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# GETTING DISPUTES RESOLVED

*Designing Systems to Cut  
the Costs of Conflict*



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## Three Approaches to Resolving Disputes

### Interests, Rights, and Power

It started with a pair of stolen boots. Miners usually leave their work clothes in baskets that they hoist to the ceiling of the bathhouse between work shifts. One night a miner discovered that his boots were gone.<sup>1</sup> He couldn't work without boots. Angry, he went to the shift boss and complained: "Goddammit, someone stole my boots! It ain't fair! Why should I lose a shift's pay and the price of a pair of boots because the company can't protect the property?"

"Hard luck!" the shift boss responded. "The company isn't responsible for personal property left on company premises. Read the mine regulations!"

The miner grumbled to himself, "I'll show them! If I can't work this shift, neither will anyone else!" He convinced a few buddies to walk out with him and, in union solidarity, all the others followed.

The superintendent of the mine told us later that he had replaced stolen boots for miners and that the shift boss should have done the same. "If the shift boss had said to the miner, 'I'll buy you a new pair and loan you some meanwhile,' we wouldn't have had a strike." The superintendent believed that his way of resolving the dispute was better than

the shift boss's or the miner's. Was he right and, if so, why? In what ways are some dispute resolution procedures better than others?

In this chapter, we discuss three ways to resolve a dispute: reconciling the interests of the parties, determining who is right, and determining who is more powerful. We analyze the costs of disputing in terms of transaction costs, satisfaction with outcomes, effect on the relationship, and recurrence of disputes. We argue that, in general, reconciling interests costs less and yields more satisfactory results than determining who is right, which in turn costs less and satisfies more than determining who is more powerful. The goal of dispute systems design, therefore, is a system in which most disputes are resolved by reconciling interests.

### Three Ways to Resolve Disputes

#### *The Boots Dispute Dissected*

A dispute begins when one person (or organization) makes a claim or demand on another who rejects it.<sup>2</sup> The claim may arise from a perceived injury or from a need or aspiration.<sup>3</sup> When the miner complained to the shift boss about the stolen boots, he was making a claim that the company should take responsibility and remedy his perceived injury. The shift boss's rejection of the claim turned it into a dispute. To resolve a dispute means to turn opposed positions—the claim and its rejection—into a single outcome.<sup>4</sup> The resolution of the boots dispute might have been a negotiated agreement, an arbitrator's ruling, or a decision by the miner to drop his claim or by the company to grant it.

In a dispute, people have certain interests at stake. Moreover, certain relevant standards or rights exist as guideposts toward a fair outcome. In addition, a certain balance of power exists between the parties. Interests, rights, and power then are three basic elements of any dispute. In resolving a dispute, the parties may choose to focus their attention on one or more of these basic factors. They may seek to (1) reconcile

their underlying interests, (2) determine who is right, and/or (3) determine who is more powerful.

When he pressed his claim that the company should do something about his stolen boots, the miner focused on rights—"Why should I lose a shift's pay and the price of a pair of boots because the company can't protect the property?" When the shift boss responded by referring to mine regulations, he followed the miner's lead and continued to focus on who was right. The miner, frustrated in his attempt to win what he saw as justice, provoked a walkout—changing the focus to power. "I'll show them!" In other words, he would show the company how much power he and his fellow coal miners had—how dependent the company was on them for the production of coal.

The mine superintendent thought the focus should have been on interests. The miner had an interest in boots and a shift's pay, and the company had an interest in the miner working his assigned shift. Although rights were involved (there was a question of fairness) and power was involved (the miner had the power to cause a strike), the superintendent's emphasis was on each side's interests. He would have approached the stolen boots situation as a joint problem that the company could help solve.

### *Reconciling Interests*

Interests are needs, desires, concerns, fears—the things one cares about or wants. They underlie people's positions—the tangible items they *say* they want. A husband and wife quarrel about whether to spend money for a new car. The husband's underlying interest may not be the money or the car but the desire to impress his friends; the wife's interest may be transportation. The director of sales for an electronics company gets into a dispute with the director of manufacturing over the number of TV models to produce. The director of sales wants to produce more models. Her interest is in selling TV sets; more models mean more choice for consumers and hence increased sales. The director of manufacturing

wants to produce fewer models. His interest is in decreasing manufacturing costs; more models mean higher costs.

