Instructor: Joel Cutcher-Gershenfeld

Panel Members:
- Chris Albertyn (Canada), Arbitrator (member Ontario Labour-Management Arbitrators Association; National Academy of Arbitrators); Vice-Chair, Ontario Labour Relations Board.
- Anna Booth (Australia), Director of the private workplace change, training & dispute resolution agency CoSolve; Director of Members Equity (the union bank in Australia); mediator, trainer, facilitator
- John Brand (South Africa) Director of the private workplace change, training & dispute resolution agency Conflict Dynamics; Partner of the law firm Bowman, Gilfillan, Johannesburg; mediator, arbitrator, trainer, facilitator
- Charles Nupen (South Africa) Chief Technical Advisor for Southern Africa, International Labour Organisation; mediator, arbitrator, facilitator
- Jonathan Sandler (Australia) Manager of Employee Relations, ANZ Bank; Partner of the law firm Blake Dawson Waldron; mediator, arbitrator, trainer
- Felicity Steadman (United Kingdom) Director of the private workplace change, training & dispute resolution agency Conflict Dynamics; mediator, arbitrator, trainer, facilitator
- Brian Smeenk (Canada), Partner, management law firm of McCarthy Tétrault, Ontario.
- Clive Thompson (Australia) Director of CoSolve, arbitrator of the Workers Compensation Commission, New South Wales, adjunct professor, University of Cape Town Law School; mediator, arbitrator, trainer, facilitator

Session Notes:
- What to do about what I call “evil wicked problems” – problems with many stakeholders and many issues – with visible disputes and some disputes that haven’t even come to the surface and some stakeholders who don’t even know that they are stakeholders? What is the first step?
  - Identify the interests
  - Get all the stakeholders in a room
    - An issue is that you can’t always get them all in a room or it would be too big a group
    - An option is to have a series of focus groups – so that you can engage the interests without everyone being all together
  - Example of South African constitution effort that failed due to a lack of initial attention to the process – it must have equal importance to content
    - In this case, people started having position papers and rotating chairs without sufficient internal process dialogue
  - Once you set the table, there has to be a process of agenda development – to surface the issues that are important
    - Structure the system to achieve credible outcomes, which might involve specialized task forces, focus groups, bringing in particular expertise
  - Sort out who generates proposals and where does the decision making authority reside
  - A common failure is the assumption that there is shared knowledge around the table that is all you need to get to a solution – build in the role of research, evidence
  - Thinking about process upfront is important, but you don’t want to get stalemated on the shape of the table
In this respect, respected neutrals or facilitators can move the process along without too much pre-negotiations. Avoid the conflict of interest where people who have a stake in the substance people have to take responsibility for the process.

- A key is to go slow and not jump to solutions – analyze the problem
- There are issues around how a decision is made – consensus, weight of opinion, majority opinion – and mechanisms when latent disputes emerge

- Conflict transformation – mediators getting into underlying disputes – some of which have long-held emotional disputes – lessons from that
  - The concept of Relationships by Objective as a method to understand the root cause of disputes – from the Federal Mediation and Conciliation Service in the US
  - Example of the Mercedes-Benz conflict – with black workers coming to work with carved wooden models of AK-47s, while the white workers came with real guns and no cars were being built – the workers just did military maneuvers on the front lawn of the factory
  - A key part was deeper investigation and initial relationship building process, which included the chief executive, representatives from all levels of management, representatives from the union
    - Initial side agreements on not having weapons
  - Follow-up session six months later with new issues that did not emerge initially

- I am sober about resolving deep-seated conflict...
  - In the workplace there are rule, but for many identity and faith based conflicts the rules are not clear
  - There was a sustained period of political violence right after the collapse of apartheid – many of the labor-management skills were helpful, but it was not long-term resolution
  - The greatest success was helping people to see a longer time horizon and see more of the common interests
  - The Truth and Reconciliation Commission – a twin notion of telling the truth and getting amnesty – a good process that allowed truths to surface and be confronted, with a confessional component
  - Key point of moving people from a point where they are trapped in their story of the past to a point where they are seeing a different future in which they are not so trapped
  - Also, don’t forget the importance of being able to vent and the role of a simple apology

