Dispute Resolution Providers Strengths and Weaknesses of Corporate Governance Institutes and Directors Associations

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>▶ Knowledge and understanding of corporate governance best practices</li> <li>▶ Competence in reaching and providing member services through established networks</li> <li>▶ Ability to gather/train professionals to be competent in ADR approaches</li> <li>▶ Product/service development experience and skill</li> </ul>	<ul style="list-style-type: none"> <li>▶ Inability to access the right experts (e.g., poor pay, unattractive terms of engagement, weak network of contacts) in competitive market</li> <li>▶ Limited capacity to expand services (e.g., limited funds and weak infrastructure to support growth)</li> </ul>
<p><b>Boards could typically seek the following corporate governance dispute resolution services from corporate governance institutes and directors associations:</b></p> <ul style="list-style-type: none"> <li>▶ Corporate governance dispute resolution training</li> <li>▶ Workshops on using corporate governance dispute resolution</li> <li>▶ Advice on implementing ADR processes and guidance on who to contact</li> <li>▶ Counsel on dispute resolution policies</li> <li>▶ Facilitation of difficult discussions among board members</li> <li>▶ Facilitation of discussions between the board and external stakeholders</li> </ul>	

## Corporate Governance Institutes and Directors Associations

As awareness of corporate governance has broadened and more businesses adopt best practices, institutes of directors and/or corporate governance centers are launching or expanding their services in many countries. Often, these institutions are in the vanguard of advancing corporate governance best practices and play an essential role in building boardroom capacity. Institutes typically have strong networks of leaders in business, academia, and

government. They may administer training programs for board directors and promote research to demonstrate the business case for adopting best practices. Some offer consulting services for a fee; others do not, adhering to a strict policy of independence.

Given their focus, institutes of directors are well positioned to raise awareness on effective corporate governance dispute resolution and train directors on preventing and resolving disputes. Institutes may offer training, facilitation, and coaching, among other services. In most cases, these institutes refer governance disputes that need formal third-party intervention to mediation centers or ADR firms. In some cases, as in South Africa, the institute houses a mediation center.

Corporate governance dispute resolution is nevertheless still uncharted territory in most countries. Therefore, most institutes are limited in providing advice on ADR approaches and resolving a company's unique corporate governance disputes.



### EXAMPLE

#### Dispute Resolution Service Providers South Africa: Institute of Directors Center for Mediation

The IoDSA established the Center for Mediation, which focuses on corporate and commercial dispute resolution. The center encourages contracting parties to incorporate mediation clauses in their contracts. There has been traditional reluctance to include mediation provisions in contracts in South Africa. Yet, as the representative body for directors and business leaders, the institute is well positioned to develop a culture of mediation.

The Institute promotes the use of mediation clauses as a precondition to arbitration. The logic is that parties should first attempt mediation through the institute's mediation center and, if that fails, arbitration at the Arbitration Foundation of South Africa according to its rules.

#### COMMENT

IoDSA demonstrates a different approach than IBGC. An institute's offerings are shaped by market demand, the existence of existing ADR services, and competing priorities for limited resources.

*SOURCE: Ronan Feehily and John Brand, "Commercial mediation in South Africa." Available at: <http://www.bowman.co.za/LawArticles/Law-Article-id-2132417326.asp>.*

### Mediation Centers and ADR Firms

An important contributor to the emphasis on mediation within corporate governance has been the emergence of specialist professional mediation or other ADR centers and providers. Professional mediation and dispute resolution services have been triggered by demand and the market opportunities for resolving social and commercial disputes in more constructive ways — either to assist social harmony and productive business relationships, or to offset the cost, professional rigidity, and delays inherent in civil justice systems worldwide.



TO REVIEW THE LIMITS OF COURT LITIGATION AND THE BENEFITS OF ALTERNATIVE DISPUTE RESOLUTION, SEE VOLUME 1 MODULE 3.

There is a diverse pattern of origins and structures to such organizations. They may have been formed from government agencies, courts, community services, chambers of commerce, business associations, NGOs, or private individual efforts. What they have in common generally is a focus on "better ways of resolving disputes" and, usually, a commitment to specialist rules and training programs for their experts delivering the service.

Equally, a global consensus of the key attributes of effective commercial mediation has emerged quickly:

- A facilitative approach to helping parties negotiate
- A forum respecting the confidentiality of conversations with negotiators/mediators
- An approach to negotiation that is without prejudice to parties' rights to seek more formal adjudication if they fail to reach agreement within the mediation process

Mediation is the most commonly used ADR process and, globally, has been emerging as a key focus of new professional development and recognition, assisted by the mediation providers.

Mediation has been adopted as a formal dispute resolution process and given appropriate judicial or legislative support in many countries. Mediation is also increasingly promoted as an effective management tool for non-litigious, if still difficult, business negotiations.



## EXAMPLE

### Types of Mediation Service Providers

PROVIDERS	EXAMPLES	TRAINING	CONSULTANCY	FACILITATION	MEDIATION	ARBITRATION
<b>Court-Annexed Mediation</b>	Tamil Nadu Mediation Center of the Madras High Court <a href="http://www.hcmadras.tn.nic.in/adr.htm">www.hcmadras.tn.nic.in/adr.htm</a>				X	
<b>Chamber of Commerce</b>	International Chamber of Commerce <a href="http://www.iccwbo.org">www.iccwbo.org</a>  Center of Arbitration and Conciliation of the Bogota Chamber of Commerce <a href="http://www.ccb.org.co/cac">www.ccb.org.co/cac</a>	X			X	X
<b>International Mediation Centers</b>	Center for Effective Dispute Resolution (CEDR) <a href="http://www.cedr.com">www.cedr.com</a>  International Institute for Conflict Prevention and Resolution (CPR) <a href="http://www.cpradr.org">www.cpradr.org</a>	X	X		X	
<b>ADR Firms</b>	Bickerman Dispute Resolution, PLLC <a href="http://www.bickerman.com">www.bickerman.com</a>		X	X	X	
<b>Online Services</b>	ICM-Online ADR Training <a href="http://www.icmadr.com/conflict-resolution-training/online-adr-training">www.icmadr.com/conflict-resolution-training/online-adr-training</a>	X	X		X	

Developments have nevertheless been uneven in organizational structure and focus.



TO REVIEW THE ROLE OF POLICYMAKERS IN SUPPORT OF CORPORATE GOVERNANCE DISPUTE RESOLUTION, SEE VOLUME 2 MODULE 2.

ADR and mediation centers provide training, consulting, forums for parties to convene, and other services (e.g., recommending mediators who can work directly with disputants).

There is one important factor to consider when reviewing mediation centers: the limited risk a board will encounter in taking steps towards involving a center. The mediation process will usually be protected by confidentiality and be non-binding, unless an agreement is reached to publicly disclose the final agreement and/or be bound to the mediator's decision.



## EXAMPLE

### Dispute Resolution Service Providers Italy: ADR Center

The ADR Center combines 30 years of experience in administering efficient JAMS mediation and arbitration in the United States with the expertise of some of the best Italian and European mediators and arbitrators. The ADR Center's services have evolved based on requests from customers to ensure its ability to resolve disputes within a prescribed timeframe at predetermined costs. The ADR Center is the world's only body with operations in Europe and the United States.

#### COMMENT

International expertise may be particularly important for cross-border disputes. Organizations that have offices or ADR professionals based in the countries where the disputes occurred may be more attuned to cultural, social, and other nuances that are key in understanding the disputed issues and finding a resolution.

SOURCE: <http://www.adrcenter.com>.



## EXAMPLE

### Dispute Resolution Service Providers United Kingdom: Centre for Effective Dispute Resolution

We offer a comprehensive dispute resolution service with a range of processes together with bespoke solutions we can tailor to your needs.

Our service is independent with neither law firms, mediators, nor special interest groups as financial stakeholders.

We can:

#### ► Select the most appropriate process

Helping parties decide which process will most effectively resolve their dispute.

#### ► Approach the other parties

Because of our neutrality, we can approach all parties to gain consent to the process.

#### ► Select a neutral

The choice of neutral rests ultimately with the parties, but we are able to provide advanced matching due to our detailed and up-to-date knowledge, including client feedback, on all CEDR Solve Mediators.

#### ► Administer the process

Depending on the process you choose, the experienced team will sort logistical arrangements and provide advice and support where required.

#### ► Ensure quality control

After each mediation, we seek feedback on the process and the mediator's performance.

We also provide free downloadable documents under "Model Documents" on our website, including our Model Mediation Procedure and Agreement, Model ADR Contract Clauses, and Model Settlement Agreement.

#### COMMENT

CEDR's online library provides guidance as to what constitutes best practice in engaging a third-party expert.

SOURCE: <http://www.cedr.com>.



## EXAMPLE

### Dispute Resolution Service Providers Colombia: Bogota Chamber of Commerce Arbitration and Conciliation Center

The Center offers different services, intended for the solution of the conflict and the formation in managing the problem, through the effective application of ADR methods. This service is directed to the industrial, communitarian, and educational areas. Services offered include:

- ▶ Arbitration
- ▶ Conciliation
- ▶ Friendly composition
- ▶ Specialized areas
- ▶ Communitarian programs
- ▶ Conflict resolution in the educational field
- ▶ Professional training programs
- ▶ Consultancy and Investigation

The ACC's function is to administer the different conflict solution mechanisms, among these, arbitration, conciliation, friendly composition, and mediation. ACC also offers training programs, conflict resolution mechanisms in the education area, communitarian programs, investigation, and consultancy.

#### COMMENT

The Bogota Chamber of Commerce illustrates how chambers are in the vanguard of developing ADR processes and procedures as alternatives to the courts. These initiatives are typically required by business leaders who have seen directly the costs of lengthy battles to entrepreneurs. Hence, the chambers are often driven by their mission to promote environments where business can thrive.

SOURCE: [www.ccb.org.co](http://www.ccb.org.co).



## EXAMPLE

### Dispute Resolution Service Providers International Chamber of Commerce

ICC dispute resolution services exist in several forms:

**International Court of Arbitration™** — A truly international arbitration institution with an outstanding track record for resolving cross-border disputes

**ADR** — An amicable dispute resolution procedure based on the goodwill of the parties and the assistance of a neutral third party covering various techniques, including mediation

**Dispute Board** — Independent bodies designed to help resolve disagreements and disputes as and when they arise during the performance of a contract

**Expertise** — Assistance in finding the right person to make an independent assessment on every conceivable subject relevant to business operations

**DOCDEX** — Providing expert decisions to resolve disputes relating to documentary credits, collections, and demand guarantees incorporating ICC banking rules.

#### Publications

- ▶ Model contracts series:
  - Confidentiality agreement
  - Confidentiality clause
  - Sales contract
  - Commercial agency contract
  - Distributorship contract
  - International franchising contract law and arbitration

ICC Arbitration and ICC Arbitral Awards

ICC Institute of World Business Law Dossier

#### COMMENT

ICC's array of ADR services are among the most extensive. Its model contracts provide templates in addressing such issues as the confidentiality of contractual obligations for ADR professional.

SOURCE: ICC, Guide to ICC ADR. Available at: <http://www.iccwbo.org>.



## EXAMPLE

### Dispute Resolution Service Providers United States: Chris Whitelaw

Anyone engaging my consultancy services can ask me to do any of the following things:

- ▶ Full analysis of the relevant facts
- ▶ Precise identification of the nature and scope of the dispute
- ▶ Precise identification of all possible parties to the dispute
- ▶ Precise identification of each party's legal rights and obligations
- ▶ Identification of any "gray areas" with respect to legal rights and obligations
- ▶ Advice on the strengths and weaknesses of the legal position of any party to the dispute
- ▶ Identification of the best pathways open to each party, taking into account all relevant considerations (such as financial capacity, bargaining power, health issues, personality type, family issues, estate issues, etc.) to avoid, dissipate, manage, and resolve the dispute

Fully explaining in clear, simple language the alternative methods open to each party in dealing with the dispute and the implications of each option financially, time-wise, business-wise, physically, and emotionally.

If there is a clear need to engage legal services, determine the right level and quality of services for the dispute, taking into account its level of complexity and the amount in dispute.

#### COMMENT

This example illustrates the importance of communications skills in articulating the issues in dispute, outlining possible solutions, and helping disputants understand the ADR process and the possible outcomes. In considering an ADR professional, communications skills should be evaluated carefully.

SOURCE: <http://www.chriswhitelaw.com.au/dispute-resolution-services.html>.



## EXAMPLE

### Dispute Resolution Service Providers Online ADR Services

Internet-based proceedings to resolve commercial disputes are increasing in use given the technology's ease of access and connectivity improvements worldwide. More and more people are using the Internet for business, social, and personal reasons; online ADR (OADR) services are a logical extension of these uses. "The internet facilitates the storage, retrieval, review, comparison, annotation, classification, and reuse of information more than other communication mediums," write Hashemite University (Jordan) Professors Haitham A. Haloush and Bashar H. Malkawi. Further, governments, agencies, and other entities are beginning to provide online dispute resolution services directly to consumers.

"OADR is essentially a change in venue rather than in approach," write Haloush and Malkawi. "The online ADR process does not differ very much from the offline process, except for the fact that another form of communication, i.e., the Internet, is used rather than face-to-face procedures." These forums use chat rooms, websites with encryption software and password protection, instant messaging, and video conferencing to create several online alternative dispute methods.

"ADR has evolved with the development of commerce, and online ADR will refine ADR rather than making any radical new departures. Online ADR would thus not represent a major shift, and the choice for the parties between online ADR and ADR would be dictated by considerations of economics and convenience, informed by the relative importance that they ascribe to face-to-face interaction."

#### COMMENT

Online ADR services are emerging as cost-effective means of bringing parties together but may not be appropriate for all disputes.

SOURCE: Haitham A. Haloush and Bashar H. Malkawi, "Internet Characteristics and Online Alternative Dispute Resolution." Harvard Negotiation Law Review. Spring 2008. Available at: [http://www.hnlr.org/print/wp-or-content/uploads/2009/06/Haloush\\_Malkawi.pdf](http://www.hnlr.org/print/wp-or-content/uploads/2009/06/Haloush_Malkawi.pdf). See also: Haitham A. Haloush, Besem Melhem, Bashar H. Malkawi, "Equality of Arms in the Digital Age." 2008. Macquarie Journal of Business Law. Available at: <http://www.austlii.edu.au/au/journals/MqJBLaw/2008/3.html>.

### Leading Mediation Centers

Leaders with the biggest influence in advancing corporate use of ADR approaches have typically originated from such non-profit organizations as the International Institute for Conflict Prevention and Resolution (CPR) in New York and the Centre for Effective Dispute Resolution (CEDR) in London. Launched with significant backing from the corporate community, both have promoted better alternatives to address corporate and commercial disputes and the procedures/skills involved in mediation and other alternatives. CPR, for example, pioneered the “Corporate Pledge”

in which companies’ officers signed a commitment to use ADR in appropriate cases with other pledge signatories. This initiative gathered significant support from the U.S. General Counsels and law firms. CEDR adopted a “membership” system to promote the value of committing to high-quality conflict-management practices and “accredited mediator” training.

### Chambers of Commerce

In many jurisdictions, chambers of commerce have traditionally taken a role in resolving private business disputes. That role has evolved into one of formulating



## FOCUS

### Corporate Governance Dispute Resolution Providers Strengths and Weaknesses: Mediation Centers and ADR Firms

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>▶ Solid grounding in ADR methods</li> <li>▶ Experience and track record in resolving disputes</li> <li>▶ Range of experts available with different industry expertise</li> <li>▶ Ability to gather/train competent ADR professionals</li> <li>▶ Ability to dedicate funds for developing ADR services</li> <li>▶ Offers safe environment for exploring negotiation without breach of confidentiality or prejudicing subsequent legal action</li> </ul>	<ul style="list-style-type: none"> <li>▶ Inadequate expertise and experience in the field of corporate governance</li> <li>▶ In-house capacity to access or attract qualified professionals (e.g., poor pay and unattractive terms of engagement)</li> <li>▶ Limited capacity to handle demand and expand services (e.g., inadequate funds, human resources, infrastructure)</li> </ul>

#### Boards could typically seek the following corporate governance dispute resolution services from mediation centers and ADR firms:

- ▶ Support professional development with specialized training and workshops for directors and senior executives to enhance their dispute resolution skills
- ▶ Advise on using different ADR processes (including model documents)
- ▶ Mediate or co-mediate corporate governance disputes — especially with external stakeholders
- ▶ Advise on implementing dispute resolution policies

arbitration rules, building on the chamber's close ties with the business community. In many countries, chambers have a quasi-public role and legal recognition.

The International Chamber of Commerce (with a court of arbitration) is the leading global example. Most others are associated with a major city. In countries where chambers have a less formal public status, arbitration centers have tended to develop independently as autonomous vehicles for commercial dispute resolution, such as the Chartered Institute of Arbitrators in London

(ChIA) or the American Arbitration Association (AAA). As the popularity and recognition of mediation has grown, most of these earlier centers have been encouraged to participate in this development. Over time, these centers have adopted ADR or mediation rules in addition to their traditional arbitration focus. This is rapidly becoming the norm. In line with these developments in commercial practice, UNCITRAL promulgated a Model Law on Conciliation (read "mediation") to assist centers and international business in finding a common, standard approach.



## EXAMPLE

### **Dispute Resolution Service Provider** **United States: Program on Negotiation,** **Harvard Law School**

This program is by any measure the foremost academic contingent in the dispute resolution field, with more than 50 affiliated faculty from prestigious institutions. For more than 20 years, the PON has been extremely successful at marketing "executive education" courses, which are taught to a wide variety of professionals and executives. These courses can generate substantial fees, faculty members volunteering some of their time to teach these courses, without any extra fee, to support the program. Hence, PON has its own internal financing for supporting the professors' research when outside grant makers cannot do so and numerous graduate student assistants. This, in turn, helps recruit top students. The faculty's reputation, particularly among business leaders who have participated in these courses, creates a ready market for the professors' services in ADR roles. This keeps their practical perceptions sharp. The end result is an integrated series of services, in which each function serves the others well.

#### **COMMENT**

University-based centers and programs can draw on faculty research, expertise in adult-learning techniques, training facilities, and thought leadership initiatives.

*SOURCE: [www.pon.harvard.edu](http://www.pon.harvard.edu).*



## EXAMPLE

### **Dispute Resolution Service Provider** **Ukraine: Mediation Center**

The Ukrainian Mediation Center (UMC) was established under the auspices of the Kyiv-Mohyla Business School to be the driving force behind ADR development by providing training and independent mediators' services.