Reconciling such interests is not easy. It involves probing for deep-seated concerns, devising creative solutions, and making trade-offs and concessions where interests are opposed.<sup>5</sup> The most common procedure for doing this is *negotiation*, the act of back-and-forth communication intended to reach agreement. (A procedure is a pattern of interactive behavior directed toward resolving a dispute.) Another interests-based procedure is *mediation*, in which a third party assists the disputants in reaching agreement.

By no means do all negotiations (or mediations) focus on reconciling interests. Some negotiations focus on determining who is right, such as when two lawyers argue about whose case has the greater merit. Other negotiations focus on determining who is more powerful, such as when quarreling neighbors or nations exchange threats and counterthreats. Often negotiations involve a mix of all three—some attempts to satisfy interests, some discussion of rights, and some references to relative power. Negotiations that focus primarily on interests we call “interests-based,” in contrast to “rights-based” and “power-based” negotiations. Another term for interests-based negotiation is *problem-solving negotiation*, so called because it involves treating a dispute as a mutual problem to be solved by the parties.

Before disputants can effectively begin the process of reconciling interests, they may need to vent their emotions. Rarely are emotions absent from disputes. Emotions often generate disputes, and disputes, in turn, often generate emotions. Frustration underlay the miner’s initial outburst to the shift boss; anger at the shift boss’s response spurred him to provoke the strike.

Expressing underlying emotions can be instrumental in negotiating a resolution. Particularly in interpersonal disputes, hostility may diminish significantly if the aggrieved party vents her anger, resentment, and frustration in front of the blamed party, and the blamed party acknowledges the validity of such emotions or, going one step further, offers an

apology.<sup>6</sup> With hostility reduced, resolving the dispute on the basis of interests becomes easier. Expressions of emotion have a special place in certain kinds of interests-based negotiation and mediation.

### *Determining Who Is Right*

Another way to resolve disputes is to rely on some independent standard with perceived legitimacy or fairness to determine who is right. As a shorthand for such independent standards, we use the term *rights*. Some rights are formalized in law or contract. Other rights are socially accepted standards of behavior, such as reciprocity, precedent, equality, and seniority.<sup>7</sup> In the boots dispute, for example, while the miner had no contractual right to new boots, he felt that standards of fairness called for the company to replace personal property stolen from its premises.

Rights are rarely clear. There are often different—and sometimes contradictory—standards that apply. Reaching agreement on rights, where the outcome will determine who gets what, can often be exceedingly difficult, frequently leading the parties to turn to a third party to determine who is right. The prototypical rights procedure is adjudication, in which disputants present evidence and arguments to a neutral third party who has the power to hand down a binding decision. (In mediation, by contrast, the third party does not have the power to decide the dispute.) Public adjudication is provided by courts and administrative agencies. Private adjudication is provided by arbitrators.<sup>8</sup>

### *Determining Who Is More Powerful*

A third way to resolve a dispute is on the basis of power. We define power, somewhat narrowly, as the ability to coerce someone to do something he would not otherwise do. Exercising power typically means imposing costs on the other side or threatening to do so. In striking, the miners exercised power by imposing economic costs on the company. The

exercise of power takes two common forms: acts of aggression, such as sabotage or physical attack, and withholding the benefits that derive from a relationship, as when employees withhold their labor in a strike.

In relationships of mutual dependence, such as between labor and management or within an organization or a family, the question of who is more powerful turns on who is less dependent on the other.<sup>9</sup> If a company needs the employees' work more than employees need the company's pay, the company is more dependent and hence less powerful. How dependent one is turns on how satisfactory the alternatives are for satisfying one's interests. The better the alternative, the less dependent one is. If it is easier for the company to replace striking employees than it is for striking employees to find new jobs, the company is less dependent and thereby more powerful. In addition to strikes, power procedures include behaviors that range from insults and ridicule to beatings and warfare. All have in common the intent to coerce the other side to settle on terms more satisfactory to the wielder of power. Power procedures are of two types: power-based negotiation, typified by an exchange of threats, and power contests, in which the parties take actions to determine who will prevail.

