

Integrated Conflict Management Programs Emerge as an Organization Development Strategy

BY JENNIFER LYNCH

Conflict management systems ... [are] apparently an emerging phenomenon in American corporations. ... In many companies with strong ADR policies, ADR isn't simply a set of techniques added to others the company uses but represents a change in the company's mindset about how it needs to manage conflict."

David B. Lipsky and Ronald L. Seeber, "The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations," Cornell/PERC Institute on Conflict Resolution, 23 (1998).

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For decades, every first-year law student in North America has been welcomed to the adversarial system, and told that this system is a cornerstone of democracy, where the legal representatives for all adversaries will advance their clients' positions as strongly as possible. The theory is that the judge will have the benefit of the best presentations and make the wisest decision.

Today, only a tiny percentage of disputes arrive before a judge, and just a fraction of those cases go all the way to trial and judgment without being settled. This is partially due to the fact that lawyers and disputants have begun to use other ways of resolving their disputes, such as negotiations, among themselves or through their lawyers; arbitration, where a neutral third party makes a binding decision; and mediation, where a neutral third party does not decide but rather assists the disputants in developing their own solutions. These approaches fall under the umbrella of alternative dispute resolution.

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As the trend toward negotiating and mediating grows, wave after wave of lawyers are taking training in interest-based negotiation and mediation. Many attorneys are now describing themselves as "collaborative lawyers" and committing themselves to taking an interest-based, rather than adversarial, approach to litigating and negotiating disputes.

Most companies have tried ADR, some use it regularly, and in some jurisdictions, such as Ontario, a mediation session is mandatory for all litigation cases.

Yet as practical and effective as ADR can be, it still serves only the "back end" of disputing, usually long after the dispute arose.

The ADR field is now moving to the "front end" of disputing, through the introduction of methods for preventing unnecessary conflict—and where conflict arises, responsibly managing it. The term "conflict management" encompasses the entire range of prevention, management, and all forms of resolution including ADR. See Figure 1 below.

When organizations go beyond ad hoc, case-by-case dispute resolution and turn their focus to systematically integrating all of these approaches into their day-to-day business, plus add processes that shift their conflict culture toward prevention, the new phenomenon is called an "Integrated Conflict Management System." This phrase and much of the early work in the field is attributable to Mary P. Rowe, an ombudsman and special

assistant to the president, and adjunct professor at the Massachusetts Institute of Technology in Cambridge, Mass.

Integrated conflict management systems are leading-edge developments and are becoming a key part of organizational development strategies, because they are understood to be essential elements of initiatives designed to transform organizational culture.

"Conflict" is a word that encompasses all disputes and much more. Conflict denotes any difference, problem, tension or dispute experienced by one or more parties, whether or not the conflict has been brought to the attention of the others. Conflict can be generally said to have become a dispute after there has been some stressed interaction and position-taking by the parties.

DIFFERENT APPROACHES

Organizations faced with conflict can resort to different approaches used alone or in combination for dealing with that conflict, including:

- a "power-based" approach;
- a "rights-based" approach;
- an "interest-based" approach, and
- a "systems approach."

The tripartite distinction of power, rights and interests originates at W.L. Ury, J.M. Brett, and S.B. Goldberg, "Getting Disputes Resolved," 19 (Jossey-Bass 1988). See Figure 2 on page 100.

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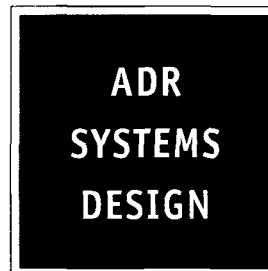
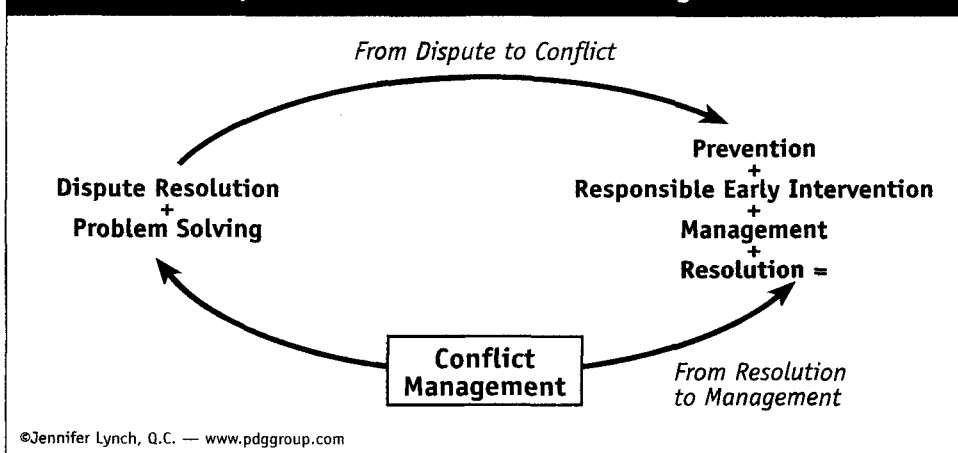


