European Journal of Law Reform

Volume 2 • Issue 4 • 2000

Strategic Alliance Mediation – Creating Value from Difference and Discord in Global Business

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A. Introduction

To win the business alliance game you must capture and hold customers and territory – by better products, property rights, swift marketing, sharper selling, and other deft means. Speed is now the critical element in success, and close upon it, how well you manage risk. Fifty years ago when we still had time, companies grew to greatness on their own steam. Today CMGI, the Internet venture capital firm, will complete a USD 900 million acquisition from start to finish (including due diligence) in a week. But the acquisition route, as many companies are finding, is fraught with dangers, because the welding together of disparate corporate cultures can be hard, and the expense often prodigious. For these three reasons – territory, speed, and risk – strategic business alliances'[1] have become increasingly popular, growing at a pace

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The author expresses his appreciation to the following friends and colleagues for their comments on various drafts and outlines of this article and for materials provided: Peter Murray, Frank Sander, Eileen Carroll, Karl Mackie, Peter Pekar, Richard Buxbaum, Lynne S. Paine, John Place, Michael Miller, Steven Rosenberg, Bill Lundberg, Jim Kiel, John Tarrant, and James Myers.

[1] As used in this article, a 'strategic alliance' refers to a business organization with an important strategic purpose, which involves a higher degree of integration than an arms-length supplier or vendor relationship, but short of a merger or acquisition. Strategic alliances are being formed to fill virtually every gap in a company's value production chain. Some alliances are organized as joint ventures or legal partnerships, although not all alliances take this legal structure. Not all joint ventures or partnerships are strategic alliances, and some alliances, which are missing the critical strategic element, may nonetheless be 'tactical alliances'.

European Journal of Law Reform, Vol. 2, No. 4

of 4,000 a month. If well conceived and carried out, the strategic business alliance affords the most efficient means today to capture and to hold customers and territory, and to manage risk intelligently.

This article focuses on one essential element in the success of most strategic alliances: how to create synergy from differences and to find value in conflict and discord. You might expect lawyers and legal process to make an important contribution in this area, but sadly, in many cases, it has been lacking. Indeed, many strategic alliance professionals view lawyers askance, as troublesome meddlers and deal killers, who have little understanding of the needs of strategic alliances. They lumber into highly volatile discussions with their own professional agendas, fears, preoccupations, and suspicions in ways that are often counterproductive to the formation of trust between business partners.

How can business lawyers and other professionals contribute most creatively to this new and vibrant field? What are the critical areas for law reform? This article explores a largely unnoticed aspect of conflict resolution and value creation in strategic alliances – 'a process called 'strategic alliance mediation'. Strategic alliance mediation involves the systematic application of the principles and techniques of negotiation and alternative dispute resolution (ADR), combined with the best alliance practices, to settle disputes, create value, and build the adaptive vitality of an alliance.

The article is directed first to the alliance champions – the players who are most responsible for the success of an alliance and who are also its strongest advocates. Every high performance alliance will have a champion, and in the best alliances the champion will play a continuing role. The second crucial actor is the international business lawyer, especially those lawyers who are already trained as mediators, or are interested in the field. The rapid growth of transborder alliances offers international lawyers an important new role as alliance mediators. In fact, as explained below, the successful launch of the new field of strategic alliance mediation will depend heavily, at least at first, on an *ad hoc* alliance between the champions and those special in-house and outside lawyers who are imaginatively alive to the opportunity.

Section B begins with an overview of the radical structural changes now under way in business. Today, hundreds of companies are forming collaborative constellations, paralyzing and leapfrogging their competition, to build whole new industries. The relentless pace toward greater speed and complexity is substantially increasing the stakes, both opportunities and risks, of the alliance game, and is a central cause of conflict and alliance failure. Section C examines the sources of alliance failure, the costs of conflict, and counsel's own contribution to the problem. Section D explains *the principle of integrity*, which can provide a useful framework for the practice of alliance mediation. Integrity, as used here, refers to the sense of being connected, whole, coherent, and adaptively alive.[2] An alliance's integrity

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[2] For a lengthy discussion of the principle of integrity see, Julian Gresser, *Piloting Through Chaos: Wise Leadership and Effective Negotiation for the 21st Century* (1996); also John

provides the vessel or container in which differences and disputes can be energetically transformed into creative ideas and innovative products and services.

Section E makes the best case for strategic alliance mediation, by setting out the data on its economic and other benefits, and discussing the broad range of precedents that can serve as the foundation for this new field. In fact, many of the best commercial mediators today are already engaged in creating value for alliances without defining their activities specifically as strategic alliance mediation. Section F gives the reader a more intimate picture of an alliance mediator at work. Section G examines two special challenges: the complex and subtle practice of transcultural alliance mediation (using the case of Japan) and the whirlwind of mediating Internet alliances. Section H concludes with some practical steps lawyers and other alliance professionals can take in building a new global profession.

B. The Strategic Challenge

According to authors, Harbison, Pekar et al., the allied enterprise is the breakout strategy of the new century.[3] The results of Booz, Allen & Hamilton's survey of 215 large firms and 147 smaller companies by the Association for Corporate Growth are striking:

- Accelerated growth is the most important driver for these companies and the primary reason they are entering into alliances.
- 98 per cent of the respondents indicated alliances are growing in their industry.
- Revenues from alliances will double in the next five years (up to 98 per cent for smaller companies).
- 71 per cent of the respondents confirm that they see alliances as the *option of choice* for obtaining capital and accessing new capabilities.

The more successful the company, often the more adept it is in its alliances. During the past ten years Microsoft reports two new alliances on average per day![4] Andersen Consulting's 1999 Global Alliance Survey found that, 'today, alliances account for an average of 26% of Fortune 500 Companies' revenues, up from just 11%, 5 years ago.'

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Beebe, *Integrity in Depth* (1992). The author maintains that ethical action, commonly associated with integrity, derives from a developed consciousness. In other words, the more aware, the higher the integrity, the greater the sense of abundance, the more a person is likely to behave ethically. See *infra* notes 12, 28 and 76.

[3] John R. Harbison, Peter Pekar, Jr, Albert Viscio and David Moloney *The Allianced Enterprise: Breakout Strategy for the New Millennium* (Booz, Allen, & Hamilton 'Viewpoints', 2000).

[4] Ibid.

The rapid emergence of alliances reflects changing fundamentals in corporate strategy. In 1985 only 26 per cent of the revenue of top US companies derived from their core businesses. Diversification was the standard. By 1998 the core generated 60 per cent (US) and 67 per cent (Europe) of these companies' revenues. According to Harbison and Pekar, fortifying the core, while enhancing other key elements in the value chain, is management's central strategic challenge today.[5]

Real alliance power, Harbison and Pekar point out, no longer flows from discrete alliances, but from using a group of alliances *in a concentrated manner* rapidly to overpower the competition. They identify three emerging models. The first (*The Franchise*) is designed to fill 'gaps' in the production value chain. This model is used to fill a single gap in a company's value chain, where no single partner can satisfy it. The basic model is replicated for a class of partnerships. In Exhibit #1, Nintendo develops games for its consoles by positioning itself at the centre of a large number of affiliations, quickly building scale, thereby opening a corridor for rapid growth. A variant is *The Portfolio*. Companies adopting the portfolio model usually have complex production value chains, which contain too many elements for them to compete successfully on their own. In Exhibit #2, Time Warner exerts leverage within a group of partnerships, including software developers, switching and transport companies, service and content providers. Time Warner manages these relationships like a portfolio, adding or culling its assets according to its strategy.

Under the second (*Co-operative – Shared Control*) model many firms ally to offer their customers an integrated product/service offering, unavailable elsewhere and often with greater efficiency. Unlike the franchise or portfolio models, in a truly collaborative model operations and often legal control are shared. The alliance, not any single player, occupies centre stage. Exhibit #3 outlines the structure of TriStar, a co-operative venture among CBS, Columbia Pictures, and HBO. Here each partner is significantly benefitted: HBO is guaranteed an additional source of feature films; CBS secures an entry into cable TV services; and Columbia Pictures gains access to new distribution channels. Each partner distributes TriStars' films through its own channels. The distinctive feature is that no company is in control – all work together to raise the competitive bar.

The third model (*Constellations*) involves a breakout strategy where constellations of firms are collaborating to build whole new industries. These most complex alliances often standardize operations on a global scale and require substantial capital. The goal is to leapfrog the competition, put competitors on the defensive, and stimulate the market into a high growth phase. Exhibit #4 is an example of an emerging constellation alliance in the field of e-procurement.

The centrifugal forces of these increasingly complex alliances are, according to Harbison and Pekar, accelerating the collapse of traditional systems of 'command and control'. Although "lateral" leadership should, in theory, render complex

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[5] Ibid.

alliances more flexible and adaptable,[6] these changes can be dislocating and disorienting, which is fertile ground for conflict.[7]

C. Sources of Alliance Failure

The alliance game is not for amateurs. More than one half of first time alliances fail, and a good number of second and third tries are also unsuccessful. In East Asia the rate of failure of international alliances is around 90 per cent.