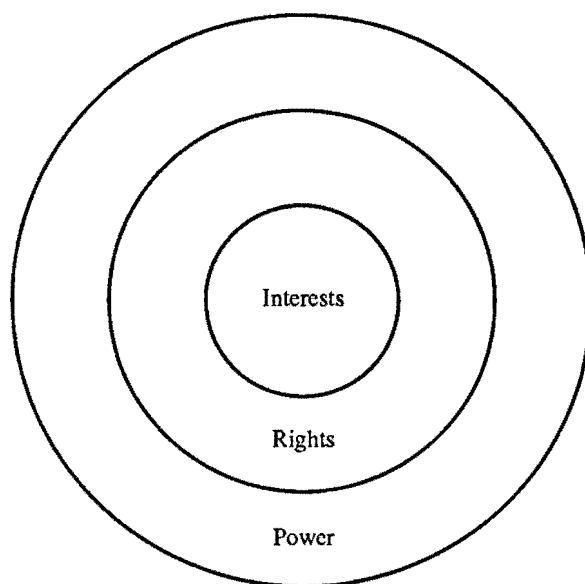
Determining who is the more powerful party without a decisive and potentially destructive power contest is difficult because power is ultimately a matter of perceptions. Despite objective indicators of power, such as financial resources, parties' perceptions of their own and each other's power often do not coincide. Moreover, each side's perception of the other's power may fail to take into account the possibility that the other will invest greater resources in the contest than expected out of fear that a change in the perceived distribution of power will affect the outcomes of future disputes.

### *Interrelationship Among Interests, Rights, and Power*

The relationship among interests, rights, and power can be pictured as a circle within a circle within a circle (as



Figure 1. Interrelationships Among Interests, Rights, and Power.



in Figure 1). The innermost circle represents interests; the middle, rights; and the outer, power. The reconciliation of interests takes place within the context of the parties' rights and power. The likely outcome of a dispute if taken to court or to a strike, for instance, helps define the bargaining range within which a resolution can be found. Similarly, the determination of rights takes place within the context of power. One party, for instance, may win a judgment in court, but unless the judgment can be enforced, the dispute will continue. Thus, in the process of resolving a dispute, the focus may shift from interests to rights to power and back again.

#### *Lumping It and Avoidance*

Not all disputes end with a resolution. Often one or more parties simply decide to withdraw from the dispute. Withdrawal takes two forms. One party may decide to "lump

it,” dropping her claim or giving in to the other’s claim because she believes pursuing the dispute is not in her interest, or because she concludes she does not have the power to resolve it to her satisfaction. The miner would have been lumping his claim if he had said to himself, “I strongly disagree with management’s decision not to reimburse me for my boots, but I’m not going to do anything about it.” A second form of withdrawal is avoidance. One party (or both) may decide to withdraw from the relationship, or at least to curtail it significantly.<sup>10</sup> Examples of avoidance include quitting the organization, divorce, leaving the neighborhood, and staying out of the other person’s way.

Both avoidance and lumping it may occur in conjunction with particular dispute resolution procedures. Many power contests involve threatening avoidance—such as threatening divorce—or actually engaging in it temporarily to impose costs on the other side—such as in a strike or breaking off of diplomatic relations. Many power contests end with the loser lumping her claim or her objection to the other’s claim. Others end with the loser engaging in avoidance: leaving or keeping her distance from the winner. Similarly, much negotiation ends with one side deciding to lump it instead of pursuing the claim. Or, rather than take a dispute to court or engage in coercive actions, one party (or both) may decide to break off the relationship altogether. This is common in social contexts where the disputant perceives satisfactory alternatives to the relationship.

Lumping it and avoidance may also occur before a claim has been made, thus forestalling a dispute. Faced with the problem of stolen boots, the miner might have decided to lump it and not make a claim for the boots. More drastically, in a fit of exasperation, he might have walked off the job and never returned.

### Which Approach Is “Best”?

When the mine superintendent described the boots dispute to us, he expressed a preference for how to resolve dis-

putes. In our language, he was saying that on the whole it was better to try to reconcile interests than to focus on who was right or who was more powerful. But what does “better” mean? And in what sense, if any, was he correct in believing that focusing attention on interests is better?