FIGURE 1—Terminology Shift from ADR and Dispute Resolution to Conflict Management



Integrated Programs Emerge as a Development Strategy

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Approach 1, Power: This approach is used by those who have the ability to decide, without fearing objection or recourse from a third party. For example, many industry conflicts are resolved in a power-based way, either by government officials, inspectors, or other industry regulators. Internally, for workplace conflict, many non-unionized organizations rely solely on supervisory or managerial decisions and have not introduced any other method of dispute resolution. In the unionized environment, recourse is provided in collective agreements for some, but not all, types of disputes. Decisions taken by the chain of management are power decisions: for example, deciding on suppliers, whether to renew contracts, whether to promote, and whether to settle or escalate.

Often those in positions of power provide no options whatsoever for dealing with conflict—the “like it or lump it” approach that leaves conflict festering or induces managers and employees to quit.

Approach 2, Rights: When a party to a dispute uses a rights-based approach, he or she engages in a formal process that culminates in having a decision made by a neutral third party, such as a judge or arbitrator.

Approach 3, Interests: There are dozens of processes that are interest based. The most common is for disputants to meet face to face, following an interest-based approach, for analyzing and discussing the problem, sometimes on their own, and other times with the help of a neutral facilitator or mediator.

When taking an interest-based approach, the parties focus on and discuss their underlying interests (e.g., needs, desires, and concerns) rather than taking positions. The objective is to understand each other’s real interests. The parties then propose options which meet as many interests as possible.

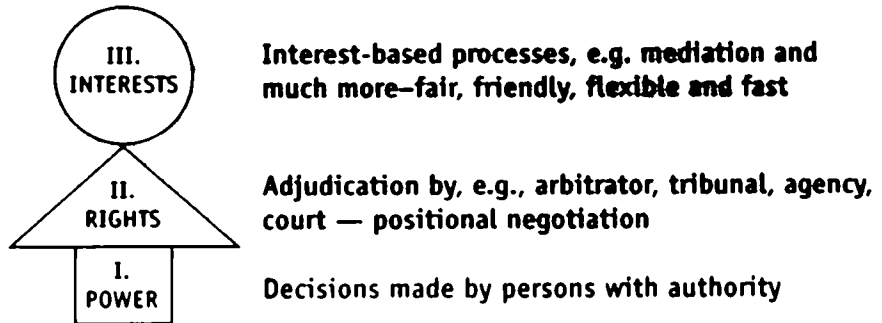
An added feature to an interest-based approach between parties is that they develop their own solutions, thereby retaining control over the outcome rather than ceding the decisionmaking to another person or body.

An interest-based approach also can be adopted by a manager.

COMBINING APPROACHES

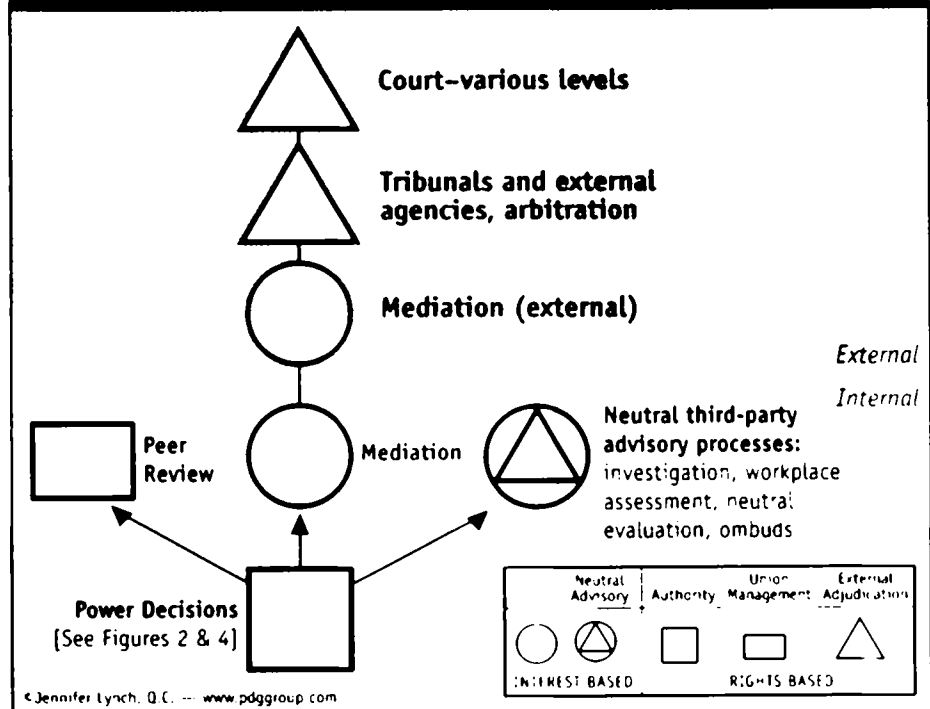
It is possible to resolve a conflict by combining approaches. For example, rights-based decisions can be made by people who are not