Every failed alliance has its special stories, its special discord and disharmony, its lost promise and potential. There have been several corporate surveys of the causes of alliance failure. In a questionnaire sent out to 593 CEOs by the Conference Board in 1995, respondents listed unrealistic expectations as the most 'dangerous;' cultural differences, poor communication, dramatic changes in the business environment, lack of shared benefits, and ambiguous or poor leadership as 'critical;' and marked slow results or payback, poor alliance integration and misunderstood operating principles as 'cautionary'.[8] Although conflict itself is not named, every issue on the list, from those marked 'danger' to only 'caution,' are potential sources of conflict.

The research of Professor Habir Singh of the Wharton School, presented at the Summit of the Association of Strategic Alliance Professionals in Chicago in October 1999, confirms this finding. Professor Singh identifies three additional important

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[6] Lateral leadership is not confined to alliances but rather reflects more pervasive changes in the structure of leadership in business. For two excellent references and many examples of lateral leadership, see Jack Stack, *The Great Game of Business* (1992); and also James O'Toole, *Leading Change* (1995).

[7] Harbison's and Pekar's important article (*The Allianced Enterprise, supra* note 3) does not address a fourth model, the global e-commerce network, which was the prime focus of discussion at the recent ASAP Summit on e-commerce alliances held in San Francisco in May, 2000. Many industry presenters stressed that the locus of competitive advantage is no longer the single firm, but rather the firm's position in its global network. How the firm negotiates internal alliances within the network, and how it gains leverage are fast becoming critical elements in the firm's ultimate success in the marketplace. As discussed in the next section, these changes in the structure of alliances, are giving rise, and will increasingly, to new sources of conflict. An overriding question is governance. No one to date has developed a coherent governance model for these global networks, which can replace the old command-and-control structures. This void of leadership is fertile ground for discord.

Tensions will also increase because many of these new networks involve large numbers of collaborating firms, which in the non-virtual world are also fierce competitors. Whether the present firewall of 'co-opetition,' involving collaboration in the virtual e-commerce field and competition in the ordinary world, will hold against traditionally fierce rivalries is an open question. When the wall is breached, it is likely there will be new conflicts over patent infringement, theft of trade secrets, and allegedly anti-competitive practices. See Adam M. Brandenburger and Barry J. Nalebuff, *Co-opetition* (1996).

[8] DataQuest 1992 and Conference Board Survey of CEOs, 1995.

points of tension. He points to the delicate position of the alliance 'champion' and other key players, who work at the boundary between companies. If any of these 'translators' of corporate culture is weak or is suddenly reassigned,[9] the alliance will become unstable. Professor Singh stresses the importance of a highly disciplined search by all parties for joint gains. If either party or their alliance itself does not derive substantial benefit, the alliance will not prosper. Trust is the elusive third condition. When trust collapses, communication goes haywire, conflicts emerge, and the alliance often goes into a tailspin.[10]

I. Fast Time and Complexity as Unnoticed Sources of Alliance Failure

According to alliance consultant Robert Porter Lynch, troubles in alliances multiply with the introduction of each new element of uncertainty (in his words, 'complexity interfaces'). In his best selling book, *Business Alliance Guide*,[11] Lynch cites a Brazilian joint venture, involved in the fabrication of stainless steel for the automotive industry. Ignoring Lynch's 'Law of Managing Compound Risk,' the partners simultaneously introduced a new technology, and permitted an inexperienced Italian supplier to furnish the steel to assembly line workers, who knew little or nothing about stainless steel fabrication. As a result, the assembly line had to be shut down, and the joint venture incurred huge cost overruns and penalties. The parties failed to heed a basic, common sense lesson: *start with the fewest number of risks, achieve success, then incrementally add new risks.*

When speed is combined with complexity, the mixture is volatile. The quality of decisions is the first to be impaired. Although speed is essential for some business decisions, few businesses, much less strategic alliances, can operate solely in fast time.[12] There is simply no space to breathe. When everything is urgent, how can the

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[9] Summit of the Association of Strategic Alliance Professionals, November 1999.

[10] Although most commentators stress the importance of trust, some maintain that the importance of trust has been exaggerated. See, for example, Benjamin Gomes-Casseres, *The Alliance Revolution* (1997). Professor Gomes-Casseres concludes that the principal driving factor in collaboration within constellations is to create barriers to collaboration for rivals.

[11] Robert Porter Lynch, *Business Alliance Guide – The Hidden Competitive Weapon* (1993).

[12] Why do top executives have the highest rates of serious illnesses such as heart disease, stroke, and cancer? One pioneering group of physicians has identified the cause as 'hurry sickness'. This is not simply a euphemism for stress. It seems that at a cellular level the basic timing and sense of rhythm, which governs all physiological processes, is being impaired, and the result is a profound and widespread disease. Why should alliances, which are only extended forms of human organization, be any different? If hurry sickness is pandemic in modern society, why should fast time not also be a central cause of discord, conflict, and malaise in strategic alliances? See Larry Dossey, *Space, Time, and Medicine* (1982).

What is the root of happiness? As we shall see in the next section, most people are happy when they feel physically alive and vital, and when they have sense of purpose, contribution, and meaning. Whereas speed can provide a 'rush,' the experience of being in tune, in balance, and adaptively alive – the sense that no situation in the end can get the better of you – is deeper and more satisfying. It is the same with happy alliances.

participants distinguish the essential from the unessential? Most errors, accidents, and conflicts occur when people simply fail to pay attention.

How does one build a durable trust in fast time? Many CEOs cite trust at the top of the reasons for their successful alliances. Trust can not be secured by fiat, or in an instant. Trust requires time – the slow time of experience.[13]

Harmony and the absence of conflict coincide, and one of the secrets of harmony is a developed sense of rhythm and timing. A quintet will not sound beautiful, if the players rush their parts and their timing is jagged. How can an alliance function without discord, if there is no time or space for the players to listen, to learn, to change, or to grow?

II. Counsel's Contribution to Alliance Failure

If the trend of alliances is toward speed and complexity, counsel has often added rigidity, mismatch, and uncertainty to the mix. This case involved a joint venture between an entrepreneurial West Coast high technology company and a large British pharmaceutical firm. The aim of the venture was to accelerate the production and distribution in the US of drugs manufactured under the British company's trademark. Soon after beginning operations the venture became profitable, and the Americans, perceiving a much larger opportunity in the US and global markets, approached the British with the idea of adding new lines of drugs and streamlining operations (which were very bureaucratic) in order to improve communication. Here they ran into trouble. The joint venture was explicitly limited to a specific class of products, with carefully worked out terms for compensation, warranties, and cost sharing. The British balked, recalling the exhausting negotiations that had preceded the joint venture, and the enormously complex agreements, their lawyers had engineered. With their priorities diverted to an internal reorganization, the British management simply did not want to spend more time or money in revising its agreements. So others captured the opportunities, and the alliance languished.

Why are lawyers themselves a contributing cause of alliance failure? One factor is the confusion over the legal status of an alliance. Most lawyers do not know whether an alliance is a partnership, a joint venture, or something else. When they do not understand a proposed business arrangement, they become concerned about the potential liability of their clients. The professional reflex is conservative, and the impulse is to define the arrangement in conventional terms. But the conventional solution – a joint venture – is often poorly suited to the needs of the parties as the above example illustrates, because joint ventures tend to be cumbersome to govern and operate, hard to modify, and at times extremely difficult to unravel and to terminate.

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[13] As explained in later sections, trust is forged through tested experience. Too many people blindly trust by some false intuitive insight and only later regret it. Alliance mediation creates a container for trust to grow, allowing the parties to create value by working through their difficulties.

The deeper problem is probably (and sadly) one of control. Many lawyers are extremely uncomfortable with risk, and in fact believe their professional responsibility is to mitigate risk. But they fail to understand that in the alliance game risk *is* the primary creative source of value. Strategic alliances are by their very nature risky.[14]

A lawyer's professional concern over risk takes several forms, all of which contribute to discord and the dysfunction of alliances. The first tendency is to intercede too early, which almost invariably dampens the enthusiasm and fragile trust that business parties have begun to develop in conceiving and planning a new alliance. The second error is to over-lawyer the agreement, so that, as in the British case, it becomes an albatross around the necks of its participants. The third mistake, surely the most subtle, is a failure to understand the interest of the alliance itself, as distinct and separate from that of the parties. We will return to this issue of the alliance interest, because it is critical to understanding alliance mediation. In virtually all surveys of the most successful alliances, the respondents invariably cite their common concern for the well being of their alliance as a key ingredient in their success. This is very hard fare for lawyers, who view their role as gladiators, charged with extracting every once of profit and advantage for a client. In discharging their professional responsibilities, many lawyers unintentionally foster a spirit of distrust and paranoia, which is quite the opposite of what the prospective allies need.

A final failing – confirmed in two recent surveys of several hundred companies[15] – is that few lawyers include mediation, in contrast to arbitration, provisions in their alliance agreements. It is a curious blind spot, because many of these lawyers' own firms have developed experience in alternative dispute resolution (ADR). By this simple change in practice, a great number of differences and disputes might be resolved, and the success of many alliances enhanced.