One barrier to the development of mediation in Ukraine is the lack of guarantees for securing a mediator's real independence. Parties to a dispute must trust a mediator to share the information, which they would otherwise not disclose to anyone else. Therefore, we separate the process of organizing an independent mediation (participants: the parties and UMC) — which secures an independent selection of a mediator, relieves a mediator from the need to discuss financial issues with the parties to a dispute, and controls the quality of procedures and their compliance with mediation principles — from the process of conducting an independent mediation (participants: independently selected mediator and the parties).

#### **COMMENT**

University-based centers can wear many hats, from advocating regulatory and statutory reforms for establishing ADR approaches to providing experts who conduct mediation.

*SOURCE: <http://ukrmediation.com.ua>.*

Chambers may offer consulting services, including recommending individuals who can conduct ADR processes, implementing rules governing the ADR processes, and establishing forums in which disputes can be conducted. The ICC offers the widest array of dispute resolution services.

**Firms Specializing in ADR Services**

In addition to institutionalized mediation centers and non-profit organizations, there are many examples of private groups and individual consultants who have established or expanded an ADR practice. The most common firm structure — arising from the origins of

ADR — has been attorneys who have either operated out of their former legal practice or, more commonly, have become individual mediators or partnered with others in a small business. The greatest number of private practitioners can be found in the United States (the largest private panel grouping there, JAMS, handles more than 10,000 cases annually), which is the earliest and largest market for ADR approaches.

Increasingly, as ADR becomes global, consultants and private business operators can be found in most countries where the appropriate legal framework and level of awareness on ADR benefits exists.

 **FOCUS**

**Corporate Governance Dispute Resolution Providers**  
**Strengths and Weaknesses: Universities and Business Schools**

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>▶ In-depth expertise and research activities may provide cutting-edge perspectives, including comparable case studies’ “lessons learned”</li> <li>▶ Reputation may enhance perception of its impartiality from all stakeholders involved in a dispute</li> <li>▶ Network of experts developed from research and other academic activities may be particularly invaluable with highly technical issues</li> <li>▶ Research and experience with ADR cases may help drive efforts to broaden use of ADR approaches</li> </ul>	<ul style="list-style-type: none"> <li>▶ Performance in academic setting may not translate to a practical setting</li> <li>▶ Focus on theoretical issues may conflict with boards, business leaders, and other stakeholders who have concrete, specific matters needing resolution</li> <li>▶ Revenue constraints may limit availability, breadth, and quality of services</li> <li>▶ Faculty’s teaching and research commitments may reduce availability and flexibility to handling a case</li> </ul>

**Boards could typically seek the following corporate governance dispute resolution services from universities and business schools:**

- ▶ Tailored training to directors, senior executives, and policymakers
- ▶ Facilitation and advice from practitioner faculty
- ▶ Assessments, studies, or evaluations of dispute resolution frameworks
- ▶ Mediation on a case-by-case basis



TO REVIEW THE LEGAL AND REGULATORY FRAMEWORK FOR CORPORATE GOVERNANCE DISPUTE RESOLUTIONS, SEE VOLUME 2 MODULE 2.

ADR firms will frequently be known to, or linked into, the other “sources of case referral” through leading ADR centers. However, as with law firms, the individuals hired to work with the board need to understand corporate governance issues, directors’ fiduciary duties, and, as a practical matter, the day-to-day challenges that corporate directors and boards confront.

### Universities and Business Schools

Some universities and business schools have established negotiation and dispute resolution training programs for executives. In some cases, universities also house mediation centers or have faculty members who also engage in consultancy or mediation services. Boards may consider universities and business schools to train their members. Some faculty members can also be hired directly as advisors or facilitators.

Typically, universities may provide executive and non-executive directors with broad, deep backgrounds, drawing from their research, which can make their services potentially up-to-the-minute. Also, professors are widely regarded as having intellectual independence, a quality that can be a comfort to parties in countries where they are not always sure who is working for whom.

For faculty members, there are significant advantages in having practical roles to complement their academic ones. The most obvious is financial. The daily fees can significantly exceed academic earnings. Equally important to many faculty members, however, is the exposure to real-world settings that cases bring. For many, this exposure can otherwise be hard to obtain. Even more significant in the long run is the improved opportunity that a practice base can bring to designing and mounting research projects with managers, professionals, and others. Consequently, there are advantages to having scholars integrated into an ADR practice.

On the negative side, faculty members may not be as available as full-time private practitioners, particularly for cases requiring travel on short notice. Also, faculty members, who are well-known as intellectually strong researchers or theorists and highly regarded as teachers, are not necessarily as successful in practice settings. They may lack the insights, for example, of how an industry conducts business or they may fail to grasp the nuances in corporate politics. Over time, however, the more effective practitioner-scholars develop a reputation that distinguishes them. There is also a known risk, one not as common yet in ADR but observable in pharmaceutical research and other fields, of a research bias from excessively close relationships between scholars and corporate interests. This particular point is also relevant for research centers that are not affiliated with those research universities. ■



#### QUOTE

#### Business Schools and ADR Training France: IRENE

*“There should be strong research and strong training, and keeping the link permanent between theory and practice.”*

#### ALAIN LEMPEREUR

PROFESSOR OF LAW AND NEGOTIATION AT ESSEC  
BUSINESS SCHOOL AND FOUNDER OF IRENE  
(INSTITUTE FOR RESEARCH AND EDUCATION ON  
NEGOTIATION IN EUROPE)

SOURCE: *Program on Negotiation at Harvard Law School, Founding a Negotiation Education Center, Case Study 1: IRENE (Paris, France), January 2003. Available at: www.pon.org.*

## DEVELOPING CORPORATE GOVERNANCE DISPUTE RESOLUTION SERVICES

Corporate governance dispute resolution is still in its infancy, but as demand grows for such services, potential service providers will need to consider how best to address demand. Regardless, whether it is an institute of directors, a law firm, or a mediation center, potential corporate governance dispute resolution service providers will need to complete a series of steps to help them determine which services to offer, how to market themselves, and how to build the appropriate capacity to deliver services effectively.

### Research and Planning Phase

Research and planning are essential in understanding the need/demand and other market factors that would determine an institution's positioning in providing corporate governance dispute resolution services. As the Chinese general Sun Tzu wrote about 2,500 years ago about enemies, one could say about markets, "If you know your (market) and know yourself, you need not fear the results. If you know yourself, but not the (market), for every victory gained, you will suffer a defeat. If you know neither the (market) nor yourself, you will always succumb."

An organization considering whether to introduce such services to respond to emerging ADR opportunities within its jurisdiction should develop an initial impression of the corporate governance problems and issues and the dispute resolution environment. It should also analyze the business climate and priorities.

In the research and planning phase, identify the impediments to speedy, cost-effective dispute resolution and plan solutions for these. Impediments may include the application of substantive law and the adversarial procedures that take time in following the normal process of discovery, interrogatories, examination, and cross-examination.

For example, in some countries it may take between nine to 14 years to set a trial date for considering a dispute. Delaying resolution in this manner is not an adequate

solution and deters complainants from raising issues and seeking redress. It also provides an opportunity for the introduction of mediation services.

### Step 1: Conduct a Market Analysis

Market research is a systematic, objective collection and analysis of data that involves *primary* (e.g., surveys) and *secondary* (e.g., "desk top" research including collation and synthesis of data) research. Data collection can use statistical (quantitative research such as income levels and economic growth) and anecdotal or attitudinal (qualitative such as focus groups that tend to use open-ended, free response formats) analysis.



## FOCUS

### Steps in Developing Corporate Governance Dispute Resolution Services

The roadmap to successful implementation of corporate governance dispute services is likely to encompass the following steps:

#### RESEARCH AND PLANNING

- ▶ **STEP 1:** Conduct a market analysis that includes an assessment of internal interest/capabilities and external demand.
- ▶ **STEP 2:** Review skills and resources to be involved in offering new services.
- ▶ **STEP 3:** Develop a marketing strategy.

#### IMPLEMENTATION

- ▶ **STEP 4:** Raise awareness about ADR's value and generate demand for training and other services the market needs.
- ▶ **STEP 5:** Secure financial and human resources.
- ▶ **STEP 6:** Formulate the vision and strategy.
- ▶ **STEP 7:** Communicate the vision and available services.
- ▶ **STEP 8:** Generate short-term wins.

As part of its market analysis, the potential provider of corporate governance dispute resolution services should:

- Consider and determine the legal environment within the home country, including the responsiveness and capacity to resolve corporate governance disputes in a timely manner.
- Build an understanding of the various ADR processes and techniques.
- Recognize that ADR processes are based on collaboration, using interests and needs to leverage a solution, whereas legal avenues focus on rights and obligations, which are adversarial in nature and style.

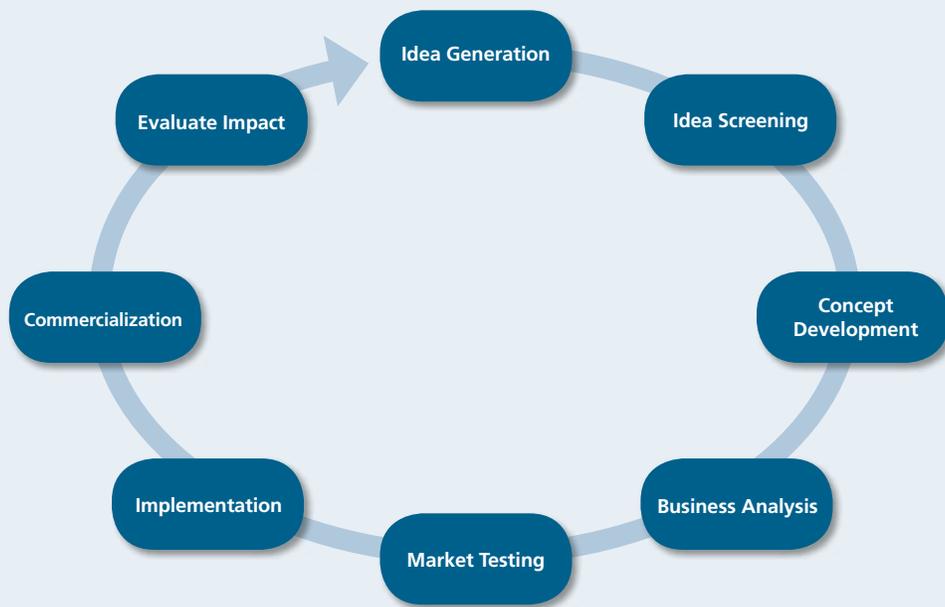


TO REVIEW THE BENEFITS OF ADR AND THE BASIC PROCESSES AND TECHNIQUES INVOLVED, SEE VOLUME 1 MODULE 3.

It is essential for the market analysis to review:

- Who the target users of corporate governance dispute resolution services could be? These considerations should include directors, shareholders, employees, stakeholders, companies (e.g., listed or unlisted companies), regulators, and the reasons why they may use ADR.
- What is the level of awareness of ADR mechanisms for corporate governance in the target user group? What steps will be necessary to raise their knowledge and appreciation of ADR?
- Consider what will motivate participants to use ADR for corporate governance disputes?
- Who will provide the services? Consider the areas of expertise required and the qualifications and experiences of potential mediators in building trust in the competence of the mediation process.
- What services are already provided?

### DEVELOPING NEW CORPORATE GOVERNANCE DISPUTE RESOLUTION SERVICES New Product Development Process (NDP)



SOURCE: [http://en.wikipedia.org/wiki/New\\_product\\_development](http://en.wikipedia.org/wiki/New_product_development)

## Step 2: Review the Skills and Resources to be Involved

While reviewing potential new services to be introduced by the organization, it is important to:

- Consider the available skills and the resources required (e.g., financing, mediators, training, partners, and marketing) to provide the scoped services. Know the organization's strengths and weaknesses in responding to the corporate governance ADR needs and plan accordingly. Engage (by interview, workshop or survey) stakeholders at this early stage to discuss their views and priorities.
- Consider the individuals who will be involved in introducing the scoped services. The individuals may include: respected leaders that can champion the introduction of ADR in the field of corporate governance, organizational panels to support the development of ADR positioning and materials, and legal fraternities.
- Determine the organization's positioning, and the ramifications of providing corporate governance ADR services. Consider in this process the legal interface.

## Step 3: Develop a Marketing Strategy

Developing a marketing strategy is essential in introducing corporate governance dispute resolution services effectively.

Service providers depend on awareness about both their capabilities and differences, compared to competitors, to attract clients, skilled professionals, and training program participants. Marketing corporate governance ADR capabilities and services helps a provider to establish and reinforce its "brand" and can be used to engage influential business leaders while gaining wider endorsement for the use of ADR services. Social media (e.g., Facebook, Twitter, and LinkedIn) provide new "pipelines" for building relationships with targeted publics.

There must be a high level of trust in the ADR approaches, the quality of the services, and the trainers, advisors, mediators, and facilitators who will provide ADR services.

The strategy should explain the services that will be introduced, why the change is needed, what the services will involve, and what will be the desired outcomes of the services to be offered. It should consider the untapped opportunities and risks in introducing ADR services, distinguishing the operational issues from strategic concerns. The strategy should also explain what elements of the ADR services will be provided directly by the organization and which services may be outsourced (if so, to whom they will be outsourced and why).

A line should be drawn to distinguish initiatives that must be included in the ADR services (the "must do") from those that may be less essential ("nice to have").



## PRACTICE

### Leading the Development of Corporate Governance Dispute Resolution Services

Ideally, individuals who would lead the introduction of corporate governance dispute resolution services would have some or all of the following characteristics:

- ▶ Impeccable reputations in their fields of influence and their personal lives
- ▶ Leadership skills
- ▶ Director and board-level and mediation knowledge experience
- ▶ Good connections in the corporate world, government, and civil society
- ▶ Entrepreneurism
- ▶ Organizational acumen
- ▶ Marketing expertise
- ▶ Good knowledge of corporate governance and mediation issues
- ▶ Commitment to the use of mediation in corporate governance issues

SOURCE: Forum, Building Director Training Organizations, Toolkit 1. Washington, D.C.: IFC, 2003. Available at: <http://www.gcgf.org>.

This will require identifying and planning the appropriate risk-mitigation scenarios that address, for example, the legal and liability issues that may arise. Is the organization sufficiently indemnified against liabilities? Are there regulations governing the provision of such services?

The organization's development and endorsement of the strategy may take some time to obtain. There will be many discussions and questions that the organization's board or senior management will want answered. They will need to establish consensus among themselves of the benefits in providing services and the likelihood for success.



## FOCUS

### Marketing Strategy

A marketing plan begins with a strategy that establishes, directs, and coordinates marketing efforts. Business goals drive the marketing strategy, and these goals must be solidified and supported by an organization's management team.

Marketing strategies may differ from organization to organization. Some may want to build a new business, perhaps challenging the leaders' client base. Others may want to stabilize their position, particularly if they already dominant the market. Still others may want to grow their business, sometimes at their competitors' expense, either by becoming a niche player or a market leader. All of these approaches will depend on the organization's ability to innovate, manage costs, differentiate itself, and succeed.

A strategy must define precisely the targeted market based on an analysis of short-, medium-, and long-term market demand for the organization's services/products. This analysis typically includes industry trends, macro- and microeconomic conditions, competitors' outlooks, the targeted market's demographics, and the organization's own potential.

With that analysis and the business objectives as the foundation, the strategy defines the goals and the marketing "pitch." What will marketing efforts achieve by what date? Goals should be measurable outcomes based on benchmarks. What will be the marketing campaign's message?

Methods to achieve those goals range from communications outreach (e.g., using Facebook and the website more aggressively) to more direct one-on-one networking with targeted peers, such as opinion leaders and board chairmen.

In *Marketing 3.0: From Products to Customers to the Human Spirit* (New York: John Wiley and Sons, 2010), authors Philip Kotler, Hermawan Kartajaya, and Iwan Setiawan argue that communications technologies have forced marketing approaches to change significantly. Marketing engages people in ways that provide "solutions to their anxieties to make the globalized world a better place." Practitioners must, as never before, understand and respond to the values that drive customer choice. Trust is at the core of the relationship.

<p><b>DATA</b></p> <p>Customer data provides insights that drive segmentations, messages, and channels</p>	<p><b>DIFFERENTIATION</b></p> <p>Offers, messaging, and channel should be differentiated by segment to create meaningful, relevant, and personal interactions</p>	<p><b>LIFECYCLE</b></p> <p>Effective programs communicate to the customer in keeping with where they are in the relationship lifecycle</p>	<p><b>MEASUREMENT</b></p> <p>Key performance indicators should be built into all relationship marketing programs</p>	<p><b>PERFORMANCE</b></p> <p>Companies must actively manage programs to achieve tangible economic results</p>
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SOURCE: <http://www.digitalcement.com>

While developing the strategy, it is important to identify the possible obstacles in both the introduction and implementation of corporate governance dispute resolution services and then develop appropriate solutions to surmount them. This includes understanding the organization's strengths and weaknesses in providing ADR services and both knowing and responding to potential threats, including opposition and competitors. The main obstacles may include:

- Insufficient appreciation of ADR's benefits and the links to corporate governance best practices.
- Inexperienced and poorly qualified individuals who cannot provide quality ADR services and command the respect of directors and senior executives.
- Difficulties with company directors inserting ADR clauses in the company constitution or articles of association, shareholder agreements, and statements of reserved powers. Directors may understand ADR's benefits, but there may be issues related to changing the constitution, articles of association, or other documents to include a clause that insists on mediation as a first step in dispute management.
- Resistance from the legal fraternity. The fraternity may perceive that ADR is a threat to their fee income from services they provide to support arbitration and litigation. However, knowledge of the frequency of

successful dispute resolutions through ADR approaches may mitigate these fears. In South Africa, 80 percent of disputes are settled prior to the commencement of trial proceedings, and of the remaining 20 percent, 80 percent are settled at the discovery/interrogatories stage.<sup>1</sup>

- The novelty of the use of ADR and mediation in commercial and/or corporate governance disputes. Leadership and advocacy within a jurisdiction for ADR may be required; this may lead to its consideration for insertion in company law and/or in corporate governance codes.

### Implementation Phase

Once the organization is sold on the idea of introducing corporate governance dispute resolution services a number of steps need to be undertaken to introduce those services. This begins with raising awareness.

#### Step 4: Raise Awareness

The organization should be pro-active in promoting the business case for ADR. It should make a strong link between ADR and the directors' fiduciary duty to act in the company's best interests. It may also promote ADR and mediation as tools for risk management and mitigation.

To make the best business case, the organization needs to:

- Consider how ADR's benefits will be communicated.



## PRACTICE

### Introducing Corporate Governance Mediation Services in Directors Associations

**Option 1:** Establish an in-house mediation center.

**Option 2:** Serve as a conduit to mediators and/or partner with existing mediation centers.

**Option 3:** Focus on dispute resolution prevention and related training or advisory services where a niche exists that existing centers do not address.



