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International Commercial Mediation and Conciliation

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Most international and domestic commercial and public disputes are resolved through direct bilateral and multilateral negotiations. When negotiations break down, the disputes either dissipate, leaving unresolved communication gaps and damaged relationships, or they escalate into litigation, mutual sanctions, or armed confrontation.

Although we have developed extremely advanced technologies in the areas of strategic military planning and intelligence and have designed intricate national litigation systems, we have no standardized institutional technology for resolving national and transnational disputes non-judicially.

In order to explore the increased utilization of non-judicial alternative systems, it is necessary to be familiar with basic principles of conflict and its resolution. This information can provide the ability to form and maintain constructive international commercial and public relations by plan and design, rather than by default.

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Ms. Dress has specialized in conflict and dispute resolution for over nine years. She has been an industry negotiator and labor/management conciliator for the United States government, and the director of a United Nations affiliate organization. She has also been an adjunct law professor at Loyola Law School in Los Angeles, where she co-developed and co-taught a pilot course on the law and policy of arms control and international conflict resolution. She is currently a consultant to the new University of Southern California Peace and Conflict Studies Program.

An active public speaker on conflict resolution, Ms. Dress has also lectured at home and overseas on arms control and international law issues. She is a Certified Mediator under the program sponsored by the Center for Collaborative Planning, and a recipient of the Presidential Clemency Board commendation for outstanding performance.

Ms. Dress is also active in business, community and international affairs. She is a member of the Los Angeles World Affairs Council, Amnesty International, and the National Association for Female Executives. She is the author of an article on conflict resolution recently published in the anthology *Solutions for a Troubled World* published by Earth View Press, and is also a fiction writer.

This presentation will discuss the essential elements of the nature of conflict and conflict resolution, the use of third-party interventions, the importance of awareness of these models, and the use of these models for strategic management and resolution of public and private disputes.

I. THE NATURE OF CONFLICT

The nature of conflict is illusory and its origins are often unclear. Yet, this amorphous phenomenon can inhibit and destroy potentially successful ventures, can permanently and unnecessarily damage business relationships, and can cost unconscionable sums in litigation which further divides the parties. Conflict can arise at any phase of commercial interaction, regardless of the constructive intent and good will of the parties.

This conflict results from differing perceptions about the same matter. For example, we believe the words we use convey certain meanings which are understood by others. We assume that the parties with whom we contract have the same ideas of good faith that we have, and that a nod or handshake have the same implications universally. However, ideas of fairness and propriety may differ markedly, much as custom and practice from country to country differ within the same industry. There may be varying interpretations of the meanings of words and different conceptions of what is important in a contract.

We also make assumptions about the specific people with whom we communicate. As we interact with them, we watch, listen and assume, and what we do not know, we automatically, unconsciously fill in, based on our own experience. In this way, in effect we make people up as we deal with them, in order to feel more certain of what we're dealing with.

However, we may fill in the information inaccurately, without complete knowledge of others' histories, goals, concerns and expectations. We do this continually. For example, during contract negotiations we may be wondering, is this party going over the contract with a fine tooth comb because he is reluctant to do business, because he is unethical and is looking for loopholes he can use, because he distrusts me and is looking for loopholes I might use, or because it is company policy to carefully scrutinize contracts in this manner?

It is necessary to make assumptions in order to communicate and do business. However, if we fail to realize our lack of information and

the fill-in process in which we are engaged, or if our beliefs are based on partial knowledge and yet we act upon them with certainty, this creates distortions in perception. As a result, others may feel misunderstood, damaged or short-changed, and conflict emerges as a signal that several misconceptions have converged.

This creates the need to justify our positions, further expanding the polarization.