*What “Better” Means: Four Possible Criteria*

The different approaches to the resolution of disputes—interests, rights, and power—generate different costs and benefits. We focus on four criteria in comparing them: transaction costs, satisfaction with outcomes, effect on the relationship, and recurrence of disputes.<sup>11</sup>

*Transaction Costs.* For the mine superintendent, “better” meant resolving disputes without strikes. More generally, he wanted to minimize the costs of disputing—what may be called the transaction costs. The most obvious costs of striking were economic. The management payroll and the overhead costs had to be met while the mine stood idle. Sometimes strikes led to violence and the destruction of company property. The miners, too, incurred costs—lost wages. Then there were the lost opportunities for the company: a series of strikes could lead to the loss of a valuable sales contract. In a family argument, the costs would include the frustrating hours spent disputing, the frayed nerves and tension headaches, and the missed opportunities to do more enjoyable or useful tasks. All dispute resolution procedures carry transaction costs: the time, money, and emotional energy expended in disputing; the resources consumed and destroyed; and the opportunities lost.<sup>12</sup>

*Satisfaction with Outcomes.* Another way to evaluate different approaches to dispute resolution is by the parties’ mutual satisfaction with the result. The outcome of the strike could not have been wholly satisfactory to the miner—he did not receive new boots—but he did succeed in venting his frustration and taking his revenge. A disputant’s satisfaction depends largely on how much the resolution fulfills the interests that led her to make or reject the claim in the first place.

Satisfaction may also depend on whether the disputant believes that the resolution is fair. Even if an agreement does not wholly fulfill her interests, a disputant may draw some satisfaction from the resolution's fairness.

Satisfaction depends not only on the perceived fairness of the resolution, but also on the perceived fairness of the dispute resolution procedure. Judgments about fairness turn on several factors: how much opportunity a disputant had to express himself; whether he had control over accepting or rejecting the settlement; how much he was able to participate in shaping the settlement; and whether he believes that the third party, if there was one, acted fairly.<sup>13</sup>

*Effect on the Relationship.* A third criterion is the long-term effect on the parties' relationship. The approach taken to resolve a dispute may affect the parties' ability to work together on a day-to-day basis. Constant quarrels with threats of divorce may seriously weaken a marriage. In contrast, marital counseling in which the disputing partners learn to focus on interests in order to resolve disputes may strengthen a marriage.

*Recurrence.* The final criterion is whether a particular approach produces durable resolutions. The simplest form of recurrence is when a resolution fails to stick. For example, a dispute between father and teenage son over curfew appears resolved but breaks out again and again. A subtler form of recurrence takes place when a resolution is reached in a particular dispute, but the resolution fails to prevent the same dispute from arising between one of the disputants and someone else, or conceivably between two different parties in the same community. For instance, a man guilty of sexually harassing an employee reaches an agreement with his victim that is satisfactory to her, but he continues to harass other women employees. Or he stops, but other men continue to harass women employees in the same organization.

*The Relationship Among the Four Criteria.* These four different criteria are interrelated. Dissatisfaction with outcomes may produce strain on the relationship, which contributes to the recurrence of disputes, which in turn increases

transaction costs. Because the different costs typically increase and decrease together, it is convenient to refer to all four together as the costs of disputing. When we refer to a particular approach as “high-cost” or “low-cost,” we mean not just transaction costs but also dissatisfaction with outcomes, strain on the relationship, and recurrence of disputes.

Sometimes one cost can be reduced only by increasing another, particularly in the short term. If father and son sit down to discuss their conflicting interests concerning curfew, the short-term transaction costs in terms of time and energy may be high. Still, these costs may be more than offset by the benefits of a successful negotiation—an improved relationship and the cessation of curfew violations.

#### *Which Approach Is Least Costly?*

Now that we have defined “better” in terms of the four types of costs, the question remains whether the mine superintendent was right in supposing that focusing on interests is better. A second question is also important: when an interests-based approach fails, is it less costly to focus on rights or on power?

*Interests Versus Rights or Power.* A focus on interests can resolve the problem underlying the dispute more effectively than can a focus on rights or power. An example is a grievance filed against a mine foreman for doing work that contractually only a miner is authorized to do. Often the real problem is something else—a miner who feels unfairly assigned to an unpleasant task may file a grievance only to strike back at his foreman. Clearly, focusing on what the contract says about foremen working will not deal with this underlying problem. Nor will striking to protest foremen working. But if the foreman and miner can negotiate about the miner’s future work tasks, the dispute may be resolved to the satisfaction of both.