## QUOTE

### Addressing the Lack of Awareness on ADR's Benefits

*"We focus on actively using techniques of mediation, negotiation, and facilitation in disputes, especially family business disputes, without explicitly referring to the 'ADR' label given the low awareness in Belgium."*

**JOZEF LIEVENS**  
PARTNER, EUBELIUS LAW FIRM



## Threats and Opportunities for the Introduction of Corporate Governance Dispute Resolution Services by Provider

SERVICE PROVIDER	MAIN OPPORTUNITIES	MAIN THREATS
<p><b>Corporate Law and Consultants</b></p>	<p>Expand business in field in its infancy in many countries</p> <p>Develop a “boutique” practice</p> <p>Provide additional services for existing and potential clients</p>	<p>Other legal work may be more lucrative</p> <p>Not easy to become widely known as a provider of corporate governance ADR services and thus build an economically significant practice</p> <p>Competitors already offering ADR services, including mediation centers and ADR firms</p> <p>Over-extended individual or firm may compromise quality and time commitment needed to ensure an outcome that all parties accept</p>
<p><b>Corporate Governance Institutes and Directors Associations</b></p>	<p>Additional member services</p> <p>Grow membership through new services</p> <p>Leadership in corporate governance, neutral “home” for mediation, and quick, confidential dispute resolution</p> <p>Opportunity to develop partnerships and alliances in mediation in non-traditional areas</p>	<p>Lack of interest or awareness of ADR’s benefits</p> <p>Inability to sustain quality in ADR services over the long-term and/or lack of qualified mediators</p>
<p><b>Mediation Centers and ADR Firms</b></p>	<p>Broaden public recognition of ADR value and services</p> <p>Opportunity to develop partnerships and alliances in mediation in non-traditional areas</p> <p>Enhance “brand” through engagement</p> <p>Development of a niche market</p> <p>Broaden network of clients/through increased exposure</p> <p>Establishing leadership in ADR training and services for corporate governance matters</p> <p>Increase client base and revenues</p> <p>Success in corporate governance disputes may facilitate spread of ADR to other dimensions of corporate life or culture, or attract attention of business schools to train next generation of executives</p> <p>Contracts and policy statements may be promoted by business associations, helping profile the center’s own credibility and expertise</p>	<p>Competition from legal community</p> <p>Inadequate national legal structure to support ADR mechanisms</p> <p>Lack of interest in or understanding about corporate governance</p> <p>Costly start-up may divert resources from other priorities</p> <p>May lack expertise in the sector or be unable to shift energy and resources from more lucrative markets</p>
<p><b>Universities and Business Schools</b></p>	<p>Attracting funding to support research and compensate world-class faculty</p> <p>Build relationships with business leaders that may lead to partnerships yielding financial support and broader acceptance of ADR</p>	<p>Competition from ADR centers and law firms</p> <p>Faculty may establish private consulting concerns, depriving center of new revenues</p>

- Explain the key business drivers and the benefits for the organization itself (e.g., leadership, good reputation, member services).
- Consider approaching key leaders for support.
- Provide articles to relevant media and use any opportunity through events, interviews, and blog “posts” to raise awareness of ADR’s values.
- Anticipate criticisms and prepare responses.

### Step 5: Secure Human and Financial Resources

It is essential to assess and secure the human and financial resources required for the roll-out of new services. In particular:

- Evaluate the possible supply of qualified individuals who are willing and able to provide corporate governance ADR services.



TO REVIEW THE SKILLS NEEDED FOR CORPORATE GOVERNANCE DISPUTE RESOLUTION, SEE VOLUME 3 MODULE 1.

- Mediators, trainers or advisors may be available in house or may be sourced through partnership with other groups or organizations. An institute of directors may want for example to partner with a mediation center to offer corporate governance dispute resolution services. This is the initial approach taken by the Brazilian corporate governance center (IBGC).



TO REVIEW STANDARD CORPORATE GOVERNANCE DISPUTE RESOLUTION TRAINING RESOURCES, SEE VOLUME 3.

- The organization will need to list the areas in which identified, trusted mediators have the capacity to provide corporate governance mediation services. This list may begin on a small scale and then expand as the needs for mediation grow and the availability of quality, skilled mediators expands.
- Ensure corporate governance dispute resolution services are provided for in the organization’s budget. In so doing, consider the amount of funds needed to achieve the organization’s new strategy and the level of funds that must be raised.



## PRACTICE

### Determining Fees for Mediation Services

In the contract or letter of engagement, make sure the fee structure is clearly and thoroughly defined. The terms should answer the following questions:

- ▶ Is the fee hourly? One fee for the entire project? Or, based entirely or partly on contingencies, such as the dispute’s outcome?
- ▶ If an hourly fee, what is the estimate for the total hours the case will take? If longer, how will you be informed? Can you renegotiate the billing terms?
- ▶ If hourly, what are the minimum billing increments?
- ▶ Is there a charge for every phone call, letter, email, or photocopy? If so, how much?
- ▶ What is the payment schedule?

- Financial considerations should include a three-year budget based on realistic estimates (including good, moderate, and worst case scenarios) for the new services. The budget process develops organizational ownership and commitment to the new services and should include assessment of:
  - Revenues to be earned (from roundtables, training of directors, training of mediators, publications or documents, mediation services, and other initiatives).
  - Underlying assumptions related to fees, likely number of services to be provided, events and training sessions to be offered, the pricing policy for services and training, and the break-even points for the overall corporate governance dispute resolution program and related services.
  - Costs that may be incurred, including direct (e.g., training and service expenses) and indirect charges (e.g., overhead, administration, personnel, rent, and insurance). Also consider the tax implications in earning revenues.
  - Risks to financial sustainability should be identified, and internal controls and performance measures established to monitor these risks.

### Step 6: Prepare for Implementation

Once the above steps have been completed, the organization can work towards implementing and rolling out the new activities. In order to do so, it is important to:

- Develop the business plan's details to execute the agreed-upon strategy, including defining and refining the services to be provided and the implementation plan for each service.
- Integrate the new strategy and services into the institution's other activities and strategies such as training, member communications, and networking activities.
- Identify and select the team accountable for the strategy's implementation, and apprise them of their roles and responsibilities. Ensure they have the capacity to undertake their roles.
- Establish criteria for quality mediators, trainers, and advisors, and develop rules and a code of conduct for their provision of services.
- Identify, contract with, and train qualified mediators, particularly in corporate governance best practices and legislative and regulatory requirements.



## QUOTE

### Introducing Corporate Governance Dispute Resolution Training Services

*"Just go little. Do a course, use simulation, show that it works, show how much students love it, and then it will be renewed. ... Word of mouth. That's why people should never be afraid. If they have a good product, and if they are good teachers, this works. ... And there comes a moment when people need to have the reflex of saying, uh-oh, I need to develop a training of trainers."*

#### ALAIN LEMPEREUR

PROFESSOR OF LAW AND NEGOTIATION AT ESSEC BUSINESS SCHOOL

FOUNDER OF IRENE (INSTITUTE FOR RESEARCH AND EDUCATION ON NEGOTIATION IN EUROPE)

SOURCE: Program on Negotiation at Harvard Law School, *Founding a Negotiation Education Center, Case Study 1: IRENE (Paris, France)*, January 2003, Available at: [www.pon.org](http://www.pon.org).

### Step 7: Marketing the New Services

Marketing is key to the successful introduction of new services. The organization can for example:

- Prepare position papers, presentations, information, and brochures for a wide range of external stakeholders.

The parties to be marketed to ensure the successful implementation of mediation services should include: directors, company officers, senior management, regulators, insurers, shareowner and business organizations, legal practitioners, accountants, stock brokers, the judiciary, and the media.



## EXAMPLE

### Phasing In Corporate Governance Dispute Resolution Services

#### South Africa: IoDSA

*Currently available:*

- ▶ Access to independent mediators accredited to the IoD
- ▶ Advice and assistance in developing specialist panels of mediators to meet the needs of the business community
- ▶ Facilitation of mediations
- ▶ Facilitating mediation forums
- ▶ Encouraging contracting parties to incorporate mediation clauses in their contracts
- ▶ Encouraging disputing parties to agree to mediation even in the absence of a mediation clause
- ▶ Liaising with other ADR organizations nationally and internationally

*To be introduced in the medium-term:*

- ▶ Provide training in all aspects of mediation

*To be introduced in the long-term:*

- ▶ Conference on mediation
- ▶ Research and submissions on mediation issues
- ▶ Designing in-house dispute resolution and complaints handling systems
- ▶ Mediation publications and information

#### COMMENT

Organizations wanting to offer ADR services typically start with a limited array of activities that build over time, using success as a driver in providing revenues, attracting clients, and enhancing the organization's reputation and brand.

SOURCE: Institute of Directors of Southern Africa (IoDSA) Centre for Mediation, Promotional Brochure, Johannesburg: IoDSA, 2007. Available at: [www.iodsa.co.za](http://www.iodsa.co.za).

- Include in the documents a discussion of ADR's benefits, a description of the ADR mechanisms, the organization's positioning, and counter-arguments for potential criticisms.
- Promote corporate governance dispute resolution and mediation services through the development of marketing and promotional materials, providing orientation courses, training, organizing forums/roundtables for discussion and networking, providing access to mediation data and tools, and making presentations to associated partners and groups.
- Include the use of a direct mail campaign, expert speakers and presentations, brochures and publications of professional quality in design and artwork, institutional public relations campaigns, a website for easy access to further information, and social media tools.

Key messages of the marketing campaign:

- The company's best interests
- Directors' duties and risk management
- Practical, timely dispute resolution
- Novel, creative solutions
- Non-confrontational, confidential nature of ADR
- Organization's leadership role in providing ADR services
- Relationship between ADR and corporate governance codes and company constitutions

### **Step 8: Generating Short-Term Wins**

Organizations should start with easy, achievable activities to demonstrate success, develop enthusiasm, and contribute to greater awareness of corporate governance dispute resolution services. Some examples:

- Establish within the organization's membership an expert panel to advise on the development of corporate governance dispute resolution services and which is

accountable for raising awareness of ADR's benefits in the field of corporate governance. This panel, for example, may engage early with relevant stakeholders (e.g., company officers, regulators regarding listing rules, code of corporate governance authors) to ensure the inclusion of mediation clauses in dispute resolution processes.

- Develop and provide companies with a standard ADR clause for shareholder agreements, which ensures shareholders and boards use mediation as the first step in seeking resolution to disputes.
- Develop a short list of recognized, trusted, and qualified mediators, available and trained in corporate governance dispute resolution.
- Develop and make available a model dispute resolution agreement that disputants and the mediator may use to establish an agreement and the conditions of mediation.
- Develop rules that specify how the organization operates in providing corporate governance dispute resolution services. Consolidating forward steps and introducing more change
- Consider the organizational support and linkages to gain maximum advantage for the change. The organization should consider the easy and early wins and also have a plan for the medium- and long-term development of ADR services.

The successful introduction of corporate governance dispute resolution services by local institutions will help mainstream the use of ADR in the field of corporate governance and help promote a legal and regulatory framework that supports the use of ADR processes when appropriate. Organizations can also take a proactive role in advocating for news regulations and best practice standards. ■

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## Endnotes

- 1 M. King, "Presentation in Washington, D.C. to the IFC." December 4, 2007.

## ESSENTIALS OF A SHAREHOLDER AGREEMENT

### More Business.com

If your business is a corporation that issues shares, then you need to have a shareholder agreement, for everyone's protection. A good shareholder agreement should contain the following:

#### FOR THE DIRECTORS OR STAKEHOLDERS

**Share Distribution:** It will include the rights related to the issuance, sale, or subsequent distribution of shares. It will also have the pre-emptive rights and first refusal rights of the directors and management.

**Duties and Rights of the Management and the Employees:** This is the legal foundation of the personnel aspect of the business and will ensure that the business is not run in an autocratic manner.

**Transfer of Shares:** With the passage of time, directors and management may want to divest their shares. The shareholder agreement should contain guidelines and options for the selling and buying of shares, so that the overall share distribution ratio is not disturbed.

**Guidelines for Exigencies:** This will include contingencies for the retirement or the death of a stakeholder or director. These guidelines will ensure that there is minimum confusion as and when an emergency should occur. It will ensure business continuity and safeguard the interest of the shareholders.

**Composition of the Board of Directors:** This is a legal requirement that clearly identifies members of the Board of Directors and their terms of employment or continuity. It will also describe the duties of the board.

**Compensation:** Members of the Board of Directors are normally not employees of the company. Therefore, they need to be compensated for their effort in formulating policies and overseeing the management of the company.

**Conditions for Change in Composition:** This section will lay down the conditions under which the Board of Directors may bring in a new stakeholder, or existing

stakeholders may transfer/sell their shares so as to reconstitute the Board of Directors.

**Exit Clauses:** A shareholder or stakeholder may choose at any time or for any reason to divest his share or stake. The shareholder agreement should lay down the conditions he needs to fulfill at this time. This will help to ensure that the directors and management continue to maintain control of the company and it will also ensure that the overall shareholding pattern of the company does not change without the express agreement of the directors.

#### FOR SHAREHOLDERS

**Structure of the Company:** This will inform shareholders of the persons who are running the organization and managing their money.

**Rights and Duties of the Shareholders:** It informs the shareholders of how much they can or cannot participate in the running of the company or how much they can control the management of the money they have invested.

**Distinction in the Ownership of the Shares:** This section helps distinguish between the different classes of shareholders.

**Vesting Rights:** Conditions under which a shareholder can sell his shares.

**Quorum:** Lays down the number of shareholders that need to be present to hold a shareholders' meeting and to pass a resolution.

**Ownership in Case of Buyouts:** Lays down the number of shareholders that need to be present to hold a shareholders' meeting and to pass a resolution.

**Dispute Settlement Machinery:** This section will spell out the methods of arbitration that would be used to settle a shareholders' dispute.

**Voting Rights:** This section will outline the voting rights on management decisions of the shareholders, thereby indicating what control the shareholders will have over the management of the money they have invested.



## ANNEX 1

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A well-drafted shareholders agreement will help run the company and will play an important role in the continuity of the organization, and will help avoid expensive and time-consuming legal wrangles. It will provide details of the rights and duties of the stakeholders and the shareholders. A shareholder agreement should be reviewed and revised periodically to ensure that it is in line with the current business environment, but it should not be revised so often as to cause instability.

*SOURCE: Article published at: [http://www.morebusiness.com/running\\_your\\_business/legal/Shareholder-Agreement.br](http://www.morebusiness.com/running_your_business/legal/Shareholder-Agreement.br).*

## SAMPLE MEDIATION AND DISPUTE RESOLUTION CLAUSES FROM AROUND THE WORLD

### American Arbitration Association

#### MEDIATION CLAUSE 1

“If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.”

#### MEDIATION CLAUSE 2

“The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures [the clause may also provide for the qualifications of the mediator(s), the method for allocating fees and expenses, the locale of meetings, time limits, or any other item of concern to the parties].”

#### MED/ARB CLAUSE

“If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties’ mediation may be asked to serve as the arbitrator.”

*SOURCE: <http://www.adr.org/resources/Drafting+Dispute+Resolution+Clauses+Guide+AAA-2007.pdf>.*

### Belgian Center on Mediation and Arbitration

#### DISPUTE RESOLUTION CLAUSE

“The parties hereby undertake to apply the CEPANI Rules of Mediation to all disputes arising out of or in relation with this Agreement.”

The following provisions may be added to this clause:

- “the seat of the mediation shall be (town or city)”
- “the proceedings shall be conducted in the (...) language”
- should the mediation fail, the dispute shall be finally settled under the CEPANI Rules of Arbitration by one or more arbitrators appointed in accordance with those Rules.”

*SOURCE: <http://www.cepani.be/EN/default.aspx?Pid=411>.*

### Bulgarian Chamber of Commerce and Industry

#### DISPUTE RESOLUTION CLAUSE

“All disputes in connection with this contract shall be referred for resolution through mediation to the Mediation Center with the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry, and in case parties fail to reach an agreement — to the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry in accordance with its Rules.”

*SOURCE: <http://www.mediation.bcci.bg/english/index.php3?vheader=RECOMMENDED%20MEDIATION%20CLAUSES&vfile=it8.htm>.*

### Center For Effective Dispute Resolution (CEDR)

#### MULTI-TIERED PROCESS

“If any dispute arises in connection with this agreement, directors or other senior representatives of the parties with authority to settle the dispute will, within [ ] days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.

“If the dispute is not resolved at that meeting, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator will be nominated

## ANNEX 2

by CEDR. To initiate the mediation a party must give notice in writing ('ADR notice') to the other party(ies) to the dispute requesting a mediation. A copy of the request should be sent to CEDR Solve. The mediation will start not later than [ ] days after the date of the ADR notice."

"[The draftsperson has the choice to add Version 1, referring to court proceedings in parallel, or Version 2, no court proceedings until the mediation is completed.]

### *Version 1:*

"The commencement of a mediation will not prevent the parties commencing or continuing court proceedings/ an arbitration."

### *Version 2:*

"No party may commence any court proceedings/ arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay."

### INTERNATIONAL CORE MEDIATION CLAUSE

"If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator will be nominated by CEDR. The mediation will take place in [city/country of neither/none of the parties] and the language of the mediation will be [ ]. The Mediation Agreement referred to in the Model Procedure shall be governed by, and construed and take effect in accordance with the substantive law of [England and Wales]. The courts of [England] shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with, the mediation. If the dispute is not settled by mediation within [ ] days of commencement of the mediation or within such further period as the parties may agree in writing, the dispute shall be referred to and finally resolved by arbitration. CEDR shall be the appointing body and administer the arbitration. CEDR shall apply the

UNCITRAL rules in force at the time arbitration is initiated. In any arbitration commenced pursuant to this clause, the number of arbitrators shall be [1 – 3] and the seat or legal place of arbitration shall be [London, England]."

SOURCE: [http://www.cedr.com/about\\_us/library/internationalclauses.php](http://www.cedr.com/about_us/library/internationalclauses.php).

### Danish Institute of Arbitration (Copenhagen Arbitration)

#### MEDIATION CLAUSE

"Any dispute arising out of or in connection with this contract, including any dispute regarding the existence, validity or termination, shall be settled by mediation arranged by Danish Arbitration in accordance with the Rules on Mediation adopted by Danish Arbitration and in force at the time when the mediation is commenced."

SOURCE: <http://www.voldgiftsinstitutet.dk/en/Menu/Recommended+clauses/Mediation>.

### International Chamber of Commerce

#### DISPUTE RESOLUTION CLAUSE

"The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules."