None of this is surprising. What is surprising is, first, that we routinely underestimate the risks of engaging in transnational business interactions with minimal information about the nations, cultures and individuals with which we deal. Secondly, we do not come prepared with immediate dispute resolution contract clauses and mechanisms that can quickly de-escalate tensions. Without the latter, business relations can come to a grinding halt. However with some foresight and planning, through an early intervention process, relations can be quickly repaired so that understandings can be clarified and interaction can resume and reach completion.

II. Why Direct Negotiations Fail

Direct negotiations can be successful and productive when the parties enter the bargaining process with a basis of mutual trust and have relatively similar understandings of the nature, use and meaning of words, language, body language, objective data and symbols. However, this convergence of characteristics does not always exist. In addition, direct negotiations undertaken to rectify disagreements tend to further polarize the parties to the disagreement and to expand, rather than reduce, gaps in understanding.

The crucial problem is that there is a formidable obstacle inherent in every attempt at direct negotiations with adversaries, as we cannot objectively evaluate how much weight to give information they provide. It is difficult for us to be receptive to their information, and vice versa, due to the obvious, but continuously overlooked, fact that we do not trust them, and they do not trust us. Adversaries lack vital credibility with each other. Because they do not trust each others' motives, supporting information becomes little more than irrelevant. Regardless of the skill and expertise of the negotiators, the conflict condition deprives the parties of a solid basis for negotiation. It is difficult at this point to distinguish posturing from good-faith positioning and to distinguish bottom lines from negotiating positions.

There are numerous other obstacles as well to the success of the

direct negotiation of disputes. There are timing issues in which some parties want a speedy resolution while others have reasons for delay or do not consider the matter a priority. Sometimes feelings are intense and combative, making rational direct discussion virtually impossible. Often people think that by agreeing to negotiate they will be revealing weakness in their position, or that since past attempts to resolve the problem have been ineffective, new negotiations are equally unlikely to be productive. In other cases there are simply so many parties and/or so many issues that it does not seem logistically possible to achieve successful resolution. Many of these obstacles are present simultaneously, impeding the likelihood of a successful outcome through direct negotiation. When negotiations break down, outside intervention is required.

III. The Problems with Traditional Conflict Resolution Systems

The primary processes now used to ameliorate or manage conflict are largely systems which are designed to select or determine a prevailing party, which necessitates having a defeated party. These mechanisms can be destructive in their consequences and can lead to continuing recriminations by losing parties. Furthermore, from a business perspective, being victorious in a legal suit may not be such a victory if significant business relationships, ventures or enterprises are permanently punctured.

Traditional conflict resolution processes include use of litigation, economic sanctions, power politics and force. Despite the complex and intricate strategies involved in litigative, political and military technologies, these systems often conclude or contain conflicts without resolving them. It has often been said that if you want an ongoing, cooperative relationship with someone, the last thing you want to do is win a case or a battle against them. For conflict to be shifted or neutralized, it must be *resolved* rather than merely concluded. Without resolution, hostility or recriminations can be indefinitely perpetuated.

What is needed is a system which can accommodate all points of view presented, identify strengths and weaknesses of all positions, and diffuse tension between the disputants so that they can release the tight grip on their positions and justifications and focus on how to eliminate the adversarial condition, in a way that does not generate retaliation.

An intervention process can function to quickly diffuse tension and facilitate maintenance of the business relationship. One such intervention process is mediation, which may be used as a precondition to arbitration, or as a voluntary first-resort mechanism at the earliest indication of misunderstanding.

Mediation, as will be described, utilizes a third-party neutral who works with the parties to understand and ameliorate disputes and problematic encounters as they arise. Many negotiators believe that such a process is not necessary because, as expert negotiators, they feel completely capable of resolving their own disputes. They do not take into account the trust factor previously discussed. This erroneous belief is one reason that so many disputes remain unresolved, destroying valuable business relationships.

IV. Third-Party Intervention Systems

There are three primary types of non-judicial third-party intervention systems: arbitration, conciliation, and mediation. All of them depend for their effectiveness on the neutrality of the third-party.