Just as an interests-based approach can help uncover hidden problems, it can help the parties identify which issues are of greater concern to one than to the other. By trading off issues of lesser concern for those of greater concern, both

parties can gain from the resolution of the dispute.<sup>14</sup> Consider, for example, a union and employer negotiating over two issues: additional vacation time and flexibility of work assignments. Although the union does not like the idea of assignment flexibility, its clear priority is additional vacation. Although the employer does not like the idea of additional vacation, he cares more about gaining flexibility in assigning work. An agreement that gives the union the vacation days it seeks and the employer flexibility in making work assignments would likely be satisfactory to both. Such joint gain is more likely to be realized if the parties focus on each side's interests. Focusing on who is right, as in litigation, or on who is more powerful, as in a strike, usually leaves at least one party perceiving itself as the loser.

Reconciling interests thus tends to generate a higher level of mutual satisfaction with outcomes than determining rights or power.<sup>15</sup> If the parties are more satisfied, their relationship benefits, and the dispute is less likely to recur. Determining who is right or who is more powerful, with the emphasis on winning and losing, typically makes the relationship more adversarial and strained. Moreover, the loser frequently does not give up, but appeals to a higher court or plots revenge. To be sure, reconciling interests can sometimes take a long time, especially when there are many parties to the dispute. Generally, however, these costs pale in comparison with the transaction costs of rights and power contests such as trials, hostile corporate takeovers, or wars.

In sum, focusing on interests, compared to focusing on rights or power, tends to produce higher satisfaction with outcomes, better working relationships and less recurrence, and may also incur lower transaction costs. As a rough generalization, then, an interests approach is less costly than a rights or power approach.

*Rights Versus Power.* Although determining who is right or who is more powerful can strain the relationship, deferring to a fair standard usually takes less of a toll than giving in to a threat. In a dispute between a father and teenager over curfew, a discussion of independent standards such

as the curfews of other teenagers is likely to strain the relationship less than an exchange of threats.

Determining rights or power frequently becomes a contest—a competition among the parties to determine who will prevail. They may compete with words to persuade a third-party decision maker of the merits of their case, as in adjudication; or they may compete with actions intended to show the other who is more powerful, as in a proxy fight. Rights contests differ from power contests chiefly in their transaction costs. A power contest typically costs more in resources consumed and opportunities lost. Strikes cost more than arbitration. Violence costs more than litigation. The high transaction costs stem not only from the efforts invested in the fight but also from the destruction of each side's resources. Destroying the opposition may be the very object of a power contest. Moreover, power contests often create new injuries and new disputes along with anger, distrust, and a desire for revenge. Power contests, then, typically damage the relationship more and lead to greater recurrence of disputes than do rights contests. In general, a rights approach is less costly than a power approach.

### *Proposition*

To sum up, we argue that, in general, reconciling interests is less costly than determining who is right, which in turn is less costly than determining who is more powerful. This proposition does not mean that focusing on interests is invariably better than focusing on rights and power, but simply means that it tends to result in lower transaction costs, greater satisfaction with outcomes, less strain on the relationship, and less recurrence of disputes.

### **Focusing on Interests Is Not Enough**

Despite these general advantages, resolving *all* disputes by reconciling interests alone is neither possible nor desirable. It is useful to consider why.

*When Determining Rights or Power Is Necessary*

In some instances, interests-based negotiation cannot occur unless rights or power procedures are first employed to bring a recalcitrant party to the negotiating table. An environmental group, for example, may file a lawsuit against a developer to bring about a negotiation. A community group may organize a demonstration on the steps of the town hall to get the mayor to discuss its interests in improving garbage collection service.

In other disputes, the parties cannot reach agreement on the basis of interests because their perceptions of who is right or who is more powerful are so different that they cannot establish a range in which to negotiate. A rights procedure may be needed to clarify the rights boundary within which a negotiated resolution can be sought. If a discharged employee and her employer (as well as their lawyers) have very different estimations about whether a court would award damages to the employee, it will be difficult for them to negotiate a settlement. Nonbinding arbitration may clarify the parties' rights and allow them to negotiate a resolution.