III. Legal Uncertainties

What is the legal status of a strategic alliance and a global network? What is the legal standard of conduct of these entities, where trust is often so essential? Are the allies in a fiduciary relationship, which would require a high duty of care, trust, disclosure, and loyalty? How does one reconcile a fiduciary obligation among several hundred companies that are participating in a portfolio or constellation alliance? Where does the obligation to disclose a business opportunity to an alliance end, when a large number of allies are also competitors?

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[14] See Martha Amram and Nalin Kulatilaka, *Real Options* (1998). In this important book the authors' preface begins: 'Many managers believe that uncertainty is a problem and should be avoided. Uncertainty is frequently omitted from important corporate thinking. We hold the opposite view. If your firm is properly positioned, then uncertainty can create value and take you to market leadership'.

[15] The survey was conducted by Dr. Peter Pekar, Jr in co-operation with Booz, Allen & Hamilton and the Association for Corporate Growth, Spring 2000.

At present the law's answer is equivocal. If – a huge 'if' – a strategic alliance is deemed a *de facto* partnership, several courts have held that the partners cannot relieve themselves of their fiduciary responsibilities simply by agreement.[16] These appellate court decisions, however, are not dispositive. Very few strategic alliances, including those organized as joint ventures, explicitly state that they are partnerships. Many are close corporations, often organized by their publicly held corporate parents as limited liability corporations, joint ventures, or in some other form. When an aggrieved 'partner' in a co-operative, portfolio, or constellation alliance files a claim – and it is certain that in due course this claim will come – how will the court decide, if there is no formal partnership agreement? The court will likely look to the

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[16] In *BT-I* v. *Equitable Life Assurance Society of the United States* (99 C.D.O.S. 8777) a case involving the foreclosure of a deed of trust against a partnership's sole asset, an office building, the US Court of Appeals upheld a challenge by a limited partner stating:

'We do not believe the partnership agreement can be read as permitting Equitable to purchase the loans for its own account. Certainly it does not allow such conduct. Even if the language were broad enough to justify such interpretation, we hold a partnership agreement cannot relieve a general partner of its fiduciary duties to a limited partner and the partnership where the purchase of the partnership debt is concerned'.

Again in *Wartski* v. *Bedford* 926 F.2d11 (1st Cir. 1991) the Court of Appeals upheld the claims of a minority shareholder in a close corporation for damages arising from the misappropriation by the majority stockholder of a corporate opportunity – the discounted purchase price of the minority shareholders' stock.

'Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that shareholders in a close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the "utmost good faith and loyalty". Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to other stockholders or to the corporation'.

The Court then went on to quote Justice Cardozo's famous definition of the duty of partners and participants in a joint venture: 'Not honesty alone, but the punctilio of honor the most sensitive, is then the standard of behavior'.

The Court's definition of a corporate opportunity was equally broad:

'... property in which the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers interference will, in some degree, prevent or hinder the corporation in effecting the purpose of its creation'.

'The fiduciary duty of partners,' the court continued, 'is an integral part of the partnership agreement whether or not expressly set forth therein. It cannot be negated by the words of the partnership agreement'.

On the related question of whether a network is a legal concept, Professor Richard Buxbaum, a leading authority on corporate organization, concludes 'no'. Richard A. Buxbaum, 'Is "Network" a Legal Concept?' (1993) *Journal of Institutional and Theoretical Economics* 149/4.

intent of the parties, the ownership of common assets, the degree of integration, the strategic nature of the relationship, the extent of reliance, the nature of the expectations, and the importance of trust.

In the area of antitrust, the volatile mixture of speed and complexity becomes more potent, because many alliances are so rushed, they do not appear to take compliance particularly seriously. Yet, the prospect of civil or criminal penalties can chill an alliance, well before they are imposed. The parties become more reflective (not necessarily a bad thing), less open, self-protective, and suspicious, and after an enforcement procedure is initiated, often they will engage in finger pointing and backbiting.

Under the Justice Department's recently promulgated guidelines,[17] the great majority of strategic alliances will probably fall under the 'rule of reason'. In other words, an alliance itself is not a violation, but the Department will look into the details of the venture to ascertain whether its motives, structure, or implementation have sufficiently anti-competitive effects, which should override its pro-competitive impacts, to justify prosecution. Moreover, the Justice Department favors some kinds of co-operation such as R & D collaborations, while others like buying, production, or marketing collaborations, receive closer scrutiny. All of the alliances mentioned earlier appear to fall into this category.[18]

My purpose is not to analyze any of these questions closely. I only wish to point out how the present atmosphere of legal uncertainty is likely to give rise to conflict and is fertile ground for the alliance mediator.

IV. The Costs of Alliance Failure

The artful negotiator monitors closely not only the financial costs of a transaction, but also the less tangible, less easily measured costs of time, energy, and creativity.[19]

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[17] See US Department of Justice, *Antitrust Guidelines for Collaboration Among Competitors* (1 October 1999); also Rogers' and Wells' analysis, *A Practical Guide to the Newly Issued Joint Venture Guidelines* (November 1999).

[18] The disrupting influence of antitrust on strategic alliances may increase with the possible division of Microsoft. Strategic alliance mediation may help to anticipate and to reconcile conflicts arising over anti-trust investigations or prosecution. Because of its emphasis on building synergy, alliance mediation may indirectly keep the parties and their alliance focused on ways of enhancing efficiency – a primary concern of the Justice Department's guidelines.

[19] See Julian Gresser, *Piloting Through Chaos: Wise Leadership /Effective Negotiation for the 21st Century* (1996). In the system of artful negotiation developed in this book an effective negotiator is viewed as an effective decision-maker. One of the essential elements of effective decision making is intelligent management of budget. In artful negotiation, budget is composed of time with a value of one, energy with a value of two, financial stake (percentage of assets committed) with a value of three, and creativity with a value of four. In other words, creativity is assessed at four times the value of time, with a negotiator's overall budget calculated as Time x Energy x Financial Stake x Creativity. Although this is a somewhat crude approach, it has the virtue of forcing a negotiator to become conscious

The wise alliance manager will be equally vigilant about the direct and largely hidden costs to the firm of its alliances.

In a recent survey The Association of Strategic Alliance Professionals (ASAP) asked its members this question: 'What has been the cost of conflict?' Here is a sample of responses:

- 'The cost of internal conflict has been considerable, likely in the hundreds of millions of lost opportunity'.
- 'With customer alliances we have lost significant amounts of money due to the abuse of some of our agreements. Hundreds of thousands of dollars of product have been wasted, as well as many executive man hours trying to correct the situation'.
- 'I don't have figures for this question, but the sales cycle for winning a customer that involves one of our alliance partners averages from 6 months to a year. That involves a significant time commitment from our sales people. When we lose one of these customers due to failures by one of our alliances, it generally is a loss of anywhere from USD 500,000 to USD 5,000,000 annually'.
- '20 per cent of generated revenues'.

The stakes have recently been raised even further as Wall Street has come to recognize the link between an alliance's performance and its stock price. An example: Bally Total Fitness Corporation possesses what is termed in the Internet trade 'eyeballs' – i.e., web surfers who regularly visit the site – but it lacks innovative content. It forms an alliance with two Internet startups, Efit and Visto Corporation, which have good content, but sorely need visibility that a partner like Bally Fitness can confer. On the day Bally's partnership is unveiled, its stock rises 3 per cent.[20]

There is some solid ground for Wall Street's enchantment with strategic alliances. A close relationship exists in strategic alliances between revenues, earnings, and shareholder returns.[21] The rewards for alliance excellence and the penalties for failure are being apportioned more immediately and precisely. This fact is also reflected in the choice of partners. A company which has earned a reputation of

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of these tradeoffs. This seems an improvement over the present situation where very few business executives actually take the time to consider the charges against energy and creativity of their negotiations. In his own work with large numbers of executives the author has found the budgetary tool has significantly improved the quality of decisions. An interesting technique for measuring and displaying expenditures of time, energy, money, and creativity can be found in the Artful Navigator software (see <www.logosnet.com>).

[20] *Investors Business Daily*, net column, p. A6, Fall 1999.