Arbitration is the most formal and structured of the non-judicial third-party intervention processes. The arbitrator serves as a decision maker. After hearing presentations of the evidence, the arbitrator is vested with authority to render a decision and award. The arbitration may or may not be binding, depending upon the agreement of the parties beforehand. Since an award is made by the third-party in the arbitration setting, this process is more closely akin to the litigation/trial process than to the processes of mediation and conciliation. Arbitration is the principal means of hearing and concluding international commercial disputes.

Though the processes of conciliation and mediation are similar to each other, there are differences. In mediation, the primary role of the mediator is: (1) to facilitate dialogue and communication among the parties in a structured, constructive way; (2) to help disputants realistically assess their positions; and (3) to be a catalyst for a resolution designed by the parties. The mediator does not make a decision or impose an award. The mediator works with the parties to elicit from them options that are likely to lead to resolution of the dispute. The mediator may hone these options and emphasize certain recommendations, but the concept of mediation is fundamentally different

than that of arbitration. Mediation places the ultimate decision in the matter into the hands of the parties to the dispute themselves.

Domestically, conciliation is generally considered a more informal, less structured process, in which the conciliator, like a mediator, facilitates discussion and debate, but does not impose a decision on the disputants. Internationally, however, conciliation is actually a more formal process than mediation and is something of a hybrid between mediation and arbitration. In transnational disputes, a conciliator hears evidence, discusses options with the parties, and prepares written recommendations which are proposed to all sides. The disputants may reject the proposals or recommend changes. The conciliator may also engage in preliminary fact-finding and investigation in transnational disputes, which is not done by a mediator. Both the mediator and conciliator act as catalysts to bring about a meaningful resolution which can be found acceptable to all sides of the dispute.

A key element of these processes is that if the parties do not agree to a decision, no decision is imposed. Therefore, there is less pressure for the parties to perform and justify their positions and greater encouragement for parties to be flexible, receptive and realistic about the flaws as well as strengths of their positions.

A second key element of these processes is confidentiality, which can be critical in the business and commercial sector. In mediated and conciliated settlement discussions, there are no court reporters or tape machines. Instead, there are rules of confidentiality to which all of the parties must stipulate before anything substantive is discussed in the sessions. This diminishes fears and pressures related to the international press and provides a safe harbor for sensitive personal and business information.

For purposes of this discussion, the term mediation will be used when discussing both mediation and conciliation, unless a point is made which specifically refers only to one of these processes and not the other.

It is important to note that there are two different types of issues within a dispute that must be mediated in order for the dispute to be resolved. The first is the logistics of the process itself: what type of process will be used, when it will be used, where the meetings will be located, what rules and parameters, if any, will be adopted, what time constraints will be respected and who will be designated as the third party or parties. Domestically, negotiations with the disputants on these types of issues, principally procedural and logistical issues, are

known as procedural negotiations. Internationally, these types of discussions are sometimes referenced as "good offices." Olaf Palme, late Prime Minister of Sweden, often "used his good offices" to try to bring the parties to public disputes to the table, meaning that he was negotiating individually with the disputants to obtain agreement on procedural and logistical issues.

Once this has been accomplished, all of the parties have agreed to mediate, and timing and location have been agreed to, the substantive mediation process begins.

V. The Structure of the Mediation

A typical mediated discussion session begins with the signing of a confidentiality agreement and introductions of the mediator and all of the parties and their representatives. The mediator usually discusses the format and parameters to which the parties have agreed, and confirms that all of the parties have the same understandings.

Each side is then asked to make an opening statement. The statement can include general facts, areas of dispute, legal theories, presentation of evidence, recitation of damages, theories of liability and discussion of how the problem has negatively impacted on the parties in question. Each party has an opportunity to provide such a statement or have a representative do so. After each of these statements, the mediator typically summarizes the information, neither agreeing nor disagreeing with any elements, but merely insuring that (s)he accurately understands the positions of the speaker. The speakers are each aware that they have been heard and understood. This stage deals with the issue of accuracy in understanding of information presented, not with analysis of the information.