Just as uncertainty about the rights of the parties will sometimes make negotiation difficult, so too will uncertainty about their relative power. When one party in an ongoing relationship wants to demonstrate that the balance of power has shifted in its favor, it may find that only a power contest will adequately make the point. It is a truism among labor relations practitioners that a conflict-ridden union-management relationship often settles down after a lengthy strike. The strike reduces uncertainty about the relative power of the parties that had made each party unwilling to concede. Such long-term benefits sometimes justify the high transaction costs of a power contest.

In some disputes, the interests are so opposed that agreement is not possible. Focusing on interests cannot resolve a dispute between a right-to-life group and an abortion clinic over whether the clinic will continue to exist. Resolution will likely be possible only through a rights contest, such



as a trial, or a power contest, such as a demonstration or a legislative battle.

*When Are Rights or Power Procedures Desirable?*

Although reconciling interests is generally less costly than determining rights, only adjudication can authoritatively resolve questions of public importance. If the 1954 Supreme Court case, *Brown v. Board of Education* (347 U.S. 483), outlawing racial segregation in public schools, had been resolved by negotiation rather than by adjudication, the immediate result might have been the same—the black plaintiff would have attended an all-white Topeka, Kansas public school. The societal impact, however, would have been far less significant. As it was, *Brown* laid the groundwork for the elimination of racial segregation in all of American public life. In at least some cases, then, rights-based court procedures are preferable, from a societal perspective, to resolution through interests-based negotiation.<sup>16</sup>

Some people assert that a powerful party is ill-advised to focus on interests when dealing regularly with a weaker party. But even if one party is more powerful, the costs of imposing one's will can be high. Threats must be backed up with actions from time to time. The weaker party may fail to fully comply with a resolution based on power, thus requiring the more powerful party to engage in expensive policing. The weaker party may also take revenge—in small ways, perhaps, but nonetheless a nuisance. And revenge may be quite costly to the more powerful if the power balance ever shifts, as it can quite unexpectedly, or if the weaker party's cooperation is ever needed in another domain. Thus, for a more powerful party, a focus on interests, within the bounds set by power, may be more desirable than would appear at first glance.

*Low-Cost Ways to Determine Rights and Power*

Because focusing on rights and power plays an important role in effective dispute resolution, differentiating rights

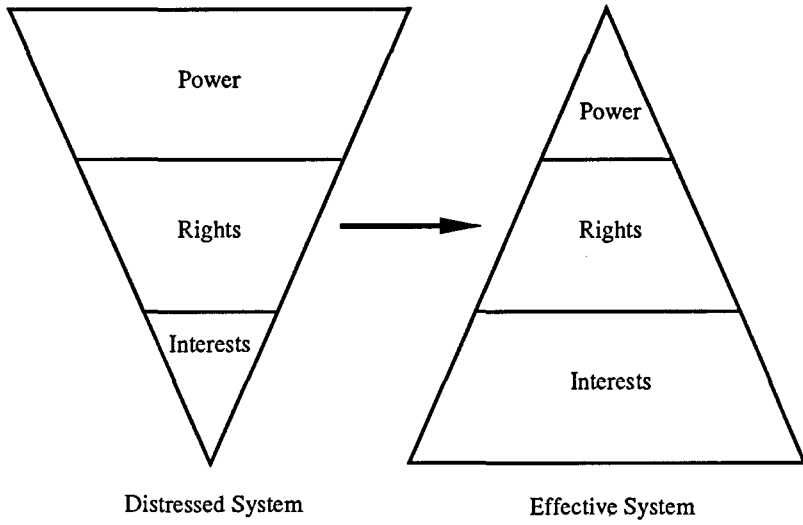
and power procedures on the basis of costs is useful. We distinguish three types of rights and power procedures: negotiation, low-cost contests, and high-cost contests. Rights-based negotiation is typically less costly than a rights contest such as court or arbitration. Similarly, power-based negotiation, marked by threats, typically costs less than a power contest in which those threats are carried out.