SOURCE: [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr\\_rules.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf).

### International Institute for Conflict Prevention and Resolution CPR Model Dispute Resolution Clauses

#### NEGOTIATION

##### *Negotiation Between Executives*

"(A) The parties shall attempt [in good faith] to resolve any dispute arising out of or relating to this [Agreement] [Contract] promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. Any person may give the other party written notice of any dispute not resolved in the normal course of business.

Within [15] days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of that party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within [30] days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. [All reasonable requests for information made by one party to the other will be honored.]

“All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.”

#### MEDIATION

“(B) If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within [30] days after delivery], the parties shall endeavor to settle the dispute by mediation under the CPR Mediation Procedure [then currently in effect OR in effect on the date of this Agreement], [provided, however, that if one party fails to participate in the negotiation as provided herein, the other party can initiate mediation prior to the expiration of the [45] days.] Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.”

#### ARBITRATION

“(C) Any dispute arising out of or relating to this [Agreement] [Contract], including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within [45] days after initiation of the mediation procedure] [within [30] days after appointment of a mediator], shall be finally resolved by arbitration in accordance with the CPR Rules for Non-Administered Arbitration [then currently in effect OR in effect on the date of this Agreement], by [a sole arbitrator] [three independent and impartial arbitrators, of whom each party shall designate one] [three arbitrators of whom each party shall appoint one in accordance with the ‘screened’ appointment

procedure provided in Rule 5.4] [three independent and impartial arbitrators, none of whom shall be appointed by either party]; [provided, however, that if one party fails to participate in either the negotiation or mediation as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above.] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be [city, state].”

*SOURCE : <http://www.cpradr.org/ClausesRules/CPRModelDisputeResolutionClauses/tabid/157/Default.aspx>.*

### London Court of International Arbitration

#### MEDIATION CLAUSE

“In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause.”

*SOURCE : <http://www.lcia-arbitration.com/>.*

### Netherlands Mediation Institute

#### MEDIATION CLAUSE

1. “The Parties agree to submit all disputes that may arise out of this Agreement to mediation pursuant to the Rules of the Netherlands Mediation Institute (Stichting Nederlands Mediation Institute) in Rotterdam, before such disputes are submitted for resolution by the competent judge [or arbitral panel] as provided below.
2. “The Mediator’s task is to analyse with the Parties the disputes which have arisen in order that the Parties may come in good faith to a resolution and mutually confirm the resolution by written agreement. This good faith entails that the Parties not commence any legal action before the mediation procedure pursuant to the preceding clause has been attempted and for a period of [\_\_\_\_] days from the date that the Mediator is appointed, unless the Mediation procedure has been terminated earlier.

## ANNEX 2

3. “The Mediation procedure is strictly confidential in nature. Parties shall not be bound in any subsequent court [or arbitral] proceedings by any positions taken or statements made during the mediation procedure.
4. “[Normal arbitration or competent court clause.]”

*SOURCE: [http://www.nmimmediation.nl/english/nmi\\_rules\\_and\\_models/nmi\\_mediation\\_clause.php](http://www.nmimmediation.nl/english/nmi_rules_and_models/nmi_mediation_clause.php).*

### Southern African Institute of Directors

#### DISPUTE RESOLUTION CLAUSE

1. “If any dispute arises out of or in connection with this Agreement, or related thereto, whether directly or indirectly, the Parties must refer the dispute for resolution firstly by way of negotiation and in the event of that failing, by way of mediation and in the event of that failing, by way of arbitration. The reference to negotiation and mediation is a pre-condition to the parties having the dispute resolved by arbitration.
2. “A dispute shall arise if the dispute and particularity thereof is communicated by one party to the other in writing.
3. “Within 21 (twenty one) days of the dispute arising, the Parties shall seek an amicable resolution to such dispute by referring such dispute to representatives of each of the Parties concerned for their negotiation and resolution of the dispute. The representatives shall be authorised to resolve the dispute.
4. “In the event of the negotiation envisaged in 2. failing for whatsoever reason or cause, the Parties must, within 21 (twenty one) days of such failure refer the dispute for resolution by way of mediation in accordance with the then current rules of the Institute of Directors in Southern Africa (below ‘IoD’). The negotiation shall, inter alia, be deemed to have failed if one of the parties declares in writing that it has failed.
5. “In the event of the mediation envisaged in 3. Failing in terms of the rules of the IoD, the matter must, within 21 (twenty one) days thereafter, be referred to arbitration as envisaged in clauses below.
6. “The period of 21 (twenty one) days aforesaid for negotiation or mediation may be shortened or lengthened by written agreement between the parties.
7. “Each party agrees that the Arbitration will be held as an expedited arbitration in South Africa in accordance with the then current rules for expedited arbitration of the Arbitration Foundation of Southern Africa (below AFSA) by 1 (one) arbitrator appointed by agreement between parties. If the parties cannot agree on the arbitrator within a period of 10 (ten) business days after the referral of the dispute to arbitration, the arbitrator shall be appointed by the secretariat of AFSA.
8. “The Provisions of this clause shall not preclude any Party to an appropriate court of law for interim relief in respect of urgent matters by way of an interdict, or mandamus pending the outcome of the arbitration for which purpose the Parties irrevocably submit to the jurisdiction of a division of the High Court of the Republic of South Africa.
9. “This clause is a separate, divisible agreement from the rest of this Agreement and shall Remain in effect even if the Agreement terminates, is nullified or cancelled for whatsoever reason.”

*SOURCE: [http://www.iodsa.co.za/centre\\_mediation.asp?ShowWhat=ServiceBlock#dispute](http://www.iodsa.co.za/centre_mediation.asp?ShowWhat=ServiceBlock#dispute).*

### Singapore Mediation Center Mediation

#### MEDIATION CLAUSE 1

“All disputes, controversies, or differences arising out of or in connection with this agreement shall first be submitted to the Singapore Mediation Centre for resolution by mediation in accordance with the Mediation Procedure for the time being in force. The parties agree to participate in the mediation in good faith and undertake to abide by the terms of any settlement reached.”

#### MEDIATION CLAUSE 2

“All disputes, controversies, or differences arising out of or in connection with this agreement shall first be submitted to the Singapore Mediation Centre for

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resolution. The disputes, controversies or differences shall be referred within [—] days from the time they arose, in accordance with the Mediation Procedure for the time being in force, unless any of the parties serve a written notice on all the other parties and the Singapore Mediation Centre stating that it does not agree to submit the matter to mediation. The parties agree to participate in mediation in good faith and undertake to abide by the terms of any settlement reached.”

*SOURCE: [http://www.mediation.com.sg/mediation\\_clauses.htm](http://www.mediation.com.sg/mediation_clauses.htm).*

## IMPLICATIONS OF E-MAIL COMMUNICATIONS FOR NEGOTIATION

The following is excerpted from the chapter, “You’ve Got Agreement: Negoti@ting via Email” in *Rethinking Negotiation Teaching: Innovations for Context and Culture* (C. Honeyman, J. Coben, J. and G. De Palo, editors, DRI Press, Hamline University). The authors are: Noam Ebner, Anita D. Bhappu, Jennifer Gerarda Brown, Kimberlee K. Kovach, and Andrea Kupfer Schneider.†

In this excerpt, the authors delineated five major implications of the unique characteristics of e-mail communication for negotiation. Highlighting these particular media effects is particularly important for understanding the challenges posed by the media to negotiators trained to conduct face-to-face interactions.

### Implications of E-mail Communications for Negotiation

There are five major implications for parties negotiating by e-mail:

1. *Increased contentiousness*
2. *Diminished information sharing*
3. *Diminished process cooperation*
4. *Diminished trust*
5. *Increased effects of negative attribution*

#### 1. Increased contentiousness

Even before the advent of Internet-based e-communication, research showed that communication at a distance via technological means is more susceptible to disruption than face-to-face dialogue. Aimee Drolet and Michael Morris, for example, have found that whereas face-to-face interactions foster rapport and cooperation, telephone communication was prone to more distrust, competition, and contentious behavior (Drolet and Morris 2000).

In Internet-based communication, these findings not only hold true, they are intensified. Communication in cyberspace tends to be less inhibited; parties ignore

the possible adverse consequences of negative online interactions because of physical distance, reduced social presence, reduced accountability, and a sense of anonymity (Griffith and Northcraft 1994; Wallace 1999; Thompson 2004). The lack of social cues in e-communication causes people to act more contentiously than they do in face-to-face encounters, resulting in more frequent occurrences of swearing, name calling, insults, and hostile behavior (Kiesler and Sproull 1992).

Research shows that these findings on e-communication also hold true in e-negotiation. Early research showed that negotiators are apt to act tough and choose contentious tactics when negotiating with people at a distance (Raiffa 1982). As researchers began to focus on e-negotiation, they discovered the effects of diminished media richness in e-negotiation: the social presence of others is reduced (Short, Williams, and Christie 1976; Weisband and Atwater 1999) and the perceived social distance among negotiators increases (Sproull and Kiesler 1986; Jessup and Tansik 1991). Thus, negotiators’ social awareness of each other may be seriously diminished (Valley and Croson 2004) when communicating through e-mail. This might explain why e-negotiators feel less bound by normatively appropriate behavior than face-to-face negotiators apparently do. This weakening of the normative fabric translates into an increased tendency to make threats and issue ultimata (Morris et al. 2002), to adopt contentious, “squeaky wheel” behavior, to lie or deceive (Naquin, Kurtzberg and Belkin, forthcoming), to confront each other negatively, and to engage in flaming (Thompson and Nadler 2002).

Hence, e-mail negotiators are contending on a much rougher playing field than face-to-face negotiators. Still, the better we understand the nature of e-mail as described in the previous section, the greater our abilities to turn the potentially hazardous characteristics of e-mail to good use — i.e. *reducing* contentiousness. Used properly, lean media may facilitate better *processing* of social conflict exactly because these media do *not* transmit visual and verbal cues (Carnevale, Pruitt, and Seilheimer 1981; Bhappu and Crews 2005). First, the visible, physical presence of an opponent can induce arousal (Zajonc 1965), which leads to more aggressive behavioral responses. Therefore, the absence of visual and verbal cues in e-mail may defuse such triggers. Second,

e-mail may also reduce the salience of group differences. By masking or deemphasizing gender, race, accent, or national origin, to name just a few, E-mail may actually reduce the impact of unconscious bias (Greenwald, McGhee, and Schwartz 1998) on negotiation. Deemphasizing group membership may also suppress coalition formation. In addition, because negotiators are physically isolated and the social presence of others is diminished, they can take time to “step out” of the discussion and thoughtfully respond rather than merely react to the other party’s behavior, potentially limiting escalation of social conflict even further (Harasim 1993; Bhappu and Crews 2005).

## 2. Diminished inter-party cooperation

Experiments in e-mail negotiation have explored two connected concepts: the measure of inter-party cooperation throughout the negotiation process, and the degree to which resulting outcomes are integrative at the end of the negotiation. The connection between the two is obvious: the potential for integrative outcomes grows as parties become more aware of each other’s needs and capabilities, and areas of potential joint gain emerge.

E-mail negotiations make information exchange likely to be constrained, analytical, and contentious. This diminishes negotiators’ ability to accurately assess differential preferences and identify potential joint gains. Indeed, one comparison of face-to-face and computer-mediated negotiations revealed that negotiators interacting electronically were less accurate in judging the other party’s interests (Arunachalam and Dilla 1995). Reduced social awareness in lean media causes parties to engage more heavily in self-interested behavior when negotiating by e-mail. As a result, they may simply ignore or fail to elicit important information about the other party’s interests and priorities. The use of e-mail may, therefore, accentuate competitive behavior in negotiations (Barsness and Bhappu 2004).

However, when used properly, e-mail could *increase* information exchange. Lean media may work to promote more equal participation among negotiators. Diminished social context cues (Sproull and Kiesler 1991) and resulting reduction in the salience of social group differences can reduce social influence bias among individuals (Bhappu et al. 1997) and encourage

lower-status individuals to participate more (Siegel et al. 1986). Rather than discounting or ignoring information provided by lower-status individuals, as they might in face-to-face encounters, negotiators may be receptive to this additional information when using e-mail. Attention to this “new” information may subsequently enable negotiators to identify optimal trades and create more integrative agreements.

The nature of e-mail interactivity reinforces this tendency toward increased participation and more diverse information. As discussed above, the parallel processing allowed by e-mail frees negotiators from sequential turn-taking, prevents interruptions, and allows negotiators to voice their different perspectives simultaneously (Lam and Schaubroeck 2000). Parallel processing can also undermine existing power dynamics and encourage direct confrontation because it stops one individual from seizing control of the discussion and suppressing the views of another (Nunamaker et al. 1991). Thus, in a sense, e-mail exchange can tame and discipline the free-for-all form of parallel processing that can occur in face-to-face encounters. By making parallel processing more coherent, e-mail may further support the simultaneous consideration of multiple issues during negotiation. Coupled with the greater diversity of information produced when social groups are deemphasized and power differentials are reduced, parallel processing in e-mail is likely to promote the search for joint gains (Barsness and Bhappu 2004).

## 3. Reduction in integrative outcomes

As previously mentioned, reduced process cooperation is expected to result in a lower level of integrative agreements. Many experiments measuring these two indicators — cooperative behavior and integrative outcomes — have shown that in e-negotiation, as opposed to face-to-face negotiation, one is less likely to encounter cooperation in the process, and less likely to achieve integrative outcomes (Arunachalam and Dilla 1995; Valley et al. 1998; see also Nadler and Shestowsky 2006). Additionally, the potential for impasse appears to be greater than in face-to-face negotiation (Croson 1999). Conversely, other researchers have found no difference in rates of impasse and frequency of integrative outcomes when comparing e-mail and face-to-face

## ANNEX 3

negotiations (Nanquin and Paulson 2003; see also Nadler and Shestowsky 2006).<sup>1</sup>

Why, we might ask, should e-mail bargaining be less integrative than face-to-face encounters (if in fact the trend goes in this direction)? We believe that a reduction in the likelihood and degree of integrative solutions could result from lower levels of process cooperation and the difficulty of building rapport in e-mail negotiation. If e-mail somehow encourages negotiators to become more contentious and confrontational in the way they communicate (Kiesler and Sproull 1992), this can lead to spiraling conflict and the hardening of positions. This problem is made even more severe by the difficulty of establishing rapport in e-mail (Drolet and Morris 2000), which we will expand on below. The development of rapport has been shown to foster more mutually beneficial settlements (Drolet and Morris 2000), especially in lean media contexts (Moore et al. 1999) perhaps because it engenders greater social awareness among negotiators (Valley and Croson 2004).

On the other hand, the media effects of e-mail negotiation include one feature that might promote integrative thinking and outcomes. As we have seen, negotiators tend to exchange long messages that include multiple points all in one “bundle” when using asynchronous media like e-mail (Adair et al. 2001; Friedman and Currall 2001; Rosette et al. 2001). Argument-bundling may facilitate integrative agreements by encouraging negotiators to link issues together and consider them simultaneously rather than sequentially (Rosette et al. 2001). This can promote log-rolling, a classic tool for reaching integrative outcomes. However, negotiators should avoid “over-bundling:” too many issues and too much information delivered at one time can place higher demands on the receiver’s information processing capabilities. Negotiators may, therefore, have more difficulty establishing meaning and managing feedback in asynchronous media (DeSanctis and Monge 1999), further hindering their efforts to successfully elicit and integrate the information that is required to construct a mutually beneficial agreement.

#### 4. Diminished degree of interparty trust

Trust between negotiating parties has been identified as playing a key role in enabling cooperation (Deutsch

1962), problem solving (Pruitt, Rubin and Kim 1994), achieving integrative solutions (Lewicki and Litterer 1985; Lax and Sebenius 1986), effectiveness (Schneider 2002) and resolving disputes (Moore 2003). Negotiators are trained and advised to seek out and create opportunities for trust-building whenever possible, and as early as possible in the course of a negotiation process (Lewicki and Litterer 1985).

Communication via e-mail, however, is fraught with threats to trust that are inherent in the medium and in the way parties approach and employ it (Ebner 2007). It has been suggested that lack of trust in online opposites is the factor responsible for the low levels of process cooperation and of integrative outcomes reported above (Nadler and Shestowsky 2006). Low levels of inter-party trust in e-mail negotiation have been measured not only through indirect indicators, such as low process cooperation and infrequently integrative outcomes, but also directly: when questioned about the degree of trust they felt in negotiation processes, e-negotiators reported lower levels of trust than face-to-face negotiators did (Naquin and Paulson 2003). E-mail negotiators enter the process with a lower level of pre-negotiation trust in their counterparts than do participants in face-to-face negotiations (Naquin and Paulson 2003). This initially low expectation regarding interpersonal trust may exacerbate the fundamental attribution error by reinforcing the tendency to seek out reasons to distrust rather than to recognize trustworthy actions. This becomes a self-fulfilling prophecy: expecting to find counterparts untrustworthy, e-mail negotiators share less information; this reinforces their counterparts’ expectations. As a result, participants in e-mail negotiation also experience lower levels of *post*-negotiation trust than do participants in face-to-face negotiations (Naquin and Paulson 2003).<sup>2</sup>

#### 5. Increased tendency towards sinister attribution

The media effects of e-mail negotiation exacerbate the tendency toward the sinister attribution error: the bias toward seeing negative events as the outgrowth of others’ negative intentions rather than unintended results or conditions beyond their control. The lack of social presence and of contextual cues lends a sense of distance and of vagueness to the interaction. The asynchronous dynamic of e-mail negotiations adds to this challenge.

Research shows that e-negotiators ask fewer clarifying questions than face-to-face negotiators do. Instead of gathering information from their counterparts, e-mail negotiators may be more likely to make assumptions (Thompson and Nadler 2002); if those assumptions later prove unfounded, the negotiators may perceive the other's inconsistent actions or preferences as a breaking of trust. The power of the sinister attribution error in e-negotiation is clearly demonstrated by experiments showing that e-negotiators are more likely to suspect their opposite of lying than are face-to-face negotiators, even when no actual deception has taken place (Thompson and Nadler 2002). Analysis of failed e-mail negotiations shows that they tend to include unclear messages, irrelevant points, and long general statements (Thompson 2004), each of which provides ample breeding ground for the sinister attribution error.

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### Endnotes

1 Reading through much of the literature on this topic, one might get the sense that most practitioners and researchers have adopted the assumption that e-negotiation, as a rule, involves diminished inter-party trust and results in fewer — and less integrative — agreements. The intuitive strength of this assumption notwithstanding, the best one can say about the research exploring it is that it is inconclusive. Several authors have noted experiences and experiments challenging this assumption (Nadler and Shostovsky 2006; Conley, Tyler, and Raines 2006; Chamoun-Nicholas 2007), indicating that more careful examination needs to be done, which might differentiate between different e-communication platforms (only some of the experiments were conducted via e-mail), or examine e-negotiation's suitability to specific types of disputes (Conley, Tyler, and Raines 2006).