After each party has had an opportunity to present its viewpoint, the mediator begins a process of caucusing confidentially with each side individually.

Consider what has already occurred by the time the caucusing stage is about to begin. First, the parties have all agreed to participate at the bargaining table. They have agreed on the process that will be used and who the third-party neutral will be. They have even agreed on time and location. So despite the adversarial conditions, several agreements have already been made amongst the parties and they have followed up and demonstrated good faith by attending and allowing the process to commence. They have then all made presentations in each others' presence of what they believe to be their rights,

liabilities, obligations and damages and have heard each of the other parties do the same.

By the time this portion of the process is over, all participants are aware of each other's positions and are drawing preliminary conclusions about where their positions are strong, where their positions are fallible, and what hurdles of evidence and persuasion must be overcome. This is a profound distance to have come in the midst of heated confrontation. Further, once the parties understand that their positions have accurately been heard, much of the pressure to explain, justify and cling to their points of view begins to subside. This opens the possibility of receptivity to new information and opposing perspectives. This is true in small, two-party disputes and equally true in highly sophisticated or technologically complex multi-party cases. At the conclusion of the joint session, the confidential caucuses begin.

VI. The Confidential Caucuses

Most of the critical work gets done in the informal confidential caucuses which the mediator holds with each set of parties. There are several purposes for these caucuses. First, the mediator is held to a second tier of confidentiality in these caucuses, if agreed in advance. This means that information provided to the mediator during the caucuses may not be revealed by the mediator to any other parties without consent. Hence, in the caucuses the parties can candidly reveal strategic information and provide additional data about the case, their positions, why they take those positions, what their underlying interests are, what they fear they have to lose and what they hope to gain. This gives the mediator, and only the mediator, a clear perspective of what all of the parties need, what can be bargained away and what cannot, and what it will take for each side to come to an accord. The other parties would never provide the information to each other that they will provide to a mediator whom they trust to keep the information confidential. In turn, they know that the others are also providing the mediator with confidential information. Since this information is at the disposal of the mediator, (s)he then becomes a broker of perspectives, but not of information.

After additional information has been gathered from all of the parties, the mediator begins a process of risk analysis with each of the parties. This risk analysis serves the purpose of insuring that parties are not holding on to unrealistic or incorrect assumptions, that they are not basing their decisions on inaccurate information and that they

are not blind-siding themselves with an inability to absorb outside information which may alter their assessments of the case. In fact, most of the time, the parties are engaging in all of these traditional elements of denial of the weak points of their positions. Thus the risk analysis segment is the most difficult, resisted and ultimately most useful part of the mediation.

Once the risk analysis caucuses are completed, the parties are actively thinking about what they need to do if they want to achieve a resolution. The purpose of the final round of caucuses is to explore settlement options. The mediator makes the parties aware of what options will be agreeable to the others and what options are not feasible, again without revealing strategic information, but being cognizant of it.

It should be clear that while the parties to a mediation are often charged with reevaluating their case, they never lose control of it, and nothing is imposed. They are the sole determinants of the information disclosed, the options considered, and the outcome. If no options for resolution are palatable, they may leave, or may recess the mediation until more time has passed or more information has been exchanged.

Mediations serve a dual purpose. Closure is the ultimate goal. However, in matters that are not concluded, the mediator can call the parties back together and suggest moving into a procedural focus in which the parties agree to exchange certain information or provide documentation or additional evidence. A second mediation can then be scheduled. This kind of result can be achieved because the process of mediation clarifies and focuses the information that is needed to close the matter in the future, providing extremely valuable information to the parties and eliminating inquiry into unnecessary areas of fact-finding.