Different kinds of contests incur different costs. If arbitration dispenses with procedures typical of a court trial (extensive discovery, procedural motions, and lengthy briefs), it can be much cheaper than going to court. In a fight, shouting is less costly than physical assault. A strike in which workers refuse only overtime work is less costly than a full strike.

### **The Goal: An Interests-Oriented Dispute Resolution System**

Not all disputes can be—or should be—resolved by reconciling interests. Rights and power procedures can sometimes accomplish what interests-based procedures cannot. The problem is that rights and power procedures are often used where they are not necessary. A procedure that should be the last resort too often becomes the first resort. The goal, then, is a dispute resolution system that looks like the pyramid on the right in Figure 2: most disputes are resolved through reconciling interests, some through determining who is right, and the fewest through determining who is more powerful. By contrast, a distressed dispute resolution system would look like the inverted pyramid on the left in Figure 2. Comparatively few disputes are resolved through reconciling interests, while many are resolved through determining rights and power. The challenge for the systems designer is to turn the pyramid right side up. It is to design a system that promotes the reconciling of interests but that also provides low-cost ways to determine rights or power for those disputes that cannot or should not be resolved by focusing on interests alone. The chapters that follow discuss how a designer might go about creating such a system.

**Figure 2. Moving from a Distressed to an Effective  
Dispute Resolution System.**



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## Notes

### Chapter One

1. In order to steer between the Scylla of sexist language and the Charybdis of awkward writing, we have chosen to alternate the use of masculine and feminine pronouns.

2. This definition is taken from Felstiner, W.L.F., Abel, R. L., and Sarat, A. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming." *Law and Society Review*, 1980-81, 15, 631-654. The article contains an interesting discussion of disputes and how they emerge.

3. See Felstiner, W.L.F., Abel, R. L., and Sarat, A. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming." *Law and Society Review*, 1980-81, 15, 631-654.

4. In speaking of resolving disputes, rather than processing, managing, or handling disputes, we do not suggest that resolution will necessarily bring an end to the fundamental conflict underlying the dispute. Nor do we mean that a dispute once resolved will stay resolved. Indeed, one of our criteria for contrasting approaches to dispute resolution is the frequency with which disputes recur after they appear to have been resolved. See Merry, S. E., "Disputing Without Culture." *Harvard Law Review*, 1987, 100, 2057-2073; Sarat, A. "The 'New Formalism' in Disputing and Dispute Processing." *Law and Society Review*, 1988, 21, 695-715.

5. For an extensive discussion of interests-based negotiation, see Fisher, R., and Ury, W. L. *Getting to Yes*. Boston: Houghton Mifflin, 1981. See also Lax, D. A., and Sebenius, J. K. *The Manager as a Negotiator*. New York: Free Press, 1986.

6. Goldberg, S. B., and Sander, F.E.A. "Saying You're Sorry." *Negotiation Journal*, 1987, 3, 221-224.

7. We recognize that in defining rights to include both legal entitlements and generally accepted standards of fairness, we are stretching that term beyond its commonly understood meaning. Our reason for doing so is that a procedure that uses either legal entitlements or generally accepted standards of fairness as a basis for dispute resolution will focus on the disputants' entitlements under normative standards, rather than on their underlying interests. This is true of adjudication, which deals with legal rights; it is equally true of rights-based negotiation, which may deal with either legal rights or generally accepted standards. Since, as we shall show, procedures that focus on normative standards are more costly than those that focus on interests, and since our central concern is with cutting costs as well as realizing benefits, we find it useful to cluster together legal rights and other normative standards, as well as procedures based on either.

8. A court procedure may determine not only who is right but also who is more powerful, since behind a court decision lies the coercive power of the state. Legal rights have power behind them. Still, we consider adjudication a rights procedure, since its overt focus is determining who is right, not who is more powerful. Even though rights, particularly legal rights, do provide power, a procedure that focuses on rights as a means of dispute resolution is less costly than a procedure that focuses on power. A rights-based contest, such as adjudication, which focuses on which disputant ought to prevail under normative standards, will be less costly than a power-based strike, boycott, or war, which focuses on which disputant can hurt the other more. Similarly, a negotiation that focuses on normative criteria for dispute resolution will be less costly than a negotiation that focuses on the disputants' relative capacity to injure each other. Hence, from our cost perspective, it is appropriate to distinguish procedures that focus on rights from those that focus on power.