2 While this tendency for trust-diminishment in online communication holds true for those brought up in a predominantly face-to-face relational environment, it might not be as strong regarding people for whom the online environment has always been a primary meeting place. The more reflective experience and familiarity people have with online communication, the more they will develop new senses for receiving and assessing new types of contextual cues. This would suggest that people born and raised after the Internet Revolution may need to put less time and effort into becoming adept at trust-building and trust-assessment than might older communicators, who might be more prone to apply reception, transmission and assessment processes not suitable or not attuned to the medium. On the other hand, familiarity with the medium might lead younger users to being less careful in its use, causing them to send off-the-cuff or excessively informal messages that undermine their goals. The greater care and formality characterizing many older, less experienced users might be helpful in avoiding this. A negotiator's generational affiliation notwithstanding, understanding the differences between face-to-face and email negotiation, and conscious practice at developing new senses and sharpening old senses to new types of nuance, will result in a degree of medium-familiarity conducive to improved decision-making and negotiation results. For more discussion of this issue see Larson (2003) and Ebner (2007).



## ANNEX 4

## SAMPLE BOARD EVALUATION TOOL

NACD SAMPLE BOARD SELF-ASSESSMENT QUESTIONNAIRE		
Use this scale in your response: 1=Strongly Disagree; 2=Disagree; 3=Undecided; 4=Agree; 5=Strongly Agree		
OVERALL	RATING	RECOMMENDATION FOR IMPROVEMENT
1. The board is firmly committed to being held accountable.	1 2 3 4 5	
2. The board has critiqued, questioned, and approved management's corporate strategy.	1 2 3 4 5	
3. The board can clearly articulate and communicate the company's strategic plan.	1 2 3 4 5	
4. The board ensures superb operational execution by management.	1 2 3 4 5	
5. The board focuses on management succession and aligns CEO leadership with the company's strategic challenges.	1 2 3 4 5	
6. The board and the compensation committee foster an aggressive value-driven and performance-oriented culture that aligns officer compensation with long-term performance and innovation.	1 2 3 4 5	
7. The board is knowledgeable about competitive factors, including customer satisfaction.	1 2 3 4 5	
8. The board ensures that the management team is responsive to market forces.	1 2 3 4 5	
9. The board is strategically involved in merger and acquisition discussions, and ensures management's execution in those areas.	1 2 3 4 5	
THE RIGHT PEOPLE	RATING	RECOMMENDATION FOR IMPROVEMENT
10. The board's independent directors have a wide range of talents, expertise, and occupational and personal backgrounds.	1 2 3 4 5	



## NACD SAMPLE BOARD SELF-ASSESSMENT QUESTIONNAIRE

**Use this scale in your response: 1=Strongly Disagree; 2=Disagree; 3=Undecided; 4=Agree; 5=Strongly Agree**

11. The board's independent directors are independent-minded in dealing with company issues.	1 2 3 4 5	
12. The board is intolerant of management and board ineffectiveness.	1 2 3 4 5	
13. Directors do what is best for the corporation and shareholders regardless of countervailing pressure.	1 2 3 4 5	
<b>THE RIGHT CULTURE</b>	<b>RATING</b>	<b>RECOMMENDATION FOR IMPROVEMENT</b>
14. The board encourages a culture that promotes candid communication and rigorous decision making.	1 2 3 4 5	
15. Directors and managers work together to achieve "constructive interaction" — a healthy atmosphere of give and take.	1 2 3 4 5	
<b>THE RIGHT ISSUES</b>	<b>RATING</b>	<b>RECOMMENDATION FOR IMPROVEMENT</b>
16. The board focuses on activities that will help the company maximize shareholder value.	1 2 3 4 5	
17. The board consistently focuses on corporate strategy.	1 2 3 4 5	
18. The board and management act in concert, while showing fidelity to their respective roles.	1 2 3 4 5	
<b>THE RIGHT INFORMATION</b>	<b>RATING</b>	<b>RECOMMENDATION FOR IMPROVEMENT</b>
19. Directors study and understand relevant information in order to spend their time effectively and make informed decisions.	1 2 3 4 5	
20. Director requests for information are reasonable in amount and time frame, enabling thorough and prompt replies.	1 2 3 4 5	



## ANNEX 4

NACD SAMPLE BOARD SELF-ASSESSMENT QUESTIONNAIRE		
Use this scale in your response: 1=Strongly Disagree; 2=Disagree; 3=Undecided; 4=Agree; 5=Strongly Agree		
THE RIGHT PROCESS	RATING	RECOMMENDATION FOR IMPROVEMENT
21. The board has composed a description of specific duties, goals, and objectives, and measures its performance against those responsibilities.	1 2 3 4 5	
22. The board has designated an independent committee to monitor board composition and operations.	1 2 3 4 5	
THE RIGHT FOLLOW-THROUGH	RATING	RECOMMENDATION FOR IMPROVEMENT
23. The board effectively follows through on recommendations developed during the evaluation process.	1 2 3 4 5	
24. Evaluations lead to a clearer understanding of what the board must do to become a strategic asset.	1 2 3 4 5	
25. The full board agrees on and approves actions to address areas in need of improvement.	1 2 3 4 5	
26. The board initiates action plans with specific time lines for implementation of recommendations, and monitors progress.	1 2 3 4 5	
SOURCE: NACD, <i>Improving Director Effectiveness/It./</i> , 2005. Copyright 2005 NACD. All rights reserved. Used by permission.		

# ANNEX 5

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## SAMPLE DIRECTOR SELF-EVALUATION TOOL Highmark Inc. Self-Assessment of Directors

Name: \_\_\_\_\_

Term Expiration Date: \_\_\_\_\_ Retirement Date: \_\_\_\_\_

1. During your term in office as a Director, you have chaired or served on the following committees and Subsidiary Boards. (Please review this record of your participation, correct and update as needed.)

Dates	Committee

2. Attendance at Annual Meetings

Minutes of the annual meetings since your term began on \_\_\_\_\_ reflect that you have attended \_\_\_\_\_ of the \_\_\_\_\_ annual meetings. *(Please review and correct this information, if needed.)*

3. Attendance at Board Meetings

Minutes of Board meetings reflect that you have attended \_\_\_\_\_ of the \_\_\_\_\_ meetings held since your term began. Participated in \_\_\_\_\_ meetings by telephone conference. *(Please review and correct this information, if needed.)*

4. Attendance at Committee Meetings

Minutes of Committee meetings reflect that you have attended \_\_\_\_\_ of the \_\_\_\_\_ meetings held by the committees which you chaired or on which you served since your term began. Participated in \_\_\_\_\_ meetings by telephone conference. *(Please review and correct this information, if needed.)*



## ANNEX 5

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5. Attendance at Subsidiary Board Meetings *(If Applicable)*

Minutes of Subsidiary Board meetings reflect that you have attended \_\_\_\_\_ of the \_\_\_\_\_ meetings held by the Subsidiary Board which you chaired or on which you served since your term began. Participated in \_\_\_\_\_ meetings by telephone conference. *(Please review and correct this information, if needed.)*

6. In light of time commitments, family/professional obligations, and health status, will you be able to continue to contribute to the Board and its Committees?

Yes       No

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

7. Comment on the extent to which you have brought, and will bring, useful experience, information, and insights in addressing issues coming before the Board.

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. What are the areas confronting the Board now and for the next three years that most interest you and to which you feel that you could make the greatest contribution?

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

9. Are you satisfied with your performance as a Board Member? Why or why not?

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



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10. What would help you to better fulfill your obligations as a Director in the future?

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

11. Are there areas of interest or expertise in which you would like to expand your involvement with the Board? If yes, please specify.

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*SOURCE: NACD, Improving Director Effectiveness/It./, 2005. Copyright 2005 NACD. All rights reserved. Used by permission.*



## ANNEX 6

### SAMPLE SELF-ASSESSMENT QUESTIONNAIRE FOR BANK DIRECTORS Federal Reserve Center for Online Learning

SAMPLE BOARD OF DIRECTORS' SELF-ASSESSMENT FOR DECEMBER 31, 20\_\_\_\_\_

#### 1. Determining the Bank's Mission and Purpose

The board should establish the bank's mission statement and periodically revise it when necessary. The mission statement should be clear, concise and understood and supported by each board member.

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
1.1 All board members are familiar with the current mission statement?				
1.2 All board members support the current mission statement?				
1.3 The mission statement is appropriate for the bank's activities for the next two to four years?				
1.4 The board's policy decisions are consistent with the bank's mission statement?				

Are there any areas related to the bank's mission statement that need to be discussed?

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#### 2. Establishing the Bank's Strategic Plan

Strategic planning is an essential board responsibility. The formal planning process should take place at least every three years because changes in the environment may present new opportunities or challenges and may require the bank's leadership to change. These changes may also affect the bank's goals.

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
2.1 All board members are familiar with the current mission statement?				
2.2 All board members support the current mission statement?				
2.3 The mission statement is appropriate for the bank's activities for the next two to four years?				
2.4 The board's policy decisions are consistent with the bank's mission statement?				

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Are there any areas related to the bank’s strategic planning process that need to be discussed?

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**3. Approving and Monitoring the Bank’s Products and Services**

The bank carries out its mission by offering specific products and services that have been approved by the board. Additionally, the board has the responsibility for monitoring and evaluating products, ensuring that their quality is consistent with the bank’s objectives. Monitoring means tracking progress toward the goals established in strategic and annual planning. Evaluating means measuring the effectiveness and quality of the bank’s products and services. Monitoring and evaluating can be accomplished by reviewing performance data, observing products and services firsthand, surveying customers, or retaining a consultant to conduct an evaluation.

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
3.1 The board is knowledgeable about current products and services?				
3.2 The board knows the strengths and weaknesses of the bank’s current products and services?				
3.3 The board periodically considers adding new products and services or discontinuing existing products and services?				
3.4 The board has a process for tracking the performance of products and services?				

Are there any areas related to the bank’s products and services that need to be discussed?

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**4. Selecting and Supporting the CEO and Reviewing the CEO’s Performance**

A primary board responsibility is the selection and retention of the chief executive officer. An effective board will have a clear job description to utilize in evaluating the CEO’s performance or to facilitate a carefully executed search process if the position is vacant. Additionally, the board will support the CEO by providing frequent and constructive feedback, and periodically conducting evaluations to strengthen the CEO’s performance.



## ANNEX 6

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
4.1 A written job description clearly defines the responsibilities of the CEO?				
4.2 The board assesses the CEO's performance in a systematic and fair way on a regular basis?				
4.3 The mission statement is appropriate for the bank's activities for the next two to four years?				
4.4 The board's process for determining the CEO's compensation is objective, adequate, and ties performance to compensation?				

Are there any areas related to the board's selection, support, and review of the CEO's performance that need to be discussed?

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### 5. Providing Effective Fiscal Oversight

Another important board responsibility is preservation of a bank's resources and assets. The board should establish budget guidelines, approve an annual operating budget, and monitor adherence to the budget throughout the year. In addition, the board should consider having an annual audit by an independent accounting firm to verify to shareholders and the public that the bank is accurately reporting its sources and uses of funds. The board is also responsible for ensuring that funds are appropriately invested to safeguard the bank's future.

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
5.1 The board ensures that the budget reflects priorities consistent with the strategic plan and annual plan?				
5.2 The board receives financial reports on a regular basis?				
5.3 Financial reports are understandable, accurate, and timely?				
5.4 Management has established appropriate controls over financial reporting?				
5.5 Accounting personnel have appropriate experience and on-going training to prepare financial statements in accordance with generally accepted accounting principles?				
5.6 The board considers having an annual financial statement audit by an independent accounting firm and documents in its minutes any reasons why this is not done?				

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
5.7 The board has established appropriate investment policies?				
5.8 The board has approved policies that enable the bank to manage risks and reduce them to a tolerable level?				
5.9 The board has an adequate amount of liability insurance in the event of lawsuits filed against the bank as a whole or against members and staff as individuals?				
5.10 The board periodically reviews analysis of the insurance carried by the bank (e.g., directors' and officers' general liability and workers compensation) to ensure adequate coverage and competitive pricing?				

Are there any areas related to the board's fiscal oversight that need to be discussed?

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## 6. Understanding the Relationship Between the Board and the Bank's Staff

Board members must have a clear understanding of their role and that of the bank's staff, including an awareness that the respective responsibilities may change as the bank grows and changes. Many important organizational issues require a partnership of the board and the bank's staff if they are to be addressed effectively. The primary board-staff relationship is between the board and the CEO, and the quality of this relationship is extremely important. When other staff members are assigned to work with board committees, their role should be clearly defined and approved by the CEO.

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
6.1 The respective roles of the board and staff are clearly defined and understood?				
6.2 The respective roles of the board and the CEO are clearly defined and understood?				
6.3 A climate of mutual trust and respect exists between the board and the CEO?				
6.4 The board gives the CEO enough authority and responsibility to lead the staff and manage the bank effectively?				
6.5 When bank staff is assigned to assist board committees, each understands his/her role?				



## ANNEX 6

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
6.6 Board members refrain from directing the work of the bank's staff?				
6.7 The board has adopted adequate and appropriate human resource policies?				

Are there any areas related to the relationship between the board and the bank's staff that need to be discussed?

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### 7. Enhancing the Bank's Public Image

Board members can do much to develop the bank's image. If a bank is successful, but its achievements are kept secret, it will not be able to raise additional capital, attract desirable board candidates or staff, or serve a broad cross-section of the community. Accordingly, the board should develop a marketing and public relations strategy. Such a strategy might include written and visual communications such as annual reports, newsletters, fact sheets, press releases, Web pages, and participation in community events. As part of its public relations strategy, the role of board members should be defined for communications with key businesses, government, media, and regulators. The role of the CEO should also be defined for these purposes. While encouraging individual board members to spread the word about the bank they help govern, the board should also have a policy about who should serve as the bank's official spokesperson when, for example, a news reporter requests an interview about a possibly controversial issue. Conversely, board members also need to understand that much information they learn as board members is confidential and should not be repeated in the community at large.

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
7.1 The bank has an effective public relations and marketing strategy?				
7.2 Board members promote a positive image of the bank in the community?				
7.3 Board members understand who can serve as the official spokesperson for the bank?				
7.4 Board members understand what information is confidential and is not to be repeated in the community?				

Are there any areas related to the bank's public relations and marketing strategy that need to be discussed?

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## 8. Carefully Selecting and Orienting New Board Members

An effective bank board is made up of individuals who contribute needed skills, experience, perspective, wisdom, time and other resources to the bank. Because no one person can provide all of these qualities, and because the bank's needs change over time, the board should have a plan to identify and recruit appropriate people to serve on the board. Once new members have been recruited, the board should have an orientation program to acquaint new members to their responsibilities and to the activities of the bank. Additionally, consideration might be given to having board members periodically rotated off of the board to ensure that it can benefit from new ideas and experience without creating a board so large that it becomes ineffective.

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
7.1 The board has an effective process to identify, select, and nominate new members?				
7.2 The board ensures that prospective board members have adequate time to devote to board responsibilities?				
7.3 The board's composition reflects the diversity of background, expertise, and other resources needed by the bank?				
7.4 The board provides new board members with a comprehensive orientation to the bank's programs and finances?				
7.5 The board has established policies for length of board service, mandatory retirement, and rotation of board members to ensure appropriate leadership, energy, and skills to oversee the operations of the bank?				

Are there any areas related to selection or orientation of new board members that need to be discussed?

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## 9. Organizing Itself So That the Board Operates Efficiently

Boards carry out their work in meetings. To make board meetings productive, board members need to receive and review agendas and background materials before the board meetings. Effective boards utilize board agendas that focus on important issues, allow discussion, and culminate in action. Since boards operate in accordance with by-laws and organizational policies, board members need to be familiar with these documents. By-laws and policies need to be reviewed periodically and, if necessary, revised.



## ANNEX 6

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
9.1 Board members receive clear and succinct agendas and written material with sufficient time to review prior to board and committee meetings?				
9.2 The board focuses much of its attention to long-term, significant policy issues rather than short-term administrative concerns?				
9.3 Board members have adequate opportunities to discuss issues and ask questions?				
9.4 Board members are each comfortable discussing controversial issues and asking difficult questions?				
9.5 The frequency of the board meetings is appropriate for the responsible discharge of the board's duties?				
9.6 The length of board meetings is adequate to thoroughly vet all items on the board's agendas?				
9.7 The size of the board is appropriate for the effective governance of the bank?				
9.8 Board members are actively involved in the work of the board?				
9.9 The board periodically reviews and approves its policies, procedures, committee charters, and bylaws?				
9.10 Board members are familiar with bylaws, policies, procedures, and charters?				
9.11 The board has adopted and approved a Code of Ethics for itself and the bank's staff?				
9.12 The board has adopted and approved an effective conflict-of-interest policy for itself and the bank's staff?				
9.13 The board has appointed appropriate committees to improve its efficiency and effectiveness?				
9.14 Committee assignments reflect the interests, experience, and skills of individual board members?				
9.15 Each committee has a charter or policy that defines its responsibilities and authorities?				
9.17 Policies regarding committee assignments offer adequate opportunities for leadership development?				
9.18 Does the board evaluate board member independence at least annually?				

Are you satisfied that:	Not Satisfied	Satisfied	Not Sure	Not Applicable
9.19 If the board does not have an audit committee, does the full board perform all of the responsibilities that would have been conducted by the audit committee?				
9.20 Does the board hold line management accountable if they do not follow up satisfactorily or effectively on control weaknesses?				
9.21 Does the board hold line management accountable if they do not follow up satisfactorily or effectively on control weaknesses?				

Are there any areas related to board organization that need to be discussed?

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#### 10. General Assessment

In addition to the issues covered by the questionnaire:

1. Have any board members been identified who need additional training regarding any aspect of their responsibilities?

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2. What issues should occupy the board's time and attention during the next couple of years?

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3. How can the board's organization or performance be improved during the next couple of years?

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4. What other comments or suggestions would you like to offer related to the board's performance?