[21] Harbison, Pekar et al., '*The Allianced Enterprise,*' emphasize (p. 5) that growth drives performance. For companies in alliances within the 90th percentile, based on 10-year cumulative growth, shareholder returns were 841 per cent, earnings 997 per cent, and revenues 678 per cent. They also point out that alliances outperform mergers in terms of stock market value creation.

being fair and effective in its alliances will attract superior partners. Another with a record of failures will be shunned.[22]

D. The Principle of Integrity

The concept of 'alliance integrity' offers one way of explaining why some alliances succeed and others fail. As used in this article, integrity refers to a dynamic state of wholeness, coherence, connection, and adaptive vitality. Among the first recorded references to integrity in the West is the use of the word in 70 BC by Cicero in his prosecution of Gaius Verres, the corrupt governor of Sicily.[23] Rome's very *integritas,* Cicero warned, was in jeopardy, if the Senatorial Court in Rome would not act to rid itself of the contagion. In ancient China integrity (in the Chinese language pronounced, 'te') was considered the vessel that held the connection of all living things to the Tao – the fundamental organizing principle of the universe. Written with the separate ideographs for 'hand,' 'heart,' and 'eye,' acting together in a dynamic balance, integrity is the state where intelligence (eye), compassion (heart) and action (hand) work in harmony with one's essential nature and the external world.[24]

Integrity is also understood as a governing principle in physical and biological systems. In electronics the integrity of a wave form refers to its relative absence of 'noise'. Even the most humble of living creatures appears to 'understand' when its integrity is at risk. Encircle a paramecium with a toxic material, and it will seek to find a way out to preserve its integrity. In chemistry the system's integrity enables compounds to recombine and to transform in coherent ways.[25]

In the field of negotiation the author has been able to demonstrate in working with hundreds executives over the past ten years, that integrity is a *core life skill*, which can be learned and eventually mastered through dedicated practice. Integrity acts as an aegis – a protective shield. A single negotiator or a team possessing integrity will be able to recover and to adapt quickly, and no situation for very long will get the better of them.

The principle applies equally to organizations and communities.[26] Integrity can confer a decisive strategic advantage for companies that practice it. Harvard Business School Professor Lynne S. Paine has shown that those firms that encourage

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[22] This point was emphasized by several presenters at the ASAP Summit in Chicago, November 1999.

[23] Beebe, *supra* note 2, at p. 18.

[24] Gresser, *supra* note 2, at p. 18.

[25] The author is indebted to Dr. James A. Cusamano, Chairman of Catalytica for this insight.

[26] The observation is based on the author's seminars conducted at the Oregon Graduate Institute for Science and Technology between 1997–1999 for middle managers and engineers from Intel and other high technology companies in the Pacific Northwest. The students were able quickly to transfer and to replicate the self-mastery model within their working groups at their companies.

high ethical conduct also avoid costly administrative fines, penalties, law suits, poor morale, loss of key personnel and goodwill.[27] Although Professor Paine has focused her research on ethics in business, ethics and consciousness are directly and powerfully related. When our powers are in abundance, we will treat others with kindness, patience, and cheer; when we are less fearful and guarded, we become curious about everything, and we cannot help but to act ethically and wisely.[28]

Applying these principles to strategic alliances we find that:

- when the parties to an alliance are rushed and do not pay attention to important details, the integrity of their alliance will suffer;
- when an alliance involves multiple parties in complex associations of franchises, portfolios, or constellations, the relationship can become quickly stressed, and its integrity impaired;
- when these alliances have a cumbersome legal architecture that chills and chokes the life blood out of the parties' co-operative spirit, the alliance cannot adapt or change, and its integrity will be compromised;
- but once management understands how to apply the principle, so there exists a high degree of integrity within each participant organization and among the parties, their alliance will proceed steadily on course – nimble, profitable, and alive to discovery.

This art of navigation – for indeed it is an art as well as a skill – is also the primary asset of the strategic alliance mediator to whom we now turn.[29]

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[27] Lynn Sharp Paine, 'Managing for Organizational Integrity' (1994) *Harvard Business Review*, March-April; also 'Ethics as Character Development: Reflections on the Objective of Ethics Education' in R. Edward Freeman (ed.), *Business Ethics – The State of the Art* (1991); Lynn Sharp Paine, 'Integrity' in *The Blackwell Encyclopedic Dictionary of Business Ethics* (1997).

[28] This is an empirical observation based on the author's many years of practice in the martial and healing arts and training in Zen mediation. Certainly, many martial artists, possessing formidable powers, have not necessarily acted kindly or ethically. The science of yoga cautions against the development of *siddhis* (powers) for the very reason that the practitioner can become self-inflated and lose the way. However, these are examples of a compromised integrity. Dynamic integrity by definition implies balance, flow, connection, wholeness, humility (i.e., connection to the earth), and adaptive vitality – life force. In this state the author himself has found it very hard to be grasping, envious, fearful, or aggressive, which are all sources of unethical action.

[29] In the system of artful negotiation 'negotiation' is used in its navigational sense, i.e., to negotiate a river or a mountain. The definition alone can at times prove decisive to the side that continues to negotiate, while the other falls asleep, assuming that the negotiation has ended. The player who embodies integrity has a great advantage, because of the element of adaptive vitality. Each negotiation also brings its own unique opportunity to practice and to refine integrity. From this perspective alliance mediation presents a fascinating challenge to the artful negotiator, who must negotiate with all parties simultaneously on behalf of their alliance. This idea is developed in the next section.

E. Strategic Alliance Mediation

The purpose of strategic alliance mediation is to restore and to build the integrity of an alliance. The creation of value is the by-product of a vibrant integrity. As will be explained in a moment, the distinguishing feature of alliance mediation is its protection of the alliance interest. As in standard mediation, the alliance mediator is neutral and unbiased with respect to the parties, but at the same time helps to integrate and is an advocate for the success of their alliance.[30] Alliance mediation is frequently practiced in teams and involves two tiers of mediators, the primary team staffed from inside the alliance, which is then supported by outside neutrals.[31] In other respects alliance mediation applies the best mediator's practices to the field of alliances.

I. The Benefits of Strategic Alliance Mediation

The first and foremost benefit of strategic alliance mediation is that it offers a fast-time solution to conflicts in a world where time itself is rapidly becoming the key competitive asset.[32] In their recent book, *International Mediation – The Art of Business Diplomacy*,[33] Eileen Carroll and Karl Mackie make a strong case for the overwhelming efficiencies of commercial mediation, even in the most complex situations. In Chart #1 (below, p. 707) they cite one case where mediation saved three years and 800 hours of effort, USD 744,000 in direct costs, and USD 2.18 million in legal costs and party expenses. The appendix to their book contains twenty-five other case summaries with comparable results.[34]

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[30] The alliance mediator must be careful not to get too far ahead of the parties in the role of the advocate, because otherwise they will reject his/her overtures. As in any negotiation, the ideal course is for the parties, perhaps with the assistance of the mediator, to discover by themselves the path, in this case of building a healthy alliance. In some instances it may not be feasible for one person simultaneously to play the distinctly separate roles of mediator and advocate. In such cases mediation is best conducted in teams, with one person serving as the neutral, and the other as the advocate. Some professional mediators such as Steven Rosenberg of Mill Valley, California maintain that combining the two roles will only weaken the effect of both, and that the advocate's role is better characterized as 'alliance integrator'.

[31] See Julian Gresser, 'Turning Conflict into Opportunity Through Alliance Mediation' (1999) *CEDR Resolutions*; the article can also be downloaded directly from <www.logosnet.com>.

[32] See George Stalk, Jr and Thomas Hout, *Competing Against Time* (1990). The ability to resolve issues quickly and efficiently may prove a significant source of competitive advantage, particularly in the formation stage of alliances, where fast time to market is often the critical ingredient in a successful launch.

[33] Eileen Carroll and Karl Mackie, *International Mediation – The Art of Business Diplomacy* (Kluwer, 1999).

[34] In a private conversation with the author in London in June 2000, Professor Karl Mackie told the author he had just settled in a day a bitter commercial dispute which had raged for the last 15 years.

What are some of the distinguishing features of alliance mediation in contrast to other forms of mediation? In strategic alliances the relationship is often crucial. In commercial mediation, especially when litigation is involved, a dispute may be finally settled, but the parties usually no longer want to do business together. Given the stakes, no responsible CEO should allow an alliance to spin out of control when a viable remedy exists. When effectively implemented, alliance mediation will leave an alliance even stronger, as a result of its difficulties.[35]

Alliance mediation offers an effective structure and process to catch problems early on, when they are often tractable and when positions are least entrenched. Interviews and questionnaires sent to CEOs and alliance professionals confirm these observations. When asked by the Association for Corporate Growth (ACG): 'Is there a person designated in your company's strategic alliance agreement, whom your company (or its alliance partner) can turn to when things get difficult, who understands the situation and has an undivided interest and loyalty to the alliance, and possesses the skills to make things better?' 50 per cent answered 'no,' but 81 per cent responded, 'There should be'. Similarly, 79 per cent of those contacted at ACG thought it was important for their company to have an effective mediation

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[35] It may be useful to list more precisely the salient differences between strategic alliance mediation and conventional mediation.

First, the practice involves a blend of mediation and alliance skills. The strategic alliance mediator must be thoroughly familiar with the theory, techniques and best practices of strategic alliances. The business relationship in strategic alliances is crucial. Whereas many commercial alliances result in a settlement, in most cases, especially in Europe, the business relationship is fatally impaired. A primary task of the strategic alliance mediator is to find inside conflict ways of making the relationship between the parties more resilient and vital. As stated, an essential ingredient in accomplishing this goal is the effective advocacy of the alliance interest.

Second, the strategic alliance mediator must draw on the full range of mediatory approaches without favoring any one. The approach is eclectic. In the current parlance, the strategic alliance mediator will at times deploy a 'facilitative' approach, at others an 'evaluative' one, and still on other occasions, a 'transformative' approach will be indicated. All techniques and approaches are valid, so long as they contribute to the integrity of the alliance.