FIGURE 2 — First Three Generations: Disputes are Resolved One Case at a Time, Using One or a Combination of...



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FIGURE 3 — A Generic Dispute Resolution Model



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neutral, such as a manager or a panel of peers, who might decide the matter on the basis of rights. Power-based decisions can be made by people in authority who make those decisions based on the rights of the disputants, or based on their interests, or both.

This leads to Approach 4, Integrated Conflict Management Systems. A system is different from the first three approaches because, in addition to dispute resolution techniques, a system has features that focus on preventing unnecessary conflict and, when conflict arises, on managing it. Disputes often simply are the symptom of an underlying problem. An ICMS lays the foundation for addressing

the conflict causes, rather than just the dispute.

The first articulation of a systems approach was by Mary Rowe, in her 1984 article, “Are You Hearing Enough Employee Concerns?” (Co-authored by Michael Baker, 62 *Harvard Business Review* No. 3 (May-June, 1984)). In “Theory Building for Conflict Management Systems” (19 *Conflict Resolution Quarterly* No. 2, p. 215 (2001)), John P. Conbere describes the thinking of a number of system designers who have contributed to the evolution of ICMS systems design. In 2000, the Society for Professionals in Dispute Resolution (now the Association for Conflict Resolution) ap-

proved the "Guidelines for the Design of Integrated Conflict Management Systems." See www.acresolution.org.

The guidelines "have been received as a welcome addition to the discipline." Janet Reno, "The Federal Government and Appropriate Dispute Resolution: Promoting Problem Solving and Peacemaking as Enduring Values in Our Society," *Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR*, 19 *Alternatives* 16 (January 2001).

WHAT MAKES A SYSTEM?

When an organization takes a systems approach to conflict management, it introduces two key components: It develops or improves its dispute resolution model, and it creates a "Fostering and Sustaining Environment."

1. IT DEVELOPS OR IMPROVES ITS DISPUTE RESOLUTION MODEL

The organization starts by developing or modernizing its basic dispute resolution procedures. It selects a variety of dispute resolution procedures that it intends to use, and organizes them in a low-to-high cost sequence—a "dispute resolution model." Figure 3 at left, opposite, shows a generic dispute resolution model.

The model should have the following four features:

- It should provide a selection of all three dispute resolution approaches—power, rights and interests—often called the "Spectrum of Conflict Management Options." See Figure 4 on page 102. The emphasis is on interest-based options, yet always with recourse to a rights-based option.
- It should provide choices of options for disputants and managers, and the ability to "loop back" or "loop forward" to each option when appropriate. Thus, Figure 3 should not be read as a flow chart where one starts at the bottom and moves to the top; rather it depicts graphically the host of options that disputants and managers can turn to whenever it makes sense to do so.
- It should be designed to accommodate the needs of, and be accessible by, all stakeholders, including the disputants, supervisors, and so-called bystanders; that is, the other people who are not directly involved in the conflict yet are affected by it. It should be welcoming to persons who may come from cultural backgrounds where bringing forward a problem is discouraged. Knowledgeable persons who can coach and act as referrals should be easily identifiable.

- It should be accessible for all types of conflicts. In the workplace, most dispute resolution models target "hierarchical" disputes (such as the employee versus the supervisor), but the most expensive conflicts in an organization are peer-to-peer and in particular, manager-to-manager.

A good dispute resolution procedure might include this combination of options:

- *Appropriate negotiation* often is recommended as the first step in resolving any conflict that arises. At the earliest possible time and lowest possible level, employees are expected to recognize and acknowledge conflict and to try to resolve it responsibly. "Appropriate" means that the appropriate persons will initiate and be involved in negotiations, and the appropriate approach—interest-based negotiation—will be used.