- Interest in public and private partnerships – the role of dispute resolution systems that are either very informal or very formal – such as issues of emergency preparedness and responses
  - You have to think about the objectives of a public-private partnership
  - A key is anticipating that there will be disputes – which is often not anticipated in advance – thinking about what kind of things could go wrong
  - Example of the timber industry in Australia – with disputes around where to log, what is the market value of land and timber and so on – the mediation model was limited around technical aspects of these issues
  - A key involves the decision making models in the various organizations – do representatives have clear mandates?
  - Arbitration provisions are often built into commercial agreements, specifying what topics are covered, but not specifying the structure and process sufficiently
  - Mandatory mediation before getting to courts is something that has grown a great deal
  - Example of South Africa building stadiums for the 2010 World Cup – with a request to ensure that dispute resolution system is build into the consortium bid on the work
  - A key is to understand the overarching strategic objectives as the foundation
  - Build an ombudsman function into the system early on as a key element of a more comprehensive system
• What about dispute resolution systems where the culture keeps people from using the system?
  o The traditional response is that this is a change process and the initial message must come from the leadership – this is true, but not sufficient
  o There also has to be a grass roots process in which understanding emerges
  o From a traditional union case, the issues can be a mobilizing force
    • In a university environment there can be the other extreme with lots of whistle blowers everywhere – things get so formalized that people want all steps and all levels of appeal – without as much attention to the informal resolution
  o A focus on dispute prevention – beyond dispute resolution
  o Role of cultural audits – getting at whether the lack of visible problems may hide problems under the surface
  o VPs of HR do quite a bit of work around employee engagement – attitude surveys that are mined by companies to learn
  o Interested in the disconnect between what looks like world class systems that don’t have the confidence and participation on the part of the employees
    • It is about the degree of involvement that the people have had in developing the system
    • I would rather have a flawed system that people felt they had participated in building from a world class system that people felt alienated from
    • South Africa requires corporations to build diversity, which is approached from the point of view of compliance – but what they don’t get is that diversity is to be celebrated on the basis of a strong business case – it is a strength
  o In a commercial bank we don’t think very much about dispute resolution, we focus on employee engagement as part of a high performing culture to be an employer of choice
    • Our organization is 10% above the market in the levels of employee engagement and their connection to the organization
    • Look to engagement as the primary measure and then look at stress related claims, absenteeism, use of outside tribunals
    • Employees never do nothing – it shows up somewhere

• Focus on systems implications of problems
  o 35 years ago president of MIT asked that no problem came back twice – empowered to find root causes and address them
  o A focus on looking for surprises – which surfaced issues such as sexual harassment, AIDS, staking, ergonomics and others long before they were widely recognized in society

• Example of introduction of dispute resolution systems across Southern Africa
  o First question is the deepening of democracy and the legitimacy of the government – but that can’t be legislated
  o So there were no technocrats writing new dispute resolution laws behind closed doors or even focus groups – we began with a multi-stakeholder task force diagnosing the problems, exploring and debating the options – so what came out and was built into the law was something that they had a real hand in shaping – it was their architecture
  o A connection to some of the work of Larry Susskind

• Advice in establishing a Massachusetts Work/Family Council – beyond initiatives in separate workplaces – with many stakeholders involved and a supporting law – how to surface deep cultural assumptions in a multi-stakeholder process (people might agree on the issues, but the underlying cultural assumptions are more complicated – such as the common assumption that family matters are a private concern
  o We have had experience in transformation charters – associated with racial and gender initiatives
In talking about assumptions – give thought to the ground rules to make it safe for the people participating – ensuring people are non-judgmental, confidentiality, etc.

Concluding Comments – A Final Word of Advice:

- These concepts do apply to technology disputes – but it is important to recognize the role of substantive knowledge as well in these disputes – marry superior substantive knowledge with deep knowledge of dispute resolution systems
- This is a domain where there has not been a lot of thought on dispute resolution systems – so write down what you are learning – document the cases
- Keep it simple – if you apply fundamentals they will apply across a broad ranges of situations – problem analysis before jumping to solutions, focusing on interests before rights and rights before power
- Be fluid – be ready to shift from arbitration to mediation to other processes – able to mix and match as appropriate to the situation
- Move things up the food chain from dispute resolution to dispute prevention to changing the culture – keep it informal
- Push the envelope – be prepared to experiment in design and application – the sacred cows of yesterday are the buried carcasses of today
- Issues are easier to resolve than addressing underlying relationships
- Be as close as possible to the front end users of technology – to build prevention into the systems early on – hear from them and ensure that their use of technology is incorporated into the objectives of contracts or agreements