Third, a strategic alliance mediator is trained to place heavy emphasis on the anticipation of conflict. A mediator learns to catch the tendency toward discord early on, when the possibilities for creative transformation are greatest.

Fourth, strategic alliance mediation is best-practiced in teams, based upon the close collaboration between the alliance champions, other alliance professionals, and their in-house and external counsel.

Fifth, given the growing number of transborder alliances, strategic alliance mediation will inevitably evolve into an international specialty, requiring knowledge of other cultures, languages, and business customs. At present, traditional mediation is a national practice, although Karl Mackie and Eileen Carroll's recent book, *International Mediation*, suggests an international trend.

capability. In fact, when the data was reanalyzed, it was discovered the more successful the company, the more open it was to mediation.[36]

ASAP asked its members: 'What value would you place on being able to anticipate these sources of discord or conflict *in advance*, before they seriously impair the effectiveness of your alliances?' Here are a few responses:

- 'Again, hard to quantify, but it would probably have saved a minimum of USD 500,000 of folks' time, not to mention the impact on morale'.
- 'Very high value. This is why we agonize over putting the right leaders in charge of this'.
- 'Competition in the parcel shipping and delivery business is growing rapidly. If there is a way to identify and to resolve problems before they result in a loss of business, it would be extremely valuable to both parties'.
- 'Since misunderstanding can lead to the failure of the venture, the value of prevention/solution would be proportional to the value of the venture as a whole to the parent. However, I can't put a percentage on it'.[37]

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[36] Based upon a private report from Peter Pekar. Respondent's from the ACG questionnaire reported that 28 per cent of the company's alliance agreements already contain mediation provisions. The evidence of this substantial practice, linked to the finding that the more successful a company is in its alliances, the more open it is to alliance mediation, suggests a powerful way of positioning and marketing the field.

[37] Many ASAP members have noted how valuable it might be to have a method or system for pinpointing conflicts in advance. In fact, there are several approaches, which when intelligently combined, will give the alliance professional a fairly specific idea of serious future conflicts, and even the timing and other details of these disputes. The first source of insight is alliance/best practices themselves. For example, as soon as Astra-Merck's top management reassigned the champions, troubles in this alliance, which had already achieved breakthrough results, began to brew. An experienced alliance professional would have spotted the problem immediately and negotiated strenuously, either to have the decision reversed, or at least to replace the former champions with new ones, who were properly trained and familiar with the alliance.

A second source is the structure of alliances. In his presentation at the ASAP Summit in May 2000, in San Francisco, Professor Ranjay Gulati reported that certain classes of alliances invite special classes of conflict. For example in pooling arrangements, when two or more organizations combine similar resources, the conflicts will centre on grievances over who has a dominant say. In trading arrangements where two or more organizations combine dissimilar (but mutually valued) resources, conflicts tend to occur over who gets how much; and in lending arrangements serious problems often arise over intellectual property rights and the relative value of the intellectual property that is exchanged. In global networks, especially e-commerce networks involving competitors, significant differences will usually arise over issues of governance.

Integrity analysis offers a third approach for pinpointing conflict. For example, when a party to an alliance not only overspends its financial budget, but also wastes time, energy or creativity, there is a great danger that the player will become impulsive, make unwarranted assumptions, have exaggerated expectations, fail to pay attention, and, in other ways, reveal 'need' or a compromised integrity. Such situations are ripe for conflict. By assessing the strengths and weaknesses of the key actors' integrity through 'Player Integrity Profiles'

Because a strong working relationship is usually important to allies, at the top of the list of benefits of alliance mediation is the subtle issue of protecting the alliance interest. Studies of the most successful alliances consistently confirm the importance of the 'triple win,' – each party must win, but so also must their alliance. The alliance interest must have equal dignity. But who will champion this interest? Often it is forgotten in the shuffle, a result that, as mentioned, many lawyers themselves foster, when they define their responsibility too narrowly as a rigid and undivided loyalty to their client. Fostering the alliance interest, while listening attentively, are two of the alliance mediator's highest priorities.

The greatest benefits of strategic alliance mediation may flow not so much in *avoiding potential losses,* as in *discovering and creating value* out of these differences. A powerful tool for measuring the creation of value is the concept of *Strategic Return on Investment* (STROI).[38] Although many of the most successful alliances already incorporate STROI as an important element in their basic architecture, whether the parties are familiar with the concept or not, STROI is an essential tool in the alliance mediator's arsenal. As illustrated in the cases in the next section, the discipline of measurement captures the imagination, helps the parties focus, and makes abstract issues concrete and immediate.

The first element of STROI is *market strength.* The alliance mediator will assist the parties in discovering how their differences might actually help their alliance penetrate new market niches, expand market share, broaden product lines, enhance brand recognition, accelerate responsiveness to customer needs, or shorten closing rates and sales cycles. These are fresh 'out-of-the box' questions that usually do not occur to parties, who are locked in conflict or disabled by serious differences.

A second element in STROI is *innovative capacity.* We know that differences are a primary driver of innovation. The question is how to build a container (integrity) that can hold these differences and allow them to transmute to higher value. The challenge for the mediator is to re-focus the allies' attention on ways in which their

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cont.

(PIPS), the analyst can actually pinpoint how these players will interact with each other; for example, which one will compromise or fortify another's integrity, and in what specific ways and situations. Again, conflict is a sign of a compromised integrity. For further discussion of PIPS, see Julian Gresser, *Piloting Through Chaos* (1996).

A final, advanced technique derives from 'discovery engineering'. In working with the senior management of a foundation, the author facilitated a process in which the group was able to anticipate conflict in the members' own creative 'hypnagogic reverie'. Hypnagogic reverie is a natural dreamlike state occurring just before or after emerging from sleep. The participants reported images of shipwrecks, tea brewing, quicksand and a wolf's head emerging from a swamp. These images foretold a sudden coup that took place several weeks later in which the top echelon of the foundation was peremptorily replaced by its founder. For further discussion see Julian Gresser, 'Discovery Engineering and Negotiating Organizational Change' in Robert Lawrence Kuhn (ed.), *Generating Creativity and Innovation in Large Bureaucracies* (1993).

[38] Robert Porter Lynch, *supra* note11, at p. 81.

different talents can build new products, better manufacturing processes, new financial tools or other systems to add new value.

Organizational capacity is the third element. Sharp cultural or operational differences can ruin an alliance, but they need not when harnessed effectively. The mediator must help the allies discover how, by combining their talents, they can build morale, enhance loyalty and commitment, develop new knowledge, or identify new career opportunities

Competitive advantage is the fourth element in STROI. Most commercial alliances have this ultimate objective. The alliance mediator will look for the openings to insert discovery questions, such as: 'What can you do to become 'best-in-class,' or create new barriers to entry, or establish your company as the highest quality/ lowest cost producer?'; or with a constellation alliance, 'What is required for you to break out and hold an entirely new competitive position in your industry?'

The fifth element in STROI is *financial gain*. Financial gain is a 'lagging indicator,' because when an alliance is yielding measurable gains in market growth, innovation, organizational capacity, or competitive advantage, its strategic objectives will likely be achieved, and good financial returns usually follow. Since financial gain is a familiar metric, it can be a powerful lever. The skillful alliance mediator can turn the discourse into a discovery process by asking the parties questions like: 'How can you achieve faster cash flows or lower production costs; or increase net margins, or improve your return on sales, equity, or assets?' 'How might you use your differences to achieve these ends?' The mediator's essential task is to help the parties identify by themselves the financial metric, which is most valuable and meaningful to them. The world of the participants is always what matters most.

Alliance mediation is equally applicable to all alliances and at all stages in their development. It applies powerfully to what Professor Habir Singh refers to as the earliest 'pre-positional' stage of an alliance under conditions of high uncertainty, when the parties are really investing in the widest range of alternative futures[39] or are looking for technological 'windows of opportunity'. Alliance mediation can be equally helpful as a trouble shooter for mature or successful alliances, or for those alliances that need to be regenerated, or those that have outlived their original rationale and now should be put to rest with dignity. Termination need not be a source of conflict or disadvantage. How we end an alliance can affect not only a firm's future relations with its partner (multiple alliances with the same partner are common in many industries), but also its prospects with future partners. A snowball effect is frequently reported. Companies that succeed in one alliance tend to attract better partners to a second, then a third, and so on down the learning curve.

Alliance mediation applies to all industries and covers every conceivable kind of alliance, including marketing, sales, supplier, R & D, outsourcing alliances, or strategic customer alliances. Mediation can also be useful to alliances where the

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[39] See Martha Amram and Nalin Kulatilaka, *Real Options* (1998) for a discussion of options theory in evaluating technology and investments.

parents themselves are experiencing serious internal difficulties. If these conflicts are not expertly handled, the tensions can easily spill over into the alliance.[40]

II. Precedents

In developing this new field, strategic alliance mediators can draw upon a rich and diverse body of experience, precedent and practice from outside the alliance field, which can easily be adapted to the special needs of the strategic alliances.[41] Here are some major sources.