- *Ombudsman*: Here are the key elements of an effective ombuds system and a good definition:

An Ombudsperson is an independent, confidential, designated neutral who works in an impartial way. The Ombudsperson should report to the CEO or COO, with access to the Board of Directors. The purpose of the office is to provide a possible path to fairness and justice. An organizational ombudsperson has in effect all the common functions of any dispute resolver. ... except those of advocate, formal fact-finder, appeals officer, arbitrator, judge or peace officer. Ombuds typically work informally, with great flexibility. ... They make no decisions for the employer or for their visitors except in (rare) emergencies. ... [W]hat an ombudsperson can and should do is work with every visitor to devise acceptable options that both protect the confidentiality of the visitor, and either get information where it needs to go, or help to see that appropriate action is taken. Through helping to develop options, and informal intervention if requested, an ombudsperson should be able to foster resolution of most issues or get them appropriately referred.

Mary P. Rowe, and Corinne Bendersky. "Workplace Justice, Zero Tolerance, and Zero Barriers," in Thomas Kochan and David Lipsky, eds., *Negotiations and Change, from the Workplace to Society*, Cornell University Press (2002).

This office is accessible by all—suppliers, clients and employees. The most used functions will be listening, coaching (helping people help themselves to take the direct approach, such as one-on-one interest-based

ACKNOWLEDGEMENT

This article is adapted from a chapter for a work-in-progress book, "The Shifting Culture of Conflict: Perspectives on Conflict Prevention, Management and Resolution." The book records the "Green College Thematic Lecture Series," and will be published by the University of Toronto Press Inc.

This material is an expansion of an October 2001, presentation in Ottawa by author Jennifer Lynch, Q.C., and Chief Superintendent Peter German, who is the Royal Canadian Mounted Police's Director General of Financial Crime.

negotiation), referring (to the appropriate office), and looking into the problem informally.

Other functions include: giving and receiving information, developing options, shuttle diplomacy, classic formal mediation, following up on something, referring cases to the process facilitator for a facilitated process meeting (see below), or developing a customized approach.

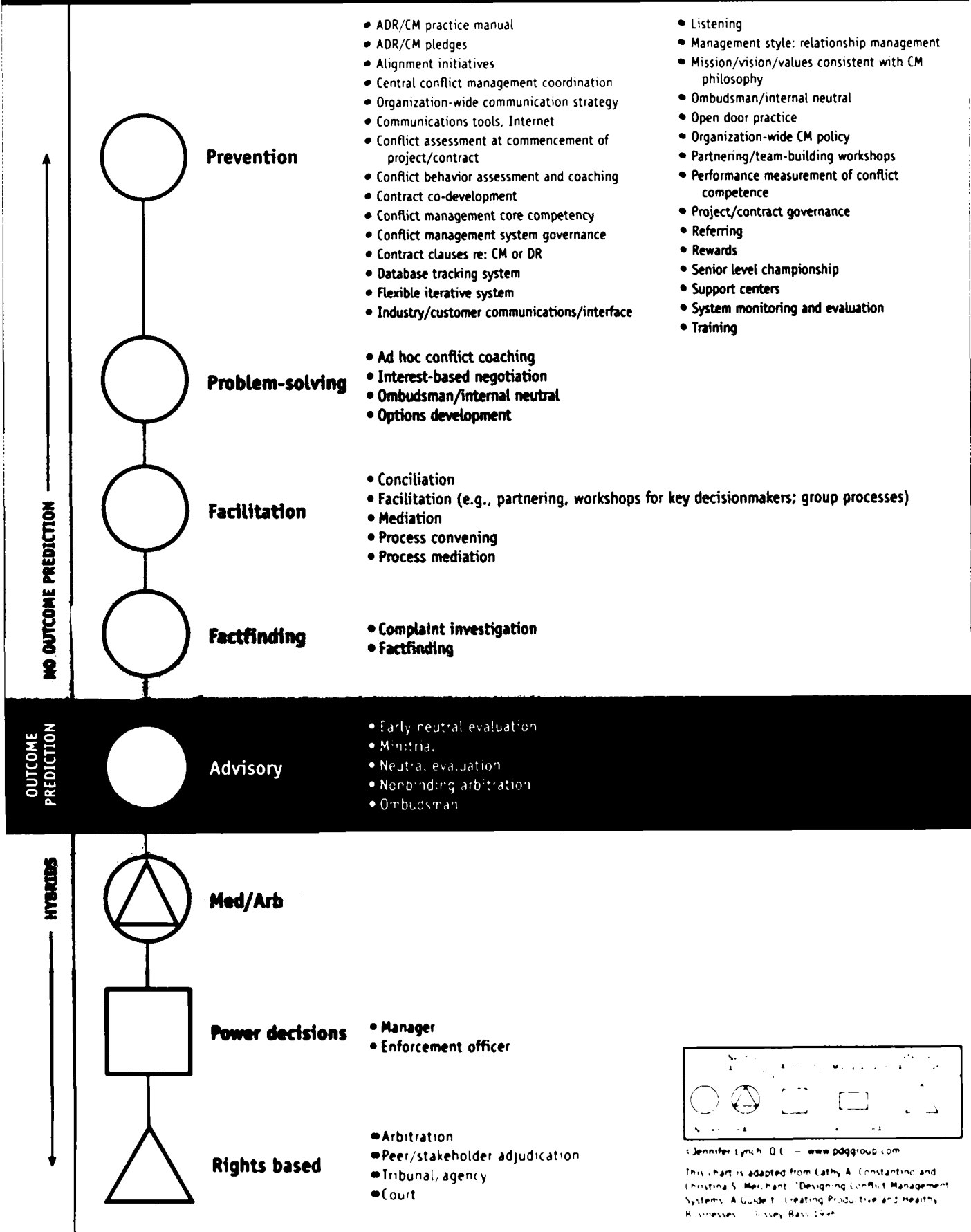
- *Usual chain of management decisions, but using an interest-based approach*: If efforts to resolve the conflict are not successful at the "Appropriate Negotiation" stage, another option is for senior managers to review the issue. The managers can invite input from, and engage in discussions with, representatives of stakeholders who have an interest in the outcome; while always using an interest-based approach.