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*SOURCE: Insight for Bank Directors, a Basic Course on Evaluating Financial Performance and Portfolio Risk, Federal Reserve Bank of Kansas City and Federal Reserve Bank of St. Louis. Copyright 2004. All rights reserved. Used by permission.*

## SAMPLE MEDIATION LAWS FROM AROUND THE WORLD

COUNTRY	YEAR OF THE LAW	FULL NAME	LINK
Albania	No 9090 of June 26, 2003	Albanian Mediation Law on Dispute Resolution Through Mediation	<a href="http://www.mediationworld.net/albania/court_rules/full/107.html">http://www.mediationworld.net/albania/court_rules/full/107.html</a>
Argentina	Ley 24.573 4 <sup>th</sup> October 1995	Law on Mediation and Conciliation	<a href="http://www.cejamericas.org/doc/legislacion/marc_ley24573.pdf">http://www.cejamericas.org/doc/legislacion/marc_ley24573.pdf</a>
Argentina	Provincial Law N° 6452 From 16/12/1998	Mediation Law of the Province of Santiago de Estero	<a href="http://www.cejamericas.org/marc/marc_legislacion.php?idioma=ingles&amp;accion=buscar">http://www.cejamericas.org/marc/marc_legislacion.php?idioma=ingles&amp;accion=buscar</a>
Australia	1997	Mediation Act	<a href="http://www.legislation.act.gov.au/a/1997-61/current/pdf/1997-61.pdf">http://www.legislation.act.gov.au/a/1997-61/current/pdf/1997-61.pdf</a>
Austria	6 June 2003	Austrian Civil Mediation Law (Zivilrechtsmediationsgesetz)	<a href="http://www.mediationworld.net/austria/court_rules/full/111.html">http://www.mediationworld.net/austria/court_rules/full/111.html</a>
Belarus	2004	Chapter 17 of Commercial Procedure Code of the Republic of Belarus	<a href="http://praunik.org/artykuly/78#sdfnote1anc">http://praunik.org/artykuly/78#sdfnote1anc</a>
Belgium	21 February 2005	Part Seven of the Belgian Judicial Code: Mediation	<a href="http://www.cepina.be/en/default.aspx?pld=413">http://www.cepina.be/en/default.aspx?pld=413</a> <a href="http://staatsbladclip.zita.be/moniteur/lois/2005/03/22/loi-2005009173.html">http://staatsbladclip.zita.be/moniteur/lois/2005/03/22/loi-2005009173.html</a>
Bosnia and Herzegovina	29 June 2004	Law on Mediation Procedure	<a href="http://www.umbih.co.ba/eng/mediation/law_on_mediation_procedure_in_bih.pdf">http://www.umbih.co.ba/eng/mediation/law_on_mediation_procedure_in_bih.pdf</a>
Brazil	2006	Project of Law in Mediation	<a href="http://www.mediationworld.net/brazil/court_rules/full/90.html">http://www.mediationworld.net/brazil/court_rules/full/90.html</a>
Bulgaria	2004	Mediation Act	<a href="http://www.mediationworld.net/bulgaria/court_rules/full/6.html">http://www.mediationworld.net/bulgaria/court_rules/full/6.html</a>
Colombia	Ley 640 De 2001	Decree Modifying Certain Regulations Concerning Conciliation Procedures and Dictates Other Specifications	<a href="http://www.cejamericas.org/doc/legislacion/ley_640_2001.pdf">http://www.cejamericas.org/doc/legislacion/ley_640_2001.pdf</a>
Ecuador	Ley No. 000. RO/145; 4 September 1997	Ley de Arbitraje y Mediación	<a href="http://www.cejamericas.org/doc/legislacion/marc_ec_arbitraje.pdf">http://www.cejamericas.org/doc/legislacion/marc_ec_arbitraje.pdf</a>
Finland	663/2005	Act on Court-annexed Mediation	<a href="http://www.finlex.fi/en/laki/kaannokset/2005/en20050663.pdf">http://www.finlex.fi/en/laki/kaannokset/2005/en20050663.pdf</a>
Hungary	9 November 2007 Act LV of 2002	Act on Mediation Mediation Act	<a href="http://www.mediationworld.net/hungary/court_rules/full/108.html">http://www.mediationworld.net/hungary/court_rules/full/108.html</a> <a href="http://www.mediacio.net/e05.php?szakterulet=">http://www.mediacio.net/e05.php?szakterulet=</a> <a href="http://www.mediationworld.net/hungary/court_rules/full/108.html">http://www.mediationworld.net/hungary/court_rules/full/108.html</a>
Indonesia	2003	Supreme Court Ruling No.2/2003 on Court Annexed Mediation	<a href="http://www.pmn.or.id/files/doc/document%20-%20perma%2002%202003_pmn_official_translation.pdf">http://www.pmn.or.id/files/doc/document%20-%20perma%2002%202003_pmn_official_translation.pdf</a>

COUNTRY	YEAR OF THE LAW	FULL NAME	LINK
Italy	Law no. 192-1998	Special Rules on Mediation in Law no. 192-1998	<a href="http://www.mediationworld.net/italy/court_rules/full/131.html">http://www.mediationworld.net/italy/court_rules/full/131.html</a>
Italy	Decreto 23 Luglio 2004, n. 222: Ministry of Justice Decrees n. 222 of 2004	The text of the law (decree no. 5 of 2003) establishing a mediation scheme intended for disputes relating to either companies and partnerships and certain financial investments or transactions, together with the relevant implementing regulations by the Ministry of Justice (decrees no. 222 and 223 of 2004).	<a href="http://www.mediationworld.net/italy/court_rules/full/132.html">http://www.mediationworld.net/italy/court_rules/full/132.html</a>
Macedonia	2008	Mediation Law	<a href="http://www.seemf.cssproject.org/pdf/fyrom/16.01.2005%20-%20%20Draft%20Mediation%20Law.Macedonia.pdf">http://www.seemf.cssproject.org/pdf/fyrom/16.01.2005%20-%20%20Draft%20Mediation%20Law.Macedonia.pdf</a>
Malta	2004	Mediation Act	<a href="http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_15/Chapt474.pdf">http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_15/Chapt474.pdf</a>
Montenegro	2005	Law on Mediation	<a href="http://www.mediationworld.net/montenegro/court_rules/full/30.html">http://www.mediationworld.net/montenegro/court_rules/full/30.html</a>
Romania	2006	Mediation Act	<a href="http://www.mediationworld.net/romania/court_rules/full/3.html">http://www.mediationworld.net/romania/court_rules/full/3.html</a>
Serbia	2005	Law on Mediation	<a href="http://www.seemf.cssproject.org/pdf/serbia/Serbia%20LAW%20ON%20MEDIATION.pdf">http://www.seemf.cssproject.org/pdf/serbia/Serbia%20LAW%20ON%20MEDIATION.pdf</a>
Singapore	1998	Community Mediation Centers Act	<a href="http://statutes.agc.gov.sg/">http://statutes.agc.gov.sg/</a>
Slovakia	25 June 2004	Mediation Law	<a href="http://www.mediationworld.net/slovakia/court_rules/full/56.html">http://www.mediationworld.net/slovakia/court_rules/full/56.html</a>
USA	Pub. Law 104 - 320 (amending Pub. Law 101 - 552 and Pub. Law 102 - 354)	The Administrative Dispute Resolution Act of 1996	<a href="http://www.justice.gov/adr/pdf/adra.pdf">http://www.justice.gov/adr/pdf/adra.pdf</a>

**SECP - DISPUTE SETTLEMENT MECHANISM****SECP may be Empowered to Evolve 'Dispute Settlement Mechanism'**

*By Sohail Sarfraz*

ISLAMABAD: The government may empower the Securities and Exchange Commission of Pakistan (SECP) to issue 'Dispute Settlement Mechanism' for resolution of disputes between a company and its shareholders on issues arising among members of board of directors of a company.

Sources told Business Recorder here on Monday that the draft of the Securities and Exchange Commission of Pakistan Act 2010 has introduced a new provision of 'Dispute Settlement Mechanism' to reduce litigation. The concept is already available in the Income Tax Ordinance 2001, Sales Tax Act, 1990; Federal Excise Act and Customs Act 1969 to resolve tax-related disputes between taxpayers and department. On the same pattern, draft of the Securities and Exchange Commission of Pakistan Act 2010 has proposed 'Dispute Settlement Mechanism' to reduce litigation between the corporate sector and the SECP.

According to the provision, the Commission may prescribe a settlement mechanism for disputes arising between regulated persons, an investor and a regulated person, a company and its shareholder or board of directors of a company. Under the proposed law, the "Regulated Person" is defined as a person who carries on or engages in business in a Regulated Activity and where such person is a subsidiary that includes a holding company, not a banking company or a Development Financial Institution.

Through another major amendment in the existing Securities and Exchange Commission of Pakistan Act 1997, the SECP would allow persons to voluntarily return the assets or gains acquired in contravention of the proposed Securities and Exchange Commission of Pakistan Act 2010.

According to the provision, "notwithstanding anything contained in any other law, where a person prior to commencement of an investigation against him voluntarily comes forward and offers to return the assets or gains acquired in contravention of this Act or an Administered Legislation, the SECP may accept such offer after determination of the amount due from him on

such terms and conditions as the Commission deems fit and such person shall be discharged from his liability in respect of the matter or transaction in issue to the extent of such amount."

The draft law said that the voluntary return of assets, gains or any other amount under this section shall not discharge any person of his liability in relation to any contractual arrangement with any other person. The powers under this section shall be exercised by the commission in accordance with the rules prescribed by the Federal Government.

According to the provision of "Enforceable Undertaking and Consent Orders," where a regulated person has committed a breach of any law, rule, regulation, condition of license or registration or directions given by the Commission, which breach does not involve fraudulent behaviour on part of the Regulated Person, the Commission may, if it deems it to be in the interest of the relevant stakeholders and the market generally, accept a written undertaking given by such Regulated Person in connection with such matter. The undertaking may contain admissions of breach and contravention, affirmation of abstinence and such other affirmation to the satisfaction of the Commission. The undertaking may be varied at any time but only with the Commission's consent.

If the Regulated Person breaches any of the terms of the undertaking, the Commission may enforce the undertaking and take the relevant action as is permissible for the said breach under this Act or any other law for the time being in force. Provided that in such case, in addition to any other right the Regulated Person agrees to waive in the undertaking given by him, he shall not be required to be given an opportunity of hearing or representation before such an action is taken by the Commission.

The Commission may, where it is adjudicating any matter under this Act or an Administered Legislation pass orders with the consent of the parties involved. The powers under this section shall be exercised by the Commission in accordance with the rules prescribed by the Federal Government, the draft of the Securities and Exchange Commission of Pakistan Act 2010 added.

SOURCE: Sohail Sarfraz, "SECP may be empowered to evolve 'Dispute Settlement Mechanism'", Business Recorder, May 11, 2010. Available at: <http://www.brecorder.com/index3.php?id=1054762&currPageNo=3&query=&search=&term=&supDate>.

# ANNEX 9

## AMMAN STOCK EXCHANGE DIRECTIVES FOR DISPUTE RESOLUTION

Issued by virtue of the provisions of article 24/B/7 of the ASE by-laws of 2004.

### Article 1:

These Instructions shall be called the “Amman Stock Exchange Directives for Dispute Resolution for the year 2004”. They shall enter into effect as of September 1st 2004.

### Article 2:

Whenever they appear in these Instructions, the following words and expressions shall have the meanings assigned to them hereunder, unless otherwise indicated by context:

ASE	Amman Stock Exchange
The Board	Board of directors of the ASE
The Chairman	Chairman of the board of the ASE
Member	ASE Member
Arbitration Panel	A single arbitrator or a three arbitrator panel
The Secretary	Secretary of the board of the ASE

### Article 3:

- A. Any dispute arising between Members and their clients shall be resolved through arbitration procedures at the ASE, in any of the following cases:
  - 1. If the agreement drafted between the parties include an arbitration clause stipulating that all disputes pertinent or related to the agreement shall be conclusively resolved in accordance with the provisions of the ASE Instructions for Dispute Resolution by one or more arbitrator as the parties may agree.

- 2. If the parties agree following the arising of a dispute that it shall be conclusively resolved in accordance with the provisions of the ASE Instructions for Dispute Resolution if there is no arbitration clause.
- B. Disputes arising between Members as regards financial brokerage activities shall be resolved according to the provisions of these Instructions, if the parties agree that it shall be conclusively resolved through arbitration procedures in accordance with the provisions of these Instructions.
- C. Disputes to which the ASE is party shall not be subject to arbitration procedures according to the provisions of these Instructions.

### Article 4:

- A. Any party wishing to resort to arbitration in pursuance of these Instructions shall submit a request to the Secretary. Said request must include the following information:
  - 1. Name and full address of both the claimant and the respondent.
  - 2. Related agreements, particularly those related to the agreement to refer the dispute to arbitration according to the provisions of these Instructions.
  - 3. A description of the nature and the circumstances of the dispute that gave rise to the request.
  - 4. Reference to the subject matter of the request, claimed amounts and evidence corroborating the claim.
  - 5. The party’s position vis-à-vis the number and the selection of arbitrators according to the provisions of Article 6 of these Instructions.
  - 6. Any other information pertinent to the subject matter of the request.
- B. Once the documents referred to in sub-paragraph (a) of this Article are completed, the Secretary shall serve on the respondent, on the following day to the completion of documents, a copy of the request and its attachments to enable the latter to present his/her response.

## ANNEX 9

### Article 5:

- A. The respondent must present his/her response to the request within (5) five working days of receiving the request. He/she shall submit his/her response to the Secretary, inclusive of the following information:
  1. His/her opinion on the nature and circumstances of the dispute.
  2. His/her response to the claimant's requests, together with corroborative documents and evidence.
  3. His/her response to the proposals regarding the number and the selection of arbitrators.
  4. Any other information pertinent to the subject matter of the dispute.
- B. The respondent shall attach to the response to the request any counter claim to the arbitration request, inclusive of a statement of the events that gave rise to the counter claim, together with a statement of the amount(s) claimed in such counter claim.
- C. The Secretary shall send a copy of the response and the documents attached thereto to the claimant on the following day to his/her receipt of the response.
- D. If the respondent's response contains a counter claim, the claimant must answer it within (5) five working days of receiving the counter claim.

### Article 6:

- A. If the claimant and the respondent agree on a single arbitrator to hear the dispute, they shall appoint him / her in writing, and their agreement shall be notified to the Secretary. If they do not so agree within (7) seven days of serving the respondent with the arbitration request, the Chairman of the Board shall appoint a single arbitrator.
- B. If the parties do not agree on appointing a single arbitrator, the dispute shall be referred to three arbitrators. In such an event, each party to the request and to the response shall appoint his/her arbitrator, and the Chairman of the Board shall appoint the third arbitrator, unless the two parties had authorized the two arbitrators appointed by them to select the third arbitrator within three days

of the date of appointing the second arbitrator. If the two arbitrators are unable to agree on the selection of the third arbitrator within the prescribed period, the Chairman of the Board shall appoint the said third arbitrator. In all cases, the third arbitrator shall be the president of the Arbitration Panel.

- C. If any of the parties fails to appoint his/her arbitrator as stipulated in sub-paragraph (b) of this Article, the Chairman of the Board shall appoint the arbitrator in his/her stead.
- D. The parties shall be notified of the final composition of the Arbitration Panel.
- E. Any party can reject the appointment of an arbitrator on the grounds of impartiality or connection, in any manner or form, to the subject matter of the dispute; the rejection petition shall be submitted to the Secretary within three days of his/her notification of the appointment of the arbitrator. The Board shall have the discretion to rule on that petition.
- F. An arbitrator who ceases to perform or resigns from his/her duty, for whatever reason, shall be replaced by another arbitrator to be appointed by the same party who appointed the previous one.
- G. Arbitrators shall act in their personal capacity and not as representatives of any party.

### Article 7:

- A. Once the procedures of exchange of documents and selection of arbitrators are complete, the Secretary shall submit the dispute file to the Arbitration Panel.
- B. The Arbitration Panel shall appoint a minute-taker and shall study the case in the light of documents and statements presented by both parties. Upon the request of any of the parties, the Panel shall hear the parties in their presence. The Arbitration Panel may also decide, of its own initiative and without any request from the parties to that effect, to hear them. The Arbitration Panel shall have the right to decide to hear any other person in the parties' presence or upon duly inviting them to attend.

#### Article 8:

- A. Notices, notifications and decisions shall be served on the concerned parties via fax or express mail, unless the parties agree otherwise .
- B. If one of the parties fails to attend the arbitration sessions in spite of his/her due invitation to attend, the Arbitration Panel shall, upon verifying the absence of any legitimate excuse, proceed with its duties, and the procedures shall be deemed as taken vis-à-vis both parties.

#### Article 9:

- A. The place of arbitration shall be Amman, and the actual venue of arbitration procedures shall be the ASE, unless the parties agree otherwise.
- B. Arabic shall be the language of arbitration, unless the parties agree to use another language.
- C. The Arbitration Panel shall be responsible for the session proceedings; and no person other than the parties or their legal representatives can attend without the Panel's approval.
- D. The minutes of the meetings shall be signed by the President of the Arbitration Panel as well as by the minute-taker.
- E. The Arbitration Panel shall be exempt from abiding by the litigants' rights under procedural codes.

#### Article 10:

It shall be within the discretion of the Arbitration Panel to rule on its competence to hear the dispute, in accordance with these Instructions, notwithstanding any claim by a party of nullification or non-existence of a contract between the parties.

#### Article 11:

Any of the parties may petition any judicial authority to take provisional or preventive measures, according to the provisions of the Law, prior to the initiation of arbitration procedures. Such a petition shall not be in contravention with the arbitration agreement, and shall not infringe on the Arbitration Panel's power. Such a petition and any

such measures taken by the judicial authority must be immediately brought to the attention of the Secretary, who shall notify the Arbitration Panel thereof. The Panel shall request the cancellation or confirmation of said provisional and preventive measures in the light of its final award.

#### Article 12:

If the parties reach a settlement to the dispute, after referral of the arbitration file to the Arbitration Panel, the settlement must be confirmed in an award issued with their mutual consent.

#### Article 13:

- A. Procedures before the Arbitration Panel shall be subject to the provisions of these Instructions. In cases where there is no provision in these Instructions, relevant Jordanian legislation shall serve as authoritative reference.
- B. The Arbitration Panel shall apply the relevant Jordanian legislation on the subject matter of the dispute.

#### Article 14:

- A. The Arbitration Panel must issue its final award within (20) twenty days of the date of submission of the file to it.
- B. On the basis of a convincing request from the Arbitration Panel, the Board may extend the period set in sub-paragraph (a) of this Article for a maximum of (20) twenty days.

#### Article 15:

- A. Where three arbitrators are appointed, the arbitration award shall be taken unanimously or by majority. If these two cases fail to materialize, the President of the Arbitration Panel shall issue the award on his/her own.
- B. The arbitration award must be reasoned.
- C. The arbitration award shall be considered as issued in the place of arbitration and on the date of its issuance.