III. Partnership Mediation

Mediation is proving highly effective in resolving conflicts among business partners. The following case is typical.[42]

A three-doctor group is in trouble. The partners have not been getting along for some time and now the best known member announces she wants time off to write a book. However, she insists that her pay scale remain the same, because, as she quickly points out, she is the rainmaker for the partnership and the only one who enjoys a national reputation. Her new book will enhance the firm's reputation.

Her two partners do not oppose her cutting back in time, but they adamantly refuse to pay her when she is not working on firm business. During this time the partners are negotiating with a young doctor to join the practice. This young physician learns of the brewing troubles, and informs the senior members that she will be pleased to consider entering the partnership after it resolves its differences. The partnership agreement is of no help or guidance. The partners struggle for weeks, unable to break the impasse. Just as they are about to sue each other, one member suggests mediation and recommends hiring an experienced business mediation firm.

The mediation team, which includes a lawyer and a psychologist, first meets with all three members as a group, and then with each individually. The team quickly discovers that the surface conflict over pay reduction masks more serious grievances

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[40] This was an important finding from a survey of ASAP members. In fact, many ASAP executives viewed internal conflicts within the parent organizations as *the* most serious source of instability and conflict.

[41] Comparatively little attention has been given to date to the rich applications of strategic alliance analysis to public sector alliances or in the public interest and/or not-for-profit fields. The problems of international debt rescheduling seem an excellent area where strategic alliances could play an important role. The design and implementation of breakthrough environmental alliances, such as those negotiated by the Nature Conservancy or within the global eco-village network, is another area where the lessons of business alliances can be very useful. In each of these cases, strategic alliance mediation can make a valuable contribution. See *infra* note 56.

[42] The author is indebted to the excellent explanatory materials produced by Business Mediation Associates (1301 20th St. Washington, DC; Tel: 1–202–363–4087). The case is an adaptation of a real mediation.

and problems. The hot-shot physician is actually considering offers from a competing practice. One partner dislikes the way the other treats the staff, while the third objects to the managing partner's domineering style. There are also irregularities in the accounts.

The mediators succeed in clarifying the critical issues and getting the partners on speaking terms again. They begin to talk about fundamental issues that they have long ignored, to weigh the trade-offs, and, most importantly, to renew their original vision for their partnership. After a few weeks they are able to negotiate some new agreements that delineate the powers and responsibilities of managing and non-managing partners, compensation, and proper handling treatment of personnel. The young physician ultimately joins the firm with a much greater level of comfort in her new employer.

IV. Partnership Charters

One of the important innovations in the business mediation field, with direct applications for strategic alliances, is the use of 'partnership charters'. How might a charter have saved the partners in the above example much time, money, and grief?

A partnership charter is a non-binding written memorandum, which expresses the best intentions of the parties, the protocols and processes under which they will conduct their relationship. Often the charter addresses concerns that are extremely difficult to 'legislate' through a private contract. The discussion and preparation of the partnership charter is usually facilitated by a neutral third party – a mediator. According to partnership mediators, the partners' lawyer, and even the partnership's lawyer, accountant, or other advisors are generally not suitable, because rarely do the owners view them as truly neutral. In most cases an advisor is more closely allied with one of partners. Moreover, most lawyers view themselves as powerful advocates for their client's interests and are uncomfortable working simultaneously for the group.[43]

Had a partnership charter been in place in the above case, what issues might a partnership charter have addressed? The first function of the charter is to help clarify the partners' expectations.[44] Unmet expectations are the most frequent cause of troubled partnerships.[45] In the above example, the well-known partner probably assumed that her colleagues would applaud her efforts and would not object to her continuing to draw her share. Her partners assumed otherwise. Equal pay for equal

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[43] David Gage, Dawn Martin, John Gromola, 'What Partners Often Leave Unsaid' (1999) *The Forum,* August and September. Of course, many lawyers do represent partnerships, not their individual partners, and some of these lawyers may serve as excellent neutral and unbiased mediators.

[44] Ibid. In the artful negotiation system players are trained to drop all assumptions and expectations.

[45] Expectations cloud the mind and limit our ability to discover new opportunities, which compromises integrity. One result of an impaired integrity is conflict.

work. The untested assumptions of both sides were prescriptions for disappointment and the ensuing conflict. If they had had an opportunity to air their divergent views early on, the partners would have saved themselves much time, and have avoided the later sense of betrayal.

Business partnerships and alliances first run aground on poor communication. A charter will specify the principles of effective communication. The principles can cover a broad range of issues beginning with the fundamental idea – too often breached – of simply doing what you say you will do, or on the other hand, of at least giving some notice or explanation of why you cannot. Other details might be preferred modes of communication, instructions to staff, and procedures for emergencies. A partnership charter is not a panacea. The partners in the preceding case might still have come to blows. But the chartering process would likely have anticipated the issues and provided a reasonable path to resolve them.

A third topic covered by the partnership charter is 'interpersonal equity'. According to mediator and psychologist, Dr. David Gage, business partners continually monitor what they are putting into a partnership and what they are getting out of it. It is not only a matter of money, which is usually addressed in the formal partnership agreement. It concerns what expertise each party brings, the ability of each to enjoy and to control his or her own work life, how hard they are expected to work, what new ideas and professional opportunities they bring to the partnership. Often these emotional perceptions are hard to quantify and to formalize in a legal instrument, but nonetheless, they can become major contributing sources to partnership conflict. In the above example, the managing partner and his colleagues may have been legally correct, but their more distinguished colleague may have felt that she still was not being treated fairly.

Surprise scenarios are a fourth fundamental of partnership charters. We cannot anticipate and plan for every untoward contingency in business, as we cannot in our personal lives. Why would we even want to? It would spoil the juice and pungency of life. Nonetheless, in business life, particularly in collective enterprises such as a partnership, it is probably prudent for the partners to address at the outset how together they might handle crises or other especially taxing situations. Dr. Gage reports that scenario planning has proved particularly useful to partners who are coming together for the first time and have very little knowledge of one another. Scenario planning allows each partner to take the measure of the other by observing how that partner functions in difficult situations. Even partners who have worked together for many years, Dr. Gage notes, gain new insights into each other's character and judgment.[46]

Suppose a partner refuses to participate in the chartering process? Dr. Gage points out that:

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[46] By gauging the integrity of a person, it is possible to predict accurately how he or she will behave. Because integrity is so fundamental, it is very hard to conceal. For a discussion of the uses of Player Integrity Profiles (PIPs) in negotiation, see Julian Gresser, *supra* note 37. PIPs offers a useful tool for the alliance mediator in taking the measure of a situation.

> "When the need for change is greatest, the resistance to planning is often greatest". A fundamental tenet of all negotiations – a partnership is an ongoing example – is that each person has an inalienable right to say "no". It is unwise to impose a process when it is unwelcome. Yet, the resisting partner must also take responsibility for results of not establishing a reasonable process. Often a partner's attitude about chartering will provide valuable clues into how he or she will deal with other human relationships, uncertainty, and change.[47]

What are some of the proven benefits of chartering and partnership mediation? The price of partnership conflict is extremely high. According to Dr. Gage, managers spend 25 per cent to 40 per cent of their time handling employee conflicts. Conflicts can erode a partnership's effectiveness, and the imminent departure of a key dissatisfied partner, as in the above case, can seriously impair the business. Litigation fees in excess of USD 80,000 are typcial in such cases.[48] Mediation offers a speedy and efficient means of resolving partnership disputes. In the above example mediation saved the partnership. Certainly, litigation would have destroyed it. (How many partners really want to continue to work closely with someone they have sued or who has sued them?) When combined with a partnership charter, mediation becomes doubly powerful. It restores each partner's sense of getting a 'fair share;' it builds and rebuilds trust; it includes rather than excludes; and by helping to create an environment of tolerance and goodwill, mediation has enhanced significantly the performance of many business partnerships.

V. Facilitated Partnering in the Construction Industry

According to business mediator, James H. Keil, facilitated partnering originated in the construction industry during the 1980s as a way of reducing the costs of complex and lengthy litigation and arbitration.[49] Facilitated partnering is a hybrid process, which combines aspects of facilitation, negotiation, and mediation. Its principal benefits are: that it helps to build a coherent and long term vision involving all the key stakeholders; it improves communication; and it reduces the risks of costly errors. Because complex construction projects – where the main contractor will manage large numbers of independent contractors – resemble a portfolio alliance, they provide a close point of reference for strategic alliances. Facilitated partnering also affords excellent insights into how a neutral and knowledgeable person (a mediator) can help to anticipate problems, while maintaining the team's focus on the project's mission.

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[47] Ibid.
[48] See *supra* note 29.
[49] James H. Keil, 'The Continuing Evolution of ADR: A Look at Hybrid Processes' (undated).