- *Organizational referral and assistance points*: This includes human resources, conflict management coordination offices, employee assistance, staff relations, union representatives, health and safety, audit and ethics, etc.

- *Process Facilitator*: Sometimes called a "facilitated process meeting," or "convening," this option is relatively new and growing in popularity, as organizations realized after the fact that many problems that go to mediation get settled at intake. With this option, a voluntary meeting or series of meetings brings together affected parties to discuss their dispute and to select and plan possible resolution options. It can be used at any time, usually after the Appropriate Negotiation level. The facilitator who conducts this meet-

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FIGURE 4 — Spectrum of Conflict Management Options



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 ing, whether from within the organization or an external provider, is in effect a “mediator of the process,” guiding a meeting where the parties will select from a broad array of appropriate dispute resolution options, and decide how to:

- identify the right parties with authority;
- obtain information and disclosure;
- allocate costs and who pays;
- define the roles of the disputing parties and their staffs, experts, and legal counsel; and
- select a third-party neutral (e.g., for mediation, arbitration, or neutral evaluation).

An agreement is created that commits the parties on issues such as:

- bona fide attempts to reach a resolution;
- confidentiality;
- privacy and without prejudice discussions;
- enforcement of any agreements reached;
- timelines;
- logistics, and
- procedures for the conduct of the future process.

Process facilitations are held expeditiously and do not delay any rights-based process, such as litigation. An informed “no” and a decision to proceed to court is a perfectly acceptable result to a process mediation. Even in cases requiring litigation, the parties may

well have streamlined the litigation process, saving considerable time and resources for all concerned.

• *Customized Options:* When none of the usual alternative dispute resolution options such as mediation, neutral evaluation, mixed stakeholder panel review or arbitration fits the problem, an ombudsman or, where the organization has implemented it, a process facilitator, may assist the parties in tailoring a responsible approach for the particular situation. This could include advisory options such as factfinding, or a minitrial, which is a type of mediation where, at the end of presentations, a neutral adviser gives a prediction of the likely outcome if the matter is litigated. It also could include binding options such as a stakeholder panel; or hybrid options such as med/arb (where the mediator will conduct a mediation, and if the parties are unable to structure their own agreement, the mediator then becomes an arbitrator and renders a decision), or “simultaneous med-arb” (where two people, one a mediator and the other an arbitrator, work with the parties simultaneously, and the mediator conducts the mediation process and the arbitrator makes on-the-spot rulings on areas where the parties become stuck from time to time).