## ANNEX 9

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- D. The arbitration award shall be issued in writing, and shall be signed by the Arbitration Panel.
- E. The final arbitration award must contain a provision on arbitration expenses, arbitrator fees, and the party that bears them or the percentage born by each party.
- F. Arbitration Panel awards shall be conclusive and enforceable.

### Article 16:

- A. The Arbitration Panel may issue temporary awards on part of the requests, prior to issuing its final award that puts an end to the entirety of dispute.
- B. The Arbitration Panel that rules on the dispute shall be in charge of interpreting any ambiguity in the award or rectifying any clerical, mathematical or typographical error therein.
- C. The interpretation or rectification decision shall be considered an integral part of the award.

### Article 17:

- A. The arbitration award shall be issued in an original copy to be deposited by the Arbitration Panel with the Secretary.
- B. Upon receipt thereof, the Secretary shall call in the parties to pass on the award to them.
- C. The Secretary shall deliver a certified copy of the arbitration award to any party upon request, provided that one or both of the parties have paid the arbitration expenses in full.
- D. Any of the parties may at any time request additional certified copies of the issued award from the Secretary.

### Article 18:

Time limits mentioned in these Instructions shall come into force on the day following that wherein notification is considered as duly served; if it is an official holiday, the time limit shall come into force on the first following

working day. Official holidays shall not be counted in the time limits.

### Article 19:

The Amman Stock Exchange/Securities Market By-Laws on Dispute Resolution for the year 2000 are thus repealed.

## BSE ARBITRATION COURT

### Rules and Regulations

**ARTICLE 1.** (1) The Arbitration Court with the Bulgarian Stock Exchange — Sofia AD is a special jurisdiction established in pursuance of Item 1 of Article 26 (1) of the Public Offering of Securities Act.

(2) The Arbitration Court shall examine cases, conforming to the cognizance thereof by law, as well as cases related to the conclusion and execution of exchange transactions and the consequences thereof, voluntary arbitration and other relations arising from the Exchange Rules and Regulations.

(3) A dispute may be brought before the Arbitration Court, and the said dispute shall be examined and resolved on the merits, regardless of the fact that the same dispute is subject to a pending proceeding before a court of law or another special jurisdiction in Bulgaria or abroad.

(4) An arbitration agreement shall be enforceable against other judicial acts according to the general principles of the applicable law.

(5) Should the applicability of the award and of the law be contested, the consent of the party regarding the examination of the dispute shall be deemed prevailing.

**ARTICLE 2.** (1) The Arbitration Court with the Bulgarian Stock Exchange — Sofia AD shall consist of a Chairperson, two Deputy Chairpersons and Arbitrator Judges.

(2) There shall be an Administrative Secretary, a Minute-Taker Clerk and a Record-Keeper with the Arbitration Court.

**ARTICLE 3.** (1) The Chairperson of the Arbitration Court shall organize the operation thereof and, to this end, shall:

1. ensure the prompt deciding of cases;
2. direct the work of the Administrative Secretary and the record-keeping;
3. ensure the interaction of the Court with the management bodies of the Exchange;

4. organize the continuing education of the judges and of the administrative staff;
5. distribute the tasks for the overall organization and management among the Deputy Chairpersons.

(2) In the absence of the Chairperson, the functions thereof shall be performed by the Deputy Chairpersons, conforming to the distribution referred to in Item 5 of the foregoing Paragraph.

**ARTICLE 4.** (1) Upon deciding cases, Arbitrator Judges shall be equal in rights, autonomous and independent and shall conform only to the law and to the Exchange Rules and Regulations.

(2) Arbitrator Judges shall be obligated to respect the confidentiality of any information that comes to the knowledge thereof in the course of or in connection with the performance of the functions thereof.

**ARTICLE 5.** The Administrative Secretary shall organize, direct and control the work at the records office of the Court and, to this end, shall:

1. direct and control the record-keeping;
2. see to the compliance with the orders of the Chairperson, the Deputy Chairpersons and the arbitration panels;
3. keep a list of arbitrators and be in charge of the application of the Tariff of the Court;
4. be in charge of the logistical support for the operation of the Court.

**ARTICLE 6.** The Minute-Taker Clerk shall:

1. draw up and certify the minutes of proceedings at the sessions of the Chairperson's Board and of the court panels;
2. ensure implementation of the orders of the Court;
3. draw up the documents in connection with the payment of the fees, the remunerations of expert etc.;
4. compile the list of persons to be summoned and report on compliance to the Presiding Arbitrator Judge;
5. certify the appearance of persons in the matter of arbitration cases;

## ANNEX 10

6. be in charge of the keeping of the records of the Court and of the separate panels.

**ARTICLE 7.** (1) Records shall be received at the Arbitration Court in the Bulgarian language, and any records in foreign languages must be accompanied by a certified translation into the Bulgarian language.

(2) Records received at the Court shall be constituted, conforming to the order of the Chairperson, as cases, case files and others.

(2) Records originally received at the Court, with the exception of regular statements of claim, shall be constituted as file cases.

(3) File cases shall be transformed into cases after the parties bring the documents into conformity with the requirements of the law, pay the fees due, and appoint regular and substitute Arbitrator Judges of their choice.

(4) The Arbitrator Judges appointed by the parties, sitting in camera on a day and at a time determined by the Chairperson, shall elect a Presiding Arbitrator Judge for the arbitration panel.

(5) Substitute Arbitrators shall join the proceeding in the event of a challenge of a regular Arbitrator or should an insurmountable obstacle prevent any of the regular Arbitrators from proceeding with examination of the case.

**ARTICLE 8.** (1) The following books shall be kept at the Arbitration Court:

1. an incoming and an outgoing register;
2. an alphabetical index;
3. an inventory book for cases;
4. a book of executive and open sessions;
5. a book of evidence.

(2) The books shall be strung through, numbered, sealed and signed by the Chairperson.

(3) Incoming records shall be accepted by the Administrative Secretary, who shall assign an incoming number and a date of receipt to the said records.

**ARTICLE 9.** (1) The records received, once filed, shall be reported by the Administrative Secretary to the

Chairperson not later than three days after the receipt of the said records, and the Chairperson shall endorse any such records immediately.

(2) Outgoing correspondence shall be signed by the Chairperson of the Court or by the Arbitrator Judge presiding the panel and by the Administrative Secretary.

**ARTICLE 10.** The cases referred to the Court shall be proceeded with conforming to the adjective provisions of the International Commercial Arbitration Act and the Code of Civil Procedure.

**ARTICLE 11.** (1) Upon receipt of a statement of claim, the Chairperson of the Court shall verify the validity thereof and, if there are no defects, shall order that transcripts of the list of arbitrators, the tariff and the present Rules and Regulations be transmitted to the claimant party, and shall set a time limit wherewithin the party must appoint a regular and a substitute arbitrator and must pay the fees due.

(2) After appointment of arbitrators and payment of the fees due, transcripts of the records shall be transmitted to the respondent party, which shall be set a time limit to appoint a regular and a substitute arbitrator and to respond to the claim.

(3) In case the claimant party fails to cure the defects within the time limit set and to pay the fees due, the Chairperson of the Court shall terminate the proceeding.

(4) A terminated proceeding may be resumed, acting on a new statement of claim and in compliance with the requirements of the law.

**ARTICLE 12.** (1) After commencement of the proceeding by the arbitration panel, the parties shall have the right to challenge, which shall be decided according to the procedure established by the Code of Civil Procedure.

(3) In case an Arbitrator establishes the existence of legal impediments to participation in the panel, the said Arbitrator shall be obligated to recuse himself or herself.

**ARTICLE 13.** (1) The cases shall be examined at the building of the Court.

(2) By way of exception, acting on a motion by a party and by a unanimous decision of the panel, where the circumstances of the case so necessitate, a case may be examined elsewhere as well.

(3) The cases shall be heard and decided in the Bulgarian language. A party who does not possess command of the Bulgarian language shall be obligated to appear with an interpreter.

**ARTICLE 14.** (1) Upon deciding of cases, the members of the panel shall enjoy equal rights, and decisions shall be rendered by a majority.

(2) Where a member of the panel holds a dissenting opinion, the said member shall state reasoning of the said opinion and shall enter the said opinion in the decision of the panel within three days after the said decision is made.

**ARTICLE 15.** All records on the cases as instituted shall be filed conforming to the order of receipt and shall be numbered so as to ensure the unimpeded reading of the text.

**ARTICLE 16.** (1) Any undecided cases shall be kept separately and shall be arranged conforming to the dates of examination thereof.

(2) Any closed cases shall be filed by an endorsement of the Chairperson and shall be kept separately in the order of the filing numbers thereof.

(3) Where a case is removed from the premises of the Court, the Administrative Secretary shall note the person whereto the said case has been delivered and the time of delivery in the relevant book.

**ARTICLE 17.** (1) It shall be inadmissible to make any marks, signs, underlining and other such on the court records, with the exception of the endorsements by the Chairperson of the Court and the Presiding Arbitrator of the panel.

(2) The cases shall be made available only to the parties or to the authorized representatives thereof.

(3) Transcripts, abstracts, certifications and other such of the case records shall be prepared solely acting on a written application with a permission from the

Chairperson of the Court or the Presiding Arbitrator of the panel.

(4) Original documents shall be returned solely where the need is proven and after the party presents a certified transcript.

**ARTICLE 18.** (1) Pending cases shall not be made available to state bodies, to the parties or to third parties and shall not be attached to other cases.

(2) Any lost cases shall be restored according to the procedure established for this by the Ministry of Justice.

(3) After the end of each year, the Administrative Secretary shall inventory the cases for the past period and shall report the result in writing to the Chairperson of the Court.

**ARTICLE 20.** (1) Cases shall be scheduled for examination in an executive session by the Presiding Arbitrator of the panel not later than seven days after the election of the said Arbitrator.

(2) After performance of the actions prescribed in the executive session, the Presiding Arbitrator of the panel shall schedule an examination of the case in an open session with summoning of the parties.

(3) The parties, the experts and the witnesses shall be summoned according to the procedure established by the Code of Civil Procedure.

**ARTICLE 21.** (1) If duly summoned, the non-appearance of a party or a representative thereof shall not be an impediment to examination of the case.

(2) In the event of non-appearance of a party or a representative thereof for cogent reasons, the court panel shall adjourn the examination of the case until another date, of which the appearing party shall be presumed notified.

(3) A party may motion that the case be examined in its absence, but if the panel determines that the appearance of the said party is of material relevance for elucidation of the factual situation in the matter of the case, the panel may order the appearance of the said party.

**ARTICLE 22.** (1) The proceeding before the arbitration panel shall open by a proposal for a settlement by the Presiding Arbitrator.

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(2) The parties may agree on a settlement before the decision of the Court is recorded, and the settlement, unless contrary to morals and to law, shall be approved by the Court and shall be entered in the minutes of proceedings.

(3) The parties may furthermore agree regarding the applicable substantive law in case this is not contrary to the standards of international law and to the Constitution.

(4) Bulgarian law shall govern any disputes related to ownership of immovable property and rights in rem arising therefrom.

**ARTICLE 23.** (1) The minutes of proceedings at the sessions of the Court shall be prepared under dictation of the Presiding Arbitrator during the session itself and shall be signed by the said Presiding Arbitrator and by the Minute-Taking Clerk.

(2) The defences of the parties, after completion of the collection and verification of evidence, unless presented in writing, shall be included in the minutes in a summary form.

**ARTICLE 24.** The decision of the arbitration panel shall be entered into the inventory book for cases and shall be transmitted to the parties in the order of summoning.

**ARTICLE 25.** (1) Each party may approach the court panel with a motion to interpret the decision or to correct an apparent error of fact.

(2) Upon interpretation of the decision, the panel shall pronounce on all ambiguities declared by a new decision.

(3) In a proceeding for correction of an apparent error of fact, the court panel may pronounce sitting in camera, if the parties do not object in writing. Otherwise, the motion shall be examined according to the procedure established by the Code of Civil Procedure.

**ARTICLE 26.** (1) After entry of the decision and notification of the parties, the case shall be filed by an endorsement of the Chairperson of the Court and shall be archived for a period of not less than ten years.

(2) Before archiving of the cases, the Administrative Secretary shall verify whether all actions prescribed in

the decision have been performed and shall report to the Chairperson of the Court.

(3) The books of the court after close of the cases entered therein shall also be kept according to the procedure established by the foregoing paragraph.

**ARTICLE 27.** Annually, the Chairperson and the Deputy Chairpersons shall summarize the caselaw of the court and shall bring the said caselaw to the notice of the plenary panel of arbitrators.

The present Rules and Regulations were adopted by the Board of Directors of the Bulgarian Stock Exchange — Sofia at a meeting evidenced by Minutes of Proceedings No. 28 dated 24 September 2004, and the seal of the Exchange has been affixed thereto.

## BM&FBOVESPA MARKET ARBITRATION PANEL

*By Luiz Eduardo Martins Ferreira*

### Market Arbitration Panel

#### *Institution*

On July 27th 2001, the Sao Paulo Stock Exchange “BOVESPA” instituted the Market Arbitration Panel, aiming to offer an appropriate forum for the solution of issues relative to capital markets and issues especially of a corporate nature.

#### *Goals of the Market Arbitration Panel*

Firstly, the Market Arbitration Panel has the function of acting in the composition of conflicts arising in the special listing segments of BOVESPA, which are New Market and Level 2 of Corporate Governance.

However, i) increasing the arbitration institute, ii) the benefits provided by the panel and iii) the recent amendments in Brazilian legislation that made possible the inclusion of solution by arbitration in company by-laws (Article 109, paragraph 3<sup>2</sup> of Law no. 10.303, of 31st October, 2001, that amended the Corporate Law)<sup>3</sup> must all be taken into consideration. The Market Arbitration Panel has decided to authorise the adhesion of any persons, companies and others than those participants referred to in the special listing segments.

#### *Compulsory Adhesion to The Market Arbitration Panel Rules*

The companies listed in the New Market and Level 2 of Corporate Governance segments, as well as their controlling shareholders, administrators and Fiscal Council members, are obliged to adhere to the Market Arbitration Panel Rules.

#### *Voluntary Adhesion to The Market Arbitration Panel Rules*

Investors of companies listed in the New Market or Level 2 of Corporate Governance may voluntarily adhere to the Market Arbitration Panel Rules. Any other company, including those companies listed in the other special listing segments, (Level 1 of Corporate Governance) will also be eligible to adhere.

#### *Procedure of Adhesion to The Market Arbitration Panel Rules*

The signing of a “Term of Approval” is necessary to adhere to the Market Arbitration Panel Rules and will become the solution of the disputes by mandatory arbitration.

#### *Proceedings of Voluntary Adhesion to The Market Arbitration Panel Rules*

For those who are voluntarily interested in submitting a dispute to the Market Arbitration Panel Rules, it is necessary to include an Arbitration Clause or another specific document, referring expressly to the regulations of the Market Arbitration Panel. In addition, the participation also depends on the consent of the Chairman of the Market Arbitration Panel.

#### *Controversies Susceptible to Solution in The Market Arbitration Panel*

- Corporate rules
- Rules applicable to capital markets

Differently to other Arbitration Centres, the Market Arbitration Panel counts on an essential characteristic, that is the maintenance of expert arbitrators in the most varied corporate issues and subjects relative to the capital market, whose degree of complexity and difficulty is quite considerable. In this sense, the Market Arbitration Panel will be able to solve controversies resulting of the application of the dispositions contained in the Corporate Law, in company by-laws, in the rules edited by the National Monetary Council, Brazilian Central Bank and Security and Exchange Commission of Brazil, as well as other applicable rules to the operation of the capital market in general.

#### *Composition of The Market Arbitration Panel*

In accordance with the regulation of the Market Arbitration Panel, the panel should be composed of at least 30 arbitrators, elected by BOVESPA’s Board of Directors, for a two year term. Each arbitrator should comply with the following requirements (cumulatively):

- to possess an unblemished reputation and good knowledge of the capital market; and

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- to be a capable person, having a minimum of 30 years of age.

Today, a board of 31 arbitrators make up the Market Arbitration Panel, with one Chairman and two Vice-Chairmen, among them lawyers, accountants, economists and administrators. The panel also includes a General Secretary (who does not make up part of the board of arbitrators).

To act in an arbitration procedure, the arbitrator does not need to necessarily integrate the board of arbitrators of the Market Arbitration Panel. The parties may appoint other persons as arbitrators, by submitting their names for approval to the Market Arbitration Panel Chairman and Vice-Chairmen.

The appointed arbitrator should not:

- be, or has been a controller, administrator, audit committee/fiscal council member, auditor, employee or representative of some of the litigant parties, in the last three years;
- be rendering services to some of the litigant parties, or to have rendered it within the last three years, except for offering opinions on issues not linked to the dispute; and
- have an economic or legal interest in the dispute.

### **Arbitration Proceedings**

The Market Arbitration Panel maintains in operation three types of arbitration proceedings:

#### **1. Ordinary Arbitration**

Ordinary Arbitration should be used to solve disputes of a large complexity, if it involves very detailed and specific proceedings, and must have a maximum of five arbitrators (Arbitration Tribunal).

In summary, the party that claims to solve a certain dispute should direct a request to the Market Arbitration Panel indicating the parties that will participate, presenting the facts that originated the controversy, formulating the request, esteeming the involved values, as well as joining all the documents pertinent to aid the judge in making a decision.

Providing that the request complies with all of the demanded requirements, the requested party should present the defense to the Market Arbitration Panel within five days, and the requesting party will hear about the defense.

The parties will be notified to attend a first hearing in the attempt of a composition, and in case a settlement is reached, the respective settlement agreement will have the effect of an arbitration award. In case the composition fails, the existing preliminary subject will be resolved and the proceedings of an arbitrator's appointment will be initiated.

The appointed arbitrators should elaborate the Arbitration Term that should contain the summary of the dispute and the rules of the proceedings (Arbitration Commitment). After the correct signing of the Arbitration Term, evidence and producing of evidence (documental, oral, expert, testimonial) will begin. After this stage, the sentence should be pronounced, observing the time delay stipulated in the Arbitration Term.

#### **2. Summary Arbitration**

Summary Arbitration should be used to solve disputes of a simpler complexity.

On his own request, the party that claims for arbitration must indicate the proof that he intends to produce in the Settlement and Judgment Hearing. The Chairman of the Market Arbitration Panel promotes the draw of a single arbitrator, except if the parties make the indication by mutual consent, when the Chairman notifies the requested party and arrange a date for the hearing. In this hearing, there will be a composition attempt, and in case it is frustrated the Arbitration Term is immediately signed. In this case, the requested party presents his defence and evidence, and either at that moment, or within 48 hours, the arbitrator pronounces the sentence.