VI. Case #1 – A Complex Redevelopment Project

In 1997 a suburban community with a long history of problems involving a Superfund site advanced a proposal to redevelop the area under the federal Environmental Protection Agency's Brownfield programme. The plan envisioned the participation of a number of regulatory agencies, contractors, neighborhood groups, trust funds, and private developers. The community's proposal contemplated a highway interchange, a port authority facility, a shopping centre, and various forms of remediation. All of this work was expected to proceed concurrently.[50]

The mediator's goal was to help the parties forge a private/public alliance on the lines of the co-operative model noted earlier. According to the mediator, James Keil, the primary benefit of the process was the clear and early identification of the risks. By examining in sequence the separate contract links, Keil writes, 'It became apparent to all that if the interchange were delayed, the multi-modal transportation facility would run into difficulties and delays, which would bring into question the private developer's ability to pay back its sizable investment, and, indeed, its willingness to continue the project'.[51] The launch succeeded, at least in part, because a neutral party (Keil) was available to the keep the parties focused on common goals, concerns, and required tradeoffs.

VII. Case #2 – Technology Conversion

Around 1959 Con Edison purchased New York City's generating plants, believing it to be more efficient for a utility company to run power plants and sell power to New York than for the city to operate its own power source. The service at the time was at 25Hz, but over the years Con Ed has sought to replace and to amplify its power. In 1998 the city, in consultation with Con Edison, entered into contracts with Cegelec Automation of Paris, an equipment supplier, and L.K. Comstack for the installation of the new system. The stakes were high for Con Edison, because the existing signaling system did not allow easy conversion, and its contract with the city included a clause for USD 1,000,000 in liquidated damages. Recognizing their common interest in the success of the venture, all three parties agreed to support a partnering process with the city to clarify the goals and to co-ordinate their implementation of the project.

According to Keil, 'One of the most significant gains made in the partnering workshop was the pledge of Con Edison to do its street work in parallel with Comstock's work, rather than sequentially, which is the usual method. This pledge came as a direct result of the facilitated interdisciplinary communication among the parties that led all to pursue the best engineered solution, rather than simply evaluating the positions based solely on contract provisions ... Cultural differences between the French company producing the conversion packages and the American companies

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[50] Ibid.
[51] Ibid.

involved in the installation were addressed more thoroughly and pledges were made among the participants to provide extra assurances that vital information would be passed in a timely and reasonable fashion in order to assure overall project success'.[52]

VIII. Dispute Review Boards

Dispute Review Boards (DRB) first appeared in the construction industry during the Second Core of the Eisenhower Tunnel Project in Colorado in 1975.[53] During the 25 years since its introduction, the approach has been tested in over 100 construction projects, totaling an estimated USD 6.5 billion.

The DRB is a three-member panel of neutral experts, who are jointly selected by the owner and the contractor at the beginning of a construction project to review disputes and serious differences. The new DRB members then together appoint a third, who customarily chairs the meetings. The DRB panelists stay current with the events by visiting the site periodically, asking questions, and reviewing progress reports. When a matter develops, which the parties cannot resolve on their own by negotiation, either may submit the dispute to the DRB. The DRB then conducts an informal hearing and issues a written recommendation, which is admissible in a subsequent arbitration or litigation. As in standard mediation, the costs are shared equally by the parties.

The first virtue of the DRB process is its contemporaneous review of the facts. Since the members are familiar with the situation, they can make informed evaluations quickly, which has stopped many conflicts from evolving into larger problems.

Secondly, the DRB has been demonstrated to improve communication and to stabilize the relationship. Since the panel members are well regarded, and the parties trust the process, many problems are anticipated and preempted before they are formally presented at the next board meeting.

Thirdly, the costs of implementing a DRB are minor when compared to unbridled conflict, litigation or arbitration. Moreover, once an owner signals an intention to establish a DRB in the instructions to bidders, the contractors typically reduce their bids in anticipation of these cost savings.

IX. Joint Ventures

Not all joint ventures are strategic alliances. In fact, a joint venture is generally a poor choice for a strategic alliance. Joint ventures often are cumbersome to govern, difficult to steer in new directions, hard to exit, and disadvantageous from a tax perspective. Mediation has rescued any number of strategic alliance joint ventures, even complex international ones.

Carroll and Mackie cite the following case:

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[52] Ibid.

[53] Frank E.A. Sander and Christopher M. Thorne, 'Dispute Resolution in the Construction Industry: The Role of Dispute Review Boards' 19 *Construction Law Reports*, 19 (2nd).

A group of international oil companies entered into a joint venture agreement some twenty years ago, which governed the management and cost/return allocation from an oil pipeline asset. Relations on the management committee overseeing the joint venture had become strained. Some of the companies claimed that others were exploiting literal aspects of the agreement, which were not intended, they claimed, to have had such an effect. Also the commercial context of the industry and some of the participants had changed dramatically, so that some of the participants were gaining more from the agreement than was originally envisaged. The only mechanism for revision of the agreement contained in the agreement required the involvement of the chief executives of all the companies. One of the 'losing' companies was threatening to withhold its share of the cost allocation. The other members of the management committee were faced with the prospect of bringing in Chief Executives or opting for litigation. A suggestion for mediation by one of the managers' in-house lawyers led to four days of assisted negotiation over a three- month period. At the end of the mediation the parties had achieved a new formula for pricing and cost-allocation. Discussions had also led to the foundation for the group to update the entire legal agreement on the joint venture.[54]

X. Coalition Building for Environmental Remediation[55]

In the late 1970s the town of Falmouth, Massachusetts discovered that a municipal well had begun foaming like dishwater. The source was quickly traced to the Massachusetts Military Reservation (MMR), which for the past fifty years had dumped aviation and motor fuel, solvents, spent acids, laboratory chemicals and assorted other toxic wastes into the sandy soil of Cape Cod, and these wastes had penetrated the aquifer – the area's sole source of drinking water. In response to a vigorous and immediate public outcry, the Department of Defense initiated an Installation Restoration Programme (IRP), which prepared a plan for the containment of seven plumes of groundwater contamination at the MMR. Although only 60 per cent complete, the proposed design met with extraordinary opposition not only from the public and the regulatory agencies, but even within the military. A significant part of the public failed to comprehend the plan, as it required pumping 27 million gallons of ground water per day, which was more than the entire Cape pumped for its daily water needs. Ecologists warned that the reclamation would destroy wetlands, endanger animals and plants, and ruin recreational uses. 'The cure was worse than the disease,' wrote the Cape Cod Times.[56]

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[54] Eileen Carroll and Karl Mackie, *supra* note 31.

[55] Lawrence Susskind, Sarah McKearnan, Jennifer Thomas-Larmer, *The Consensus Building Handbook* (1999).

[56] Ibid. See contribution by Edward Scher, 'Negotiating Superfund Cleanup at the Massachusetts Military Reservation' pp. 859–878.

The impasse was eventually broken by the formation of TRET (Technical Review and Evaluation Team), essentially an ad hoc alliance, organized by the Defense Department, the Environmental Protection Agency, and the Massachusetts Department of Environmental Protection (DEP), which also included some 20 other military, regulatory, and research agencies, and a host of consultants and citizens groups. TRET was organized in two tiers. The first resembled a think tank, which met daily, encouraging hydrologists, ecologists, environmental and public health scientists and others to challenge and reshape each other's thinking, and look for remedies. The second tier was an outreach programme of public meetings and informal caucuses for a concerned public. One observer notes: 'They not only presented their work and responded to comments but also engaged with participants in genuine deliberations. TRET members asked for help in finding and understanding the data; they acknowledged uncertainty and the diversity of opinions that existed. ...The explicit effort to engage the community challenged the conventional view of knowledge as 'linear' and as the exclusive domain of formally trained experts'.[57]

The TRET coalition was assisted by a team of four 'facilitators' from the Consensus Building Institute (CBI) in Cambridge, Massachusetts. The CBI members guided some TRET meetings, served as a liaison between TRET, high level officials, and the public, and mediated a continuous stream of issues for the key agencies, local agencies and activists. The result of the TRET initiative was a 'dynamic compromise'. The military and its contractors prepared a Strategic Plan for the clean up of the ground water plumes, specifying containment for two of the plumes and practical actions for the others. The final plan recognized the complexity of the problem, and devised an incremental solution, which permitted the TRET teams to apply the experience and lessons with one plume quickly to the next. In place of the costly IRP plan, the public and TRET with CBI's help negotiated a stable, practical, and economical approach, which was acceptable to all significant stakeholders.

CBI's part in this drama is edifying. Although this was a public dispute not a private commercial one, the TRET coalition resembles a complex, multi-party business alliance. The alliance's mission was effective remediation. CBI's most crucial contribution was to 'hold' the integrity of the process, which allowed the discoveries and transformations to take place. There were serious tensions. Some TRET members felt divided loyalties between their mandate to act independently of their organizations and express their professional opinions openly and honestly, and their responsibilities as advocates for the policies of their organizations. CBI helped to keep their attention focused on TRET's mission. TRET's membership, especially at the staff level, changed by the week, making it difficult to build consensus. In a commercial alliance the departure of the champions can prove fatal. CBI served as the project's collective memory, providing continuity, which helped to stabilize the process and hold the line against impulsive or panicky decisions. One observer concludes:

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[57] Ibid.