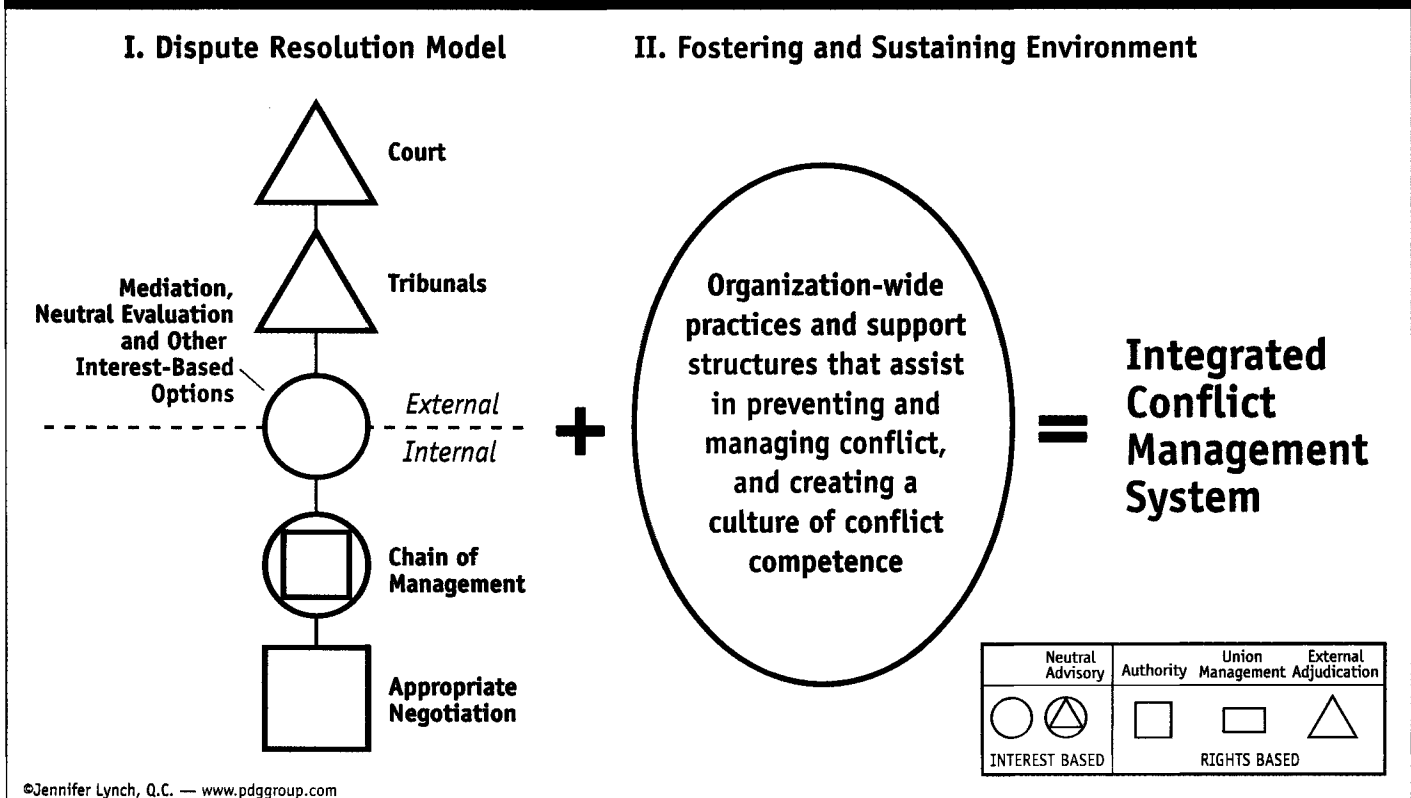
• *Mixed Stakeholders’ Panels:* A committee with representatives from stakeholders reviews the dispute—usually after hearing representations in person from affected parties and sometimes just on paper—and makes an advisory recommendation. The recommendation usually is not binding and serves as guidance to the parties in further negotiations. Examples are peer review panels, joint councils of management and unions, and joint panels of industry and regulators.

• *Mediation:* A voluntary process in which a neutral third party assists parties to a dispute to develop a mutually acceptable solution to their conflict. The mediator does not make decisions about the outcome; rather, the mediator is responsible for and in charge of the process.

• *Neutral Evaluation* occurs when a neutral third party is asked to provide an opinion about an issue or some aspects of a dispute. The evaluator is brought in due to his or her neutrality, experience, and knowledge of the dispute’s subject matter. It is called Early Neutral Evaluation when it is used early in the conflict. It can be used successfully late in the conflict as the penultimate mechanism; for example, before an adjudication decision is announced.