#### **3. Ad Hoc Arbitration**

In *Ad Hoc* Arbitration, or informal arbitration, the parties can establish private proceeding rules, as for the number of arbitrators and the use of another Centre, since they make it by mutual consent and through an Arbitration Term that should count on the Chairman's Market Arbitration Panel approval.

In all of the proceedings, the principles of the adversary, equality of the parties, impartiality of the arbitrators and free convincing are respected, besides being adopted the secrecy, the speed, the economy of resources and the expertise of the arbitrators.

### **Arbitration Award**

The arbitration award should be issued for a majority of votes, in the terms defined by the parties in the Arbitration Term or, in the absence of a term stipulation, in the time period of 180 days counted from the commencement of the proceedings.

Before the signature of the sentence, the Arbitration Tribunal should submit a draft of the sentence to the appreciation of the Chairman or one of the Vice Chairmen, who may prescribe modifications related to formal aspects and point out aspects relating to the merit of the controversy (without affecting the decision).

The extension of the arbitration decision is restricted to the parties of the proceeding. However there is the possibility of the company extending its effects to other shareholders that may plead the same situation.

From time to time, the decisions by arbitration will be published, including the names of the arbitrators who participated in the proceeding, but without disclosing the names of the parties or any other information that may be used to identify them.

### **Quarrels**

Regarding specifically to what was requested, we have to add the following:

#### **(i) in what form should the company's submission to arbitration take?**

With the edition of Law no. 9.307/96, the Arbitration Clause (that precedes the controversy, disposing of the event of a future dispute) inserted a certain agreement becoming enforceable, being enough and capable of submitting the dispute to the arbitration proceeding, avoiding the state jurisdiction. In this way, when the dispute arises the parties shall ask for the establishment of arbitration, with the signature, in good faith — or, in having resistance, for a judicial decision — of the Arbitration Commitment, that it is the document

that will establish the juridical-procedural outlines of the arbitration (summarising the dispute and the proceedings rules).

For Corporate Law to suit arbitration procedures, it is expressly established that companies may insert in their by-laws, any rule which submits the arbitration proceedings to the controversies among shareholders and their company, as well as among minority and controlling shareholders.

However, the effectiveness of the statutory Arbitration Clause is not completely accepted. For some jurists the simple provision of arbitration in the company's by-law is not enough to oblige the shareholders to submit themselves to an arbitration proceeding, being indispensable the signature of a specific Arbitration Clause. For others, the statutory clause is equivalent to an Arbitration Clause, becoming possible with the establishment of an arbitration proceeding immediately, i.e., as soon as a controversy with any shareholder arises.

Specifically in the case of the Market Arbitration Panel, the parties are obliged to adhere to its regulations and sign a Term of Approval that is equivalent to the Arbitration Clause, in accordance with item 7 above, in order to avoid any further discussion about the arbitration proceeding.

#### **(ii) what changes in law and practice would be required to join officers and directors?**

Corporate Law has foreseen only the one possibility of a public corporation's by-law implementing arbitration to solve conflicts among the shareholders and the company or among the controlling and minority shareholders (article 109, § 3º).

In the Market Arbitration Panel, in order to avoid any further discussion about the joining of officers and directors, it is necessary to sign the Term of Approval submitting the discussion to the arbitration procedure.

#### **(iii) how are damages calculated?**

Established in the arbitration proceeding, the respective sentence (or arbitration decision) should contain a "report" (delimitation of the request), the legal basis of the decision (reasons that convinced the Arbitration Tribunal) and the "decision" itself. In the last part of

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the arbitration award, the Tribunal solves the subject, resolving the conflict and refer only to the request of the winning party, declaring it proceeding or not, or deciding and specifying the sentence (example: “I impose the losing party the payment of R\$\_\_\_) and the form and execution terms of what remains to be resolved.

The decision by arbitration should be clear to avoid ambiguous or erroneous interpretations. Its imprecision can cause, for instance, an appeal requesting clarification of the decision or even the request to make the arbitration award not valid. There is also the possibility of a proceeding denominated “sentence revision” that aims for the prescription of modifications of the formal aspect of the decision, and even as for the merit of the controversy, by the Chairman or Vice Chairmen of the institute. The respective Arbitration Tribunal should specify in the arbitration award the responsibility of the parties concerning the costs and expenses of the arbitration proceeding, as well as the fees of the arbitrators who have taken part.

### (iv) how should multi-party arbitration be handled?

In the Arbitration Act, and also in the Market Arbitration Panel Rules, there is no difference in arbitration proceedings involving a single party on both sides of the proceeding, or that involves two or more parties on each side.

It is still possible to consider the possibility of grouping different arbitration proceedings that discuss the same issue and involve the same request or requested party. In this case, there should be previously appraised the consequences of grouping the proceedings, especially the appointment of the arbitrators that would make up the respective Arbitration Tribunal.

BOVESPA Novo Mercado listing rules available at: <http://www.bmfbovespa.com.br/en-us/bmfbovespa/download/regulamento.pdf>. Rules governing the panel are available at: <http://www.camaradomercado.com.br/InstDownload/Regulation.pdf>.

*SOURCE: Luiz Eduardo Martins Ferreira, “Arbitration in Brazil,” OECD – UNCITRAL Experts Group meeting on Corporate Governance Dispute Resolution, June 25, 2003. Available at: [www.oecd.org/dataoecd/2/59/3842405.pdf](http://www.oecd.org/dataoecd/2/59/3842405.pdf).*

## Endnotes

- 1 The Arbitration Clause is the convention through which the parties of an agreement commit to submit to arbitration the disputes arising from such an agreement (Article 4 of Law no. 9.307/96).
- 2 §3 The by-law can establish that the divergences between the shareholders and the company, or between the controlling shareholders and the minority shareholders, can be solved by arbitration, in the terms that specify.
- 3 Art. 109. Neither the by-law nor the General Meeting can deprive the shareholder of his rights.

## KING REPORT ON GOVERNANCE FOR SOUTH AFRICA - 2009

### Dispute Resolution

#### Principle 8.6: The board should ensure disputes are resolved as effectively, efficiently and expeditiously as possible

1. Disputes (or conflict) involving companies are an inevitable part of doing business and provide an opportunity not only to resolve the dispute at hand but also to address and solve business problems and to avoid their recurrence.
2. It is incumbent upon directors and executives, in carrying out their duty of care to a company, to ensure that disputes are resolved effectively, expeditiously and efficiently. This means that the needs, interests and rights of the disputants must be taken into account. Further, dispute resolution should be cost effective and not be a drain on the finances and resources of the company.
3. ADR has been a most effective and efficient methodology to address the costly and time consuming features associated with more formal litigation. Statistics related to success range from a low of 50%, for those situations in which the courts have handed down a case for ADR, to an average of 85% — 90% where both parties are willing participants.
4. Mediation is often suggested as an ADR method with the assumption that the parties are willing to engage fully in the process. A process of screening is undertaken by many mediators, which excludes those who fall short of the criteria of will and capacity. This is described in the field in terms of readiness or ripeness for ADRs. Incapacity, as in the case of mental illness and inability to grasp the concepts, should naturally result in exclusion from the process.
5. Those who are resistant to ADRs are problematic in terms of ubiquitous referral.
6. ADR has become the intervention of choice in many instances and so it behoves specialists to improve the overall rate of intake and success. Clearly the optimal outcome would be to increase the overall satisfaction with the process and outcome of successful resolution.
7. Disputes may arise either within a company (internal disputes) or between the company and outside entities or individuals (external disputes). The board should adopt formal dispute resolution processes for internal and external disputes.
8. Internal disputes may be addressed by recourse to the provisions of the Act and by ensuring that internal dispute resolution systems are in place and function effectively.
9. External disputes may be referred to arbitration or a court. However these are not always the appropriate or most effective means of resolving such disputes. Mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.
10. A distinction should be drawn between processes of dispute resolution (litigation, arbitration, mediation and others) and the institutions that provide dispute resolution services.
11. In respect of all dispute resolution institutions and regardless of the dispute resolution process or processes adopted by each, an indispensable requirement is its independence and impartiality in relation to the parties in dispute.
12. The courts, independent mediation and arbitration services (not attached to any disputing parties) and formal dispute resolution institutions created by statute are empowered to resolve disputes by mediation or conciliation and by adjudication. Their effective use should be ensured by companies.
13. Successful resolution of disputes entails selecting a dispute resolution method that best serves the interests of the company. This would, in turn, entail giving consideration to such issues as the preservation

## ANNEX 12

of business relationships and costs, both in money and time, especially executive time.

14. It is also important to recognise that the use of mediation allows the parties to create options for resolution that are generally not available to the parties in a court process or in arbitration. Further, the Act makes provision for alternative dispute resolution processes to be conducted in private.
15. Mediation is not defined in the Act. The concept has an accepted meaning in practice in South Africa. Mediation may be defined as a process where parties in dispute involve the services of an acceptable, impartial and neutral third party to assist them in negotiating a resolution to their dispute, by way of a settlement agreement. The mediator has no independent authority and does not render a decision. All decision-making powers in regard to the dispute remain with the parties. Mediation is a voluntary process both in its initiation, its continuation and its conclusion.
16. Similarly conciliation is not defined in the Act. Conciliation is, like mediation, a structured negotiation process involving the services of an impartial third party. The conciliator will, in addition to playing the role of a mediator, make a formal recommendation to the parties as to how the dispute can be resolved.
17. Once again, adjudication is not defined in the Act but the process will not differ significantly from arbitration.
18. In selecting a dispute resolution process, there is no universal set of rules that would dictate which is the most appropriate method. Each case should be carefully considered on its merits and, at least, the following factors should be taken into account:
  - 18.1. *Time available for the resolution of the dispute.* Formal proceedings, and in particular court proceedings, often entail procedures lasting many years. By contrast, alternative dispute resolution (ADR) methods, and particularly mediation, can be concluded within a limited period of time, sometimes within a day.
  - 18.2. *Principle and precedent.* Where the issue in dispute involves a matter of principle and where the company desires a resolution that will be binding in relation to similar disputes in the future, ADR may not be suitable. In such cases court proceedings may be more appropriate.
  - 18.3. *Business relationships.* Litigation and processes involving an outcome imposed on both parties can destroy business relationships. By contrast mediation, where the process is designed to produce a solution most satisfactory to both parties (a win-win resolution), relationships may be preserved. Where relationships and particularly continuing business relationships are concerned, therefore, mediation or conciliation may be preferable.
  - 18.4. *Expert recommendation.* Where the parties wish to negotiate a settlement to their dispute but lack the technical or other expertise necessary to devise a solution, a recommendation from an expert who has assisted the parties in their negotiations may be appropriate. This process would be termed conciliation.
  - 18.5. *Confidentiality.* Private dispute resolution proceedings may be conducted in confidence. Further, the Act makes provision for alternative dispute resolution processes to be conducted in private.
  - 18.6. *Rights and interests.* It is important in selecting a dispute resolution process to understand a fundamental difference they have to adjudicative methods of dispute resolution (court proceedings, arbitration and adjudication). The adjudicative process involves the decision maker imposing a resolution of the dispute on the parties after having considered the past conduct of the parties in relation to the legal principles and



rights applicable to the dispute. This inevitably results in a narrow range of possible outcomes based on fundamental considerations of right and wrong. By contrast, mediation and conciliation allow the parties, in fashioning a settlement of their dispute, to consider their respective needs and interests, both current and future. Accordingly, where creative and forward-looking solutions are required in relation to a particular dispute and particularly where the dispute involves a continuing relationship between the parties, mediation and conciliation are to be preferred. For example, a contract can be amended or materially rewritten.

19. Mediation and conciliation require the participation and presence of persons empowered and mandated to resolve the dispute.
20. The board should select the appropriate individual(s) to represent the company in alternative dispute resolution (ADR) processes
21. The Courts will enforce an ADR clause to resolve a dispute providing all are subject to an agreed set of rules and practices such as the place and language of the process.
22. Contracting parties who are attuned to the fact that a dispute will be administered and resolved by a third party are naturally inclined to resolve it themselves. If, for example, the ADR processes are made subject to the rules of the Arbitration Foundation of Southern Africa (AFSA), it will be administered by AFSA. If the ADR processes are ad hoc, a recalcitrant party in bad faith may be able to frustrate the process.
23. An example ADR clause has been developed by the Institute of Directors and AFSA and settled by senior counsels. That clause is set out in the practice notes and is recommended to be incorporated in all contracts, especially major procurement and cross border contracts.

*SOURCE: Institute of Directors in Southern Africa, "King Report on Governance for South Africa 2009," Copyright 2009 IoDSA. All rights reserved. Used by permission.*



## ANNEX 13

### FACTORS TO GUIDE SELECTING ADR SERVICES

The grid below may be used to conduct interviews for selecting the appropriate support and determining the level of involvement. The topics and questions are not meant to be exhaustive, but, instead, to provide examples of criteria to guide decision-making.

<p><b>CAPABILITIES</b></p> <p>What specific expertise and skills does your firm have?</p> <p>Which of those are most relevant to our company/ organization, its business/mission, the nature of the dispute, and the use of ADR approaches?</p> <p>What separates your firm from the others?</p>	<p><b>SUCCESS, QUALITY OF SERVICE</b></p> <p>Did your firm’s assistance contribute to the successful resolution of a dispute?</p> <p>If so, in what ways and why?</p>
<p><b>TRAINING, CERTIFICATION</b></p> <p>Training through what institution for what goal?</p> <p>Certification from a credible organization?</p> <p>Participation in continuing education programs to remain current?</p>	<p><b>ACCESSIBILITY AND CONVENIENCE</b></p> <p>How accessible would the individual or firm be throughout the period of engagement? Is access convenient for all disputants and the board?</p>
<p><b>SKILLS, PERSONAL ATTRIBUTES</b></p> <p>Communications (oral, written)</p> <p>Confidence, assertiveness, interest in working with you</p> <p>Personality</p> <p>Integrity</p> <p>Commitment</p> <p>Organizational skills</p> <p>Inspirational</p> <p>Diplomatic</p> <p>Culture</p>	<p><b>AVAILABILITY</b></p> <p>Would the firm be available to provide services within the timeframe needed?</p>
<p><b>THINKING PROCESS</b></p> <p>Does the firm demonstrate creativity and new ways of thinking about issues?</p> <p>Is it well-versed in the latest information relevant to your case?</p>	<p><b>CONFLICTS OF INTEREST</b></p> <p>Does your firm have any existing or potential conflicts of interest with the board, senior management, the company, or the other parties to the dispute?</p> <p>If not, could potential conflicts of interest arise?</p> <p>If there are conflicts, what are those? Are they significant to prevent the firm from providing fair, impartial counsel?</p>
<p><b>EXPERIENCE</b></p> <p>What dispute resolution cases have you and/or your firm handled?</p> <p>Are those cases and the firm’s other experience relevant to the board’s perceived needs for the dispute it is addressing?</p>	<p><b>FEES</b></p> <p>How do you typically bill your clients (e.g., hourly; daily; lump fee per case; whether there is a contingency; fee plus expenses)?</p>
	<p><b>RECOMMENDATIONS</b></p> <p>Who has used your services?</p> <p>In what specific cases was your firm involved?</p> <p>References that we may be permitted to contact?</p>
	<p><b>DIVERSITY</b></p> <p>Will the candidate understand cultural issues and gender-based viewpoints?</p>

## AGREEING ON THE TERMS OF MEDIATION

Once the board has chosen an ADR expert, both must sign an agreement. This agreement should include the following provisions:

**PARTIES** Identify the parties to the dispute. Specify if other parties may arise as the ADR expert begins their work. There is no need, here, to outline the parties' positions.

**DISPUTE'S SCOPE** Define the nature of the dispute but note if the dispute's scope may broaden or narrow as the disputants work with the ADR expert. This focuses the ADR expert's efforts and prevents him or her from getting distracted by ancillary or other disputes that may arise. Be careful not to characterize the dispute in a way that suggests bias to one party or parties over others.

**APPOINTMENT OF EXPERT** Define the specific role(s) for the ADR expert, from exploratory research to enforcement of a settlement's terms. Explain the reporting relationship with the board and his/her authority in working with the disputants and, if this is part of his/her role, to enforce the settlement. Provide a means to revisit this section if the ADR expert, the parties, and the board realize that the expert's role must be modified to meet changes as the dispute resolution process evolves. Here, too, the expert should attest to his or her having no conflicts of interest, or if he or she does, those conflicts must be disclosed to the board privately or publicly, as determined in the engagement negotiations.

**PURPOSE OF EXPERT DETERMINATION** This section provides an opportunity to affirm the board's support for ADR for the dispute.

**CONFIDENTIALITY** Make clear the importance of the confidentiality conditions that the ADR expert must abide by in his/her dealings with all parties. Trust in an ADR expert is a key source of his or her success. Maintaining confidences is integral to building and sustaining trust.

**INDEPENDENCE** ADR experts are most effective when they work independent from the board. Affirming their independence in the agreement is essential to the ADR

process because it gives the disputants greater confidence that their points of view will be addressed without any allegiances to the board or senior management.

**CONDUCT OF EXPERT DETERMINATION** This section should specify how the board expects the ADR expert to pursue his/her work, noting the expectation that the ADR expert is bound to the high professional and ethical standards, and referencing laws, regulations, and codes that affect his or her work. For example, if there is an impasse among the parties, the CEDR<sup>1</sup> agreement specifies that the ADR expert's decision shall prevail.

**DEADLINES** Provisions may place specific time limits on various phases of the ADR process and/or an overall time limit for the period from the start to settlement.

**CHALLENGE TO THE PROCEDURE** If the ADR process derails because the disputants are unhappy, or the ADR expert finds he or she isn't adequately qualified for the case, the agreement should outline a process for challenging and changing the dispute.

**OTHER DISPUTE RESOLUTION OPTIONS** If the ADR expert fails, the agreement should specify how the case can move to a court-annexed mediation or the courts for resolution.

**REASONS IN THE DECISION** The ADR expert must provide reasons for his/her decision.

**FEES AND EXPENSES** Be specific about the way the ADR expert will bill for his or her time and expenses, whether on an hourly basis or a set fee (within parameters jointly determined based on the agreement's scope of work).

**IMPLEMENTATION OF THE DECISION** Provide direction for how the ADR expert will implement the decision, if he or she has been engaged to perform this responsibility.

**ENFORCEMENT** These terms should reflect the requirements of local jurisdictions.

**CHALLENGE TO THE DECISION** If the parties, the board, or senior managers oppose the decision, what recourse, if any, is there to review and change the decision?



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**LIABILITY** Should the ADR expert be negligent, what is his or her liability? This section should reflect laws, regulations, and best practice based on model documents.

<sup>1</sup> Sample agreements are available at: <http://www.cedr.com>.