When a decision is reached, the agreement is memorialized, exchanged and reviewed by the parties, and each party begins carrying out its obligations under the new agreement. The agreement may include an additional mediation provision in the event of any misunderstanding or dispute as to the agreement or fulfillment of its obligations.

To recap the process quickly, the parties are encouraged to state their positions, reasoning and evidence in the presence of their opponents and the third-party neutral. They are given an opportunity to explain and clarify their positions and any actions they have taken

and to provide supporting data for their case. Once the facts and positions are all out in the open and the parties feel they have been heard, they become receptive to additional information. This condition of receptivity permits re-examination of their postures in light of new facts or new perspectives, and this ability to entertain the concept of change of position leads to the direct possibility of solutions, based on realistic appraisal of the conflict, stakes and options.

This process can be used in virtually any type of conflict, large or small, public or private, domestic or international, because all conflicts boil down to the perceptions of individuals and their beliefs about their rights and responsibilities and those of their adversaries. These beliefs and assumptions, when held up to a screen of scrutiny, distanced and re-examined through the eye of a neutral party, almost always undergo transformations of perception, leading to resolution and closure.

Mediation is effective in a wide range of matters because it confronts disputing parties with the full range of interpretations possible, not allowing them to screen out interpretations at variance with their own. It gives them an objective set of eyes, it cuts directly to the heart of liability and damages issues and weeds out extraneous data, and it provides a constructive atmosphere which encourages candor. It allows for the necessity of the participants to vent feelings and even make accusations, in a forum that can contain such activity and use it productively.

It is important to understand that mediation does not replace negotiation; it augments it, structures it and provides a context and tone that fosters productive aspects of confrontation and discussion and eliminates counter-productive elements.

VII. Mediation as an Element in International Policy

It is inexplicable that the vehicle of mediation is so rarely used as a tool in international relations and international commerce. One reason may be that international policy-makers believe that assistance of a third-party will compromise their autonomy. This is in fact untrue because of the safeguards of confidentiality, non-dissemination of strategic information and control of the outcome. The question of perceived lack of neutrality may be a factor as well. However, this is a much more serious concern for international arbitrators, who are not only facilitating discussion but rendering decisions and awards. In both arbitration and mediation, it has been repeatedly found that im-

partiality, neutrality and objectivity are specialized areas of skill and talent that can be learned, and for which training can be received, much as training can be received to become an expert in medicine, law and other professions.

Diplomatically, confidential facilitated negotiations can be virtually a panacea for government representatives involved in conflicts. They can nip problems in the bud early, prevent sanctions and armed conflict or mutual diplomatic punishment and retaliation, and allow parties to save face and test their positions privately. Within the privacy of the mediation, boundaries, limitations and expectations can be clarified and studied without risk. It is curious that this mechanism, which has the capacity to reduce international tensions and smooth out difficult relations in every aspect of international commerce and policy-making, is not routinely called upon to provide these benefits.

VIII. What Can Be Done to Institutionalize the Concept of Mediation?

A process is useless if it is only conceptually accepted but not pragmatically strategized and institutionally adopted.

Many commercial contracts have arbitration clauses which stipulate that in the event of a dispute as to the terms of the contract the parties will agree to either binding or non-binding arbitration. It is suggested that dispute-resolution clauses include additional language referencing mediation (a sample mediation clause is attached as Appendix A). Such a clause might indicate that mediation will be triggered in the event of any misunderstanding or dispute arising from the terms of the contract as the first-resort mechanism to be initiated. Should the parties be unable to resolve the problem through mediation or conciliation, arbitration can then be automatically invoked as the next, and in many cases, final, dispute resolution alternative. This poses no threat to the integrity of the arbitration process, since it can be assumed that jurists prefer that parties settle their own disputes when at all possible. This kind of clause, often referred to as a med/arb clause, is being used more and more domestically in contracts for the sale of large items and in contracts between businesses (a suggested med/arb clause is attached as Appendix B).