9. Emerson, R. M. "Power-Dependence Relations." *American Sociological Review*, 1962, 27, 31-41.

10. Hirschman, A. O. *Exit, Voice, and Loyalty: Responses to Declines in Firms, Organizations and States*. Cambridge, Mass.: Harvard University Press, 1970. Exit corresponds with avoidance, loyalty with lumping it. Voice, as we shall discuss later, is most likely to be realized in interests-based procedures such as problem-solving negotiation and mediation.

11. A fifth evaluative criterion is procedural justice, which is perceived satisfaction with the fairness of a dispute resolution procedure. Research has shown that disputants prefer third-party procedures that provide opportunities for outcome control and voice. See Lind, E. A., and Tyler, T. R. *The Social Psychology of Procedural Justice*. New York: Plenum, 1988; Brett, J. M. "Commentary on Procedural Justice Papers." In R. J. Lewicki, B. H. Sheppard, and M. H. Bazerman (eds.), *Research on Negotiations in Organizations*. Greenwich, Conn.: JAI Press, 1986, 81-90.

We do not include procedural justice as a separate evaluation criterion for two reasons. First, unlike transaction costs, satisfaction with outcome, effect on the relationship, and recurrence, procedural justice is meaningful only at the level of a single procedure for a single dispute. It neither generalizes across the multiple procedures that may be used in the resolution of a single dispute nor generalizes across disputes to construct a systems-level cost. The other costs will do both. For example, it is possible to measure the disputants' satisfaction with the outcome of a dispute, regardless of how many different procedures were used to resolve that dispute. Likewise, it is possible to measure satisfaction with outcomes in a system that handles many disputes by asking many disputants about their feelings. Second, while procedural justice and distributive justice (satisfaction with fairness of outcomes) are distinct concepts, they are typically highly correlated. See Lind, E. A., and Tyler, T. R. *The Social Psychology of Procedural Justice*. New York: Plenum, 1988.

12. Williamson, O. E. "Transaction Cost Economics: The Governance of Contractual Relations." *Journal of Law*

and *Economics*, 1979, 22, 233-261; Brett, J. M., and Rognes, J. K. "Intergroup Relations in Organizations." In P. S. Goodman and Associates, *Designing Effective Work Groups*. San Francisco: Jossey-Bass, 1986, 202-236.

13. For a summary of the evidence of a relationship between procedural and distributive justice—that is, satisfaction with process and with outcome—see Lind, E. A., and Tyler, T. R. *The Social Psychology of Procedural Justice*. New York: Plenum, 1988. Lind and Tyler also summarize the evidence showing a relationship between voice and satisfaction with the process. For evidence of the effect of participation in shaping the ultimate resolution beyond simply being able to accept or reject a third party's advice, see Brett, J. M., and Shapiro, D. L. "Procedural Justice: A Test of Competing Theories and Implications for Managerial Decision Making," unpublished manuscript.

14. Lax, D. A., and Sebenius, J. K. *The Manager as Negotiator*. New York: Free Press, 1986.

15. The empirical research supporting this statement compares mediation to arbitration or adjudication. Claimants prefer mediation to arbitration in a variety of settings: labor-management (Brett, J. M., and Goldberg, S. B. "Grievance Mediation in the Coal Industry: A Field Experiment." *Industrial and Labor Relations Review*, 1983, 37, 49-69), small claims disputes (McEwen, C. A., and Ma'iman, R. J. "Small Claims Mediation in Maine: An Empirical Assessment." *Maine Law Review*, 1981, 33, 237-268), and divorce (Pearson, J. "An Evaluation of Alternatives to Court Adjudication." *Justice System Journal*, 1982, 7, 420-444).

16. Some commentators argue that court procedures are always preferable to a negotiated settlement when issues of public importance are involved in a dispute (see, for example, Fiss, O. M. "Against Settlement." *Yale Law Journal*, 1984, 93, 1073-1090), and all agree that disputants should not be pressured into the settlement of such disputes. The extent to which parties should be encouraged to resolve disputes affecting a public interest is, however, not at all clear. See Edwards, H. T. "Alternative Dispute Resolution: Panacea or Anathema?" *Harvard Law Review*, 1986, 99, 668-684.