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FIGURE 5 — A Conflict Management System has Two Components



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• **Arbitration** is a rights-based process that provides the opportunity for disputants to have their issues determined by a neutral person (or a panel of neutral persons) without going to court. The arbitrator(s) renders a decision/opinion after hearing presentations on evidence and argument. A contract or statute might provide that the decision is binding; if not, the parties agree in advance whether the decision will be binding or non-

binding. Arbitration decisions are usually binding, but can be appealed to court on questions of law.

• **Agencies/Tribunals** provide rights-based adjudication of specific issues. In Canada agencies and tribunals have jurisdiction over public service staffing actions, grievances, human rights, official languages, privacy and access to information. An example of a United States agency is the U.S. Equal Employment Opportunity Commission. Such decisions are usually binding but can be appealed to court on legal questions.

• **Court:** Courts are part of the established judicial system, and allow disputants to litigate issues before a judge of a court of competent jurisdiction.

2. IT CREATES A 'FOSTERING AND SUSTAINING ENVIRONMENT'

On its own, a dispute resolution model is not a system.

The dispute resolution model is, of course, a sine qua non of a system, but it is only one of two core components. See Figure 5 on page 103. To the model are added various supporting processes and structures that are introduced across the organization to facilitate success. The resulting environ-

ment is called "a Fostering and Sustaining Environment."

According to Michael Shaw, of Public Works and Government Services Canada, a Fostering and Sustaining Environment is "the social and cultural surroundings that empower, encourage and capacitate individuals and communities to behave in certain ways." In this case, it is those features in the workplace environment that enable the organization and its employees to recognize, acknowledge, prevent, address, manage and resolve conflict in a productive, consistent and systematic manner.

The individual initiatives and options that nurture such an environment are called "Fostering and Sustaining Elements." They are organization-wide practices and support structures that assist the organization in

- preventing and managing conflict, and
- creating a culture of "conflict competence"—the creation of an environment where all who experience conflict feel comfortable to raise it, knowing it will be dealt with respectfully and responsibly.

For example, managers and employees in relevant positions are provided skills and resources in order to focus on prevention and early resolution—and they are also held accountable to do so. The system constantly reinforces the concept that conflict management means much more than dispute resolution and that interest-based language and behavior must become everyday practice.

It creates an atmosphere and culture where all conflict may be safely raised and where persons will feel confident that their concerns will be heard, respected and acted upon, with support provided. The "default reaction shifts from one of shrugging off or escalating conflict, to accepting it positively and encouraging early, low-level solutions." Jennifer Lynch, "ADR and Beyond: A Systems Approach to

Conflict Management" *Negotiation Journal*, Volume 17, Number 3, p. 213 (July 2001).

THE FULL SYSTEM

In order to meet the full definition of an Integrated Conflict Management System, the system must incorporate most aspects from all of the following four categories of fostering and sustaining elements:

A. CORPORATE COMMITMENT, DEMONSTRATED BY SUCH THINGS AS:

- Sincere and visible championship by leadership from all stakeholder groups (e.g., management/labor or management/customer/ industry/ supplier).

- Corporate mission, vision and values that are consistent with a conflict management philosophy.

- A corporate-wide policy of conflict management: Organization-wide encouragement, requirement and support of "conflict competent" behavior that emphasizes prevention of unnecessary conflict, identification and management of conflict, and earliest possible resolution.

- Conflict management as a separate core competency.

- Institutionalized incentives that reward good conflict management practices and discourage and penalize bad conflict management practices, including

- performance measurement, and
- costs of litigation and settlement allocated to responsible unit.

- Resources, both human and financial.

B. STRUCTURES THAT SUPPORT IMPLEMENTATION AND INSTITUTIONALIZATION, AND TRUST IN THE SYSTEM. FOR EXAMPLE:

- A conflict management central coordinator with high-level reporting. In larger organizations, this should be a dedicated person or office. The importance of high-level reporting cannot be overstated.

- Stakeholder participation in the development.

- Conflict management system governance by an oversight body of stakeholders.

- Access to a confidential, neutral person, such as an organizational ombudsman, and support from other knowledgeable persons to whom people can go for advice, coaching, referring, problem-solving—and listening, which is the most used "option" in a conflict management system.

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ternational arbitration, the opposing parties have their agreement to arbitrate, but there also is a contract (usually implied in fact) between the parties and the arbitral institution, and the arbitrator. With the entire system implicated in contractual arrangements, it becomes possible to contractually modify the obligations each has to the other. In fact there is some precedent in that in domestic U.S. arbitration under the American Arbitration Association rules, parties can communicate *ex parte* with arbitrators, even if such communications would be strictly forbidden in litigation.