Secondly, it is important to address the issue of location when discussing resolution of disputes and to raise the concept of neutral territory. No disputant wants to think that (s)he is starting at a disadvantage, especially if there is much at stake. This is one reason that

procedural negotiations can be as difficult and time-consuming as substantive negotiations. One of the biggest areas of dispute in procedural negotiations is the sensitive issue of location and setting of the mediation or arbitration. The forum itself becomes a critical element of dispute and can be an obstacle to getting parties to the table or having them negotiate seriously.

Recently the issue of neutral territory has surfaced as an important concept in international arbitration and conciliation. This concept will be explored further in other presentations in this series, so it need not be discussed in depth here. However, there are a few ideas which should be raised at this point. First, the idea of neutral territory, as implied, is a location which is considered equally objective and satisfactory for all parties to a dispute. Recently, largely due to the efforts of several outstanding jurists, including the other members of this panel, a measure was passed in the state of California which designates California neutral territory for purposes of international arbitration and mediation. This law will also be explained in more detail in subsequent presentations.

The American Intermediation Service (AIS) has also been developing the idea of specific institutionalized locations which can be considered as neutral territory for purposes of conflict resolution, and provides such a forum in its offices in San Francisco and Los Angeles.

It would be very valuable to have designated neutral territories for conflict resolution purposes throughout the world. This is a proposal, in effect, for regional neutral forums specifically designed for the hearing and resolution of all types of disputes, national and international, commercial, public and private. California has recognized the importance of having such neutral locations designed and available, but very few other communities around the world have taken this type of initiative. Using the California law and the AIS concept of specific neutral institutionalized locations as models, we could expand the current limited understanding and utilization of alternative, non-judicial dispute resolution and encourage greater participation from all regions and population segments of the international community.

Just taking the two steps of including mediation alternatives in commercial contracts (as well as treaties and conventions) and creating neutral locales for meeting to resolve disputes could have a great impact in the way we, as a society, view conflict and face the realities of dealing with it.

This is not to suggest that alternative dispute resolution systems are new or even contemporary concepts. Long before litigation and trial advocacy existed there were informal dispute resolution systems in virtually every society, from those pre-literate to those technologically advanced. For centuries, conflicts have been resolved on a community level through the use of third-party interventions such as conciliation. The institutional contexts for the processes being suggested may be considered new, or even experimental, but the processes of early non-violent intervention are as old as the use of force, and far more productive, and transformative.

Therefore, we are recommending that mediation and conciliation, two of the most time-tested universal principles of problem-solving, be revitalized and institutionalized in both domestic and international justice systems.[1]

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APPENDIX A

SAMPLE CONTRACT CLAUSE 1

In the event of a dispute involving interpretation or application of this agreement, the parties hereto shall meet in a good faith effort to resolve this dispute through mediated negotiations pursuant to the mediation procedures of the [American Intermediation Service], prior to initiating any adjudicatory procedures.

APPENDIX B

SAMPLE CONTRACT CLAUSE 2

The parties agree that any dispute, controversy, or claim arising out of or relating to this contract or any alleged breach thereof shall be resolved in accordance with the following procedure:

(1) Mediation. The parties will participate in a mediation conducted under the auspices of [American Intermediation Service (AIS)] in accordance with the [AIS] Mediation Rules in a good faith effort to negotiate a resolution of the dispute.

(2) Arbitration. If a resolution is not reached through mediated negotiations, the dispute will be submitted to final and binding arbitration conducted under the auspices of [AIS] and in accordance with the [AIS] Arbitration Rules. Arbitration shall be required as of the time that the mediator gives written notice to the parties that it does not appear that the dispute will be resolved through mediation or, in the alternative, at the election of any party after thirty days have passed following the initial mediation session.

This dispute resolution procedure shall be implemented by written notice given by any party to all other parties and to [AIS]. The notice shall contain a statement of the nature of the dispute and the remedy sought.