MODIFICATION LIMITS

While agreement among interested actors is a necessary prerequisite for modification, it is not a sufficient one. There are some interests that are not implicated even in the web of contractual arrangements. These interests will be protected by limits on the modification power, which come in several forms.

First, there are external constraining forces, such as national criminal sanctions and civil liabilities, which will not be affected by party modification of ethical rules. There are also practical limitations, in that any modification must be the product of agreement with the potential adversary. Parties will be reluctant to negotiate away ethical constraints on opposing counsel, and may even regard such efforts with suspicion.

There also will be some important systemic controls. Since substantive arbitral awards will have to be enforced by national courts, there will be substantive limits on the parties' abilities to modify ethical obligations. For example, they could not enforce awards that were produced by proceedings devoid of the basic assurances of fundamental fairness—say if the parties agreed that they could misrepresent facts to the arbitral tribunal or bribe the arbitrators.

Finally, arbitrators also will exercise a control function, both through their powers of persuasion and their powers of interpretation. They can interpret potentially pathological ethical rules in a way that they would not be offensive to courts that later consider awards rendered under them.

In sum, the power to modify ethical rules will be deterred and controlled by a range of interrelated constraints.

The other objections are to arbitrators' sanction powers. Commentators don't agree whether such a power currently exists, and there has been historical reluctance to em-

power arbitrators with the power to award punitive damages or to perform other "public" functions. These objections fall into three categories: substantive concerns (arbitrators often get it wrong); procedural concerns (there is no judicial oversight when arbitrators get it wrong); and "symbolic concerns" (arbitrators are not public servants and therefore should not perform traditional government functions). Of these the first two are redressed in the proposal, and the third is in many ways an obsolete urge.

Objections to arbitrator competence often come up in the context of their application of mandatory law claims, such as antitrust and securities claims, or other complex national statutory regimes they may not fully understand. In contrast, here, arbitrators are being asked to apply specially designed arbitration rules. They have a unique competence to apply them.

With regard to judicial oversight, national courts should be given enhanced power to control the content of sanction awards—akin to, but more clear than, the Second-Look doctrine, emanating from the U.S. Supreme Court's attempt to provide additional oversight in reviewing awards involving mandatory law claims.

The symbolic concerns are more formalistic than substantive, especially when it is considered that arbitrators are already *de facto* exercising the proposed powers through their substantive awards and awards of costs and fees. More important, to be a fully operational system for adjudication, *international arbitration must assume as part of its formal mission, responsibility for regulating participating attorneys.* Nations must recognize and support this goal.

The continued success of the modern international arbitration system depends on nations' willingness to cede control over the substantive outcomes of international economic disputes, while lending their support to the enforcement of arbitral agreements and awards. States are willing to relinquish control in the international arbitration arena because they have an economic interest in facilitating effective resolution of transnational economic disputes, and because international arbitration has proven far more effective than national courts at resolving those disputes. The question that looms large over the future of international arbitration is: How much should states yield to the international arbitration system? These articles attempt to answer the question as it applies to regulating attorney conduct. ■

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- Strategic communication of the initiative with consistent messages and consistent terminology.

- Documentation of conflict management policies and codes of practice.

- The ability to adapt the system and to make continuous improvements;

- Safeguards such as voluntariness, privacy, confidentiality, impartiality of neutrals, protection of rights, respect for diversity, protection against reprisal, access to disclosure and relevant information, availability and right to accompaniment and representation.

- System monitoring and evaluation.

C. INTERNAL CAPACITY BUILDING:

- Training and skills-building to create capacity to deliver services; to create awareness and understanding of the system; and to create capacity in all relevant stakeholders to understand, recognize, and acknowledge conflict, to manage relationships in a conflict-competent manner, and to resolve disputes.

- Key people to receive skills-building training are:

- leadership, including managers and labor leaders,

- persons whose job descriptions include managing conflict, listening, advising and/or referring, including compliance officers, employee assistance, EEO advisers, legal department, human resources, ethics officers.

- Awareness training should be provided to all.

- Practitioner training should be provided for those whose job descriptions include problem solving.

- Managers should be offered conflict behavior assessment tools and conflict coaches.

D. DAILY PRACTICES THAT ENCOURAGE A FRONT-END APPROACH TO CONFLICT MANAGEMENT:

- Open door practice.

- Interest-based management style.

- Projects that are launched with conflict assessments and partnering workshops.

- Enhanced interface with customers/suppliers/industry/regulators.

- Conflict management pledges with stakeholders.

- Constant alignment of all corporate initiatives, communications and policies with the goals of the integrated conflict management system. ■