Ongoing, dynamic processes may be more flexible, and ultimately more acceptable, than one-shot law suits or agency proceedings. Multidisciplinary solution seeking that cuts across "two-sided" adversarial processes may create more synergistic coalitions across institutions and "sides" that enable more creative solutions to be suggested without attribution or "ownership" by a particular side in a dispute.[58]

XI. Alliance Mediation and National Industry Policy

At times government agencies themselves have stepped in as alliance mediators to advance an important national policy.[59] In 1969, it was obvious to the Japanese Ministry of International Trade and Industry (MITI) that the six major computer and semiconductor manufacturers were operating inefficiently. MITI decided to realign the industry with two objectives:

(1) to reduce the risk of foreign takeovers once liberalization began; and
(2) to encourage the industry to expand production and specialization, thereby increasing exports and diversifying markets.

MITI's restructuring policy met at first with strong opposition. Proud and fiercely competitive, each company fought to preserve its autonomy. Moreover, the companies were reluctant or unwilling to dismiss lifetime employees; they did not want to restructure their relations with the commercial banks; and there were legal constraints under their licensing arrangements with American manufacturers. In the end MITI prevailed.

In 1971 the six major manufacturers agreed to form three alliances to produce the 3.75 computer series: Fujitsu-Hitachi, NEC-Toshiba, and Mitsubishi Electric-Oki. During 1972–1973 each group received subsidies totaling 7.47 billion yen for research and development, and an additional 4.63 billion yen was paid to peripheral equipment manufacturers, which included the six major computer companies. The industrial groupings were strategic and tactical. The Hitachi-Fujitsu alliance paired the two technically and financially strong companies. The NEC-Toshiba alignment was a response to the merger in the US of the computer division of General Electric, the Toshiba licensee, and NEC's licensee, Honeywell. The Mitsubishi-Oki Electronics alliance linked the financially strongest company, Mitsubishi, to the firm with the strongest ties with the US through its joint venture, Oki-Univac.

During the next few years MITI was largely able to accomplish its objectives, including a shakeout of the weakest partner, Oki, which withdrew in 1975 to concentrate on peripherals. The key to MITI's success was the agency's unswerving advocacy of the national interest, which it continued to identify with the 'alliance

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[58] Ibid.
[59] Julian Gresser, *Partners in Prosperity – Strategic Industries for the United States and Japan* (1984).

interest'. In fact, the participating companies never relinquished their corporate identities. Rivalries and suspicion continued throughout the period. But MITI officials' energy, drive, and commitment kept the fragile vessel intact. In those days MITI commanded much respect and trust in Japanese society, and the agency's fair-handed and unbiased daily management of serious differences and disputes carried the alliance through its difficult early period.

XII. Making The Peace

In studying the precedents for strategic alliance mediation, we can also learn from the experience of mediators working in political crises. No account may be more poignant than Senator George Mitchell's recent book, *Making the Peace*.[60] The following are his words with my commentary.

Senator Mitchell: 'It was an extremely difficult year. I was usually tired, often discouraged, always anxious. But I never felt that my situation was hopeless. I never lost faith in myself or my principles'.
Comment: In turmoil, Senator Mitchell kept the faith. How he maintained his integrity is an important lesson for those mediating arduous and disheartening alliance disputes.
Senator Mitchell: 'I have always found it useful to subject my actions to analysis by those who disagree with me'.
Comment: Humility is a key virtue of the effective alliance mediator. When the ego-rattle is quieted, you can attend and listen, and then you will find the openings.
Senator Mitchell: 'At the heart of all the problems in Northern Ireland is mistrust. Centuries of conflict have generated hatreds that make it virtually impossible for the two communities to trust each other. Each assumes the worst about the other. If there is ever to be a durable peace and genuine reconciliation, what is really needed is the de-commissioning of mind sets in Northern Ireland'.

'Each side was deeply suspicious of the other, with a presumption of bad faith'.

'Each is a minority: Catholics in Northern Ireland, Protestants on the island of Ireland. Each sees itself as a victim community, constantly under siege, the recipient of a long litany of violent blows from the other'.
Comment: The alliance mediator takes each situation as it presents itself. The principal task is not to become caught in the swirl of the protagonists' emotions, convictions, or beliefs. A deeply rooted mistrust, reinvigorated by years of cruelty and suffering, cannot be changed overnight, or by some artful technique. Senator Mitchell discovered that his most direct access to the minds and hearts of the combatants was through his own patient, at times vulnerable,

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[60] George J. Mitchell, *Making the Peace* (1999).

integrity. The Senator's integrity, along with sound mediation practice, built a container that held the transformations of ancient hatreds.

Senator Mitchell: 'Among the lessons I learned from this experience was the importance of having a plan and sticking to it, while retaining the flexibility to make adjustments as circumstances change; the necessity of total commitment, and the need for patience and perseverance to overcome the inevitable setbacks. These are not brilliant insights, but rather the kind of common sense that is often overwhelmed by panic at the first sign of adversity'.

Comment: Senator Mitchell is too modest. In fact, his simple account contains many of the secrets of great negotiators and the most effective mediators: an inspired mission and a clear plan; a sharp and continuing focus, tempered by flexibility; an ability to adjust, an openness to change; patience, perseverance, fortitude and rectitude; a willingness to take the 'hits' of life; and a humble acknowledgment that at times we are all overwhelmed by panic.

Senator Mitchell: 'What little progress was made came very slowly' ... 'Nine months had passed since the negotiations had begun, and almost no progress had been made'.

Comment: Mediations and negotiations are a bit like horticulture. They have their seasons and their rhythms, their times for sowing and planting, and their harvests. What you see on the surface often belies the deeper changes underneath. The mediator's *gravitas*[61] is an essential ingredient in the process.[62]

Senator Mitchell: 'The meeting was long and contentious ... . The delegates hurled insults and invective at each other. I had learned a valuable lesson about the fragility of the process and the sensitivity of the participants to external violence. The memory of this day was with me nearly two years later when, fearful of the effects of a new surge of violence, I decided to impose a final, rigid deadline for the talks'.

(Two years later) 'A deadline would not guarantee success, but the absence of a deadline would guarantee failure'.

'They accepted the deadline because they were as eager as I to get an agreement. It was that attitude, more than anything else, that gave me hope'.

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[61] *Gravitas* comes from the Latin word, gravid, meaning pregnant. A negotiator/mediator who embodies *gravitas* – a key indicator of a developed integrity – will influence the energetic field that encompasses all the participants. This change in the field will be experienced 'positively,' at some level of consciousness by all participants, and will create openings for the players to discover new possibilities for creative interaction.

[62] *Gravitas,* however, must be lightened and tempered by optimism.

Senator Mitchell: 'The government had for a long time made it clear that they considered optimism to be an important part of my job description'.

Comment: Before the entrance to the First Circle of Dante's Hell is the inscription: 'Ye who enter give up all hope'. When hope flies away, the life force dies, and the magic loses its potency. For this reason optimism and enthusiasm (From the Greek, en-theos i.e., the god within) are the bellows and fan that keep the keep the embers in many mediations alive.

Comment: In alliance mediation, as in all forms of negotiation, the imposition of hard and fast deadlines is a risky business. The major difficulty with deadlines is that, paradoxically, we lose control over the process, even as we attempt to control it through the deadline. In fact, we never know what will happen as the deadline approaches, what gates will open or close. But at other times – and here Senator Mitchell's integrity must have told him this was such a time – the action-forcing effect of a hard time limitation is essential, because it compels each party to face and to accept the sacrifices that must be made. This consciousness of the stakes and a willingness to pay the price of being wrong is the path of integrity.

Senator Mitchell: 'In a series of private meetings with key party leaders, Holkeri, de Chastelin, and I encouraged them to work their differences out, and we suggested compromise language. We told them we would be willing to decide, in a way we thought fair and most likely to produce agreement, those issues on which they couldn't agree .... They narrowed the differences to four provisions. We then prepared and circulated to the parties what we hoped would be an acceptable and final agreement'.

Comment: Preparing a draft agreement for the parties' review, comments, and critique has become a powerful technique in the mediator's arsenal. Senator Mitchell's willingness to make some critical decisions for the combatants, in such a highly charged environment, and to accept the risks of his failure, is again testament to his own high integrity. The case is also instructive, because it illustrates how the mediator's and arbitrator's role can at times be effectively combined.

Senator Mitchell: 'What's the right thing to do?' The words echoed in my mind. 'What's the right thing to do?'.

Comment: The alliance mediator's job is something like a helicopter pilot engaged in rescuing people in a fog. You use your instruments, you listen, you make your best calls, you feel your way, step-by-step, and when you don't know, you don't know. But sometimes, not knowing brings you closer, if you can tolerate the uncertainty. Not knowing can be most intimate.[63]

XIII. Assessment

The examples cited indicate that mediation can work powerfully and helpfully in a wide range of business situations, some of which are extremely complex and involve multiple parties. In all these cases mediation offered an immediate and inexpensive remedy to an acute problem.

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[63] When we can tolerate not knowing, actually when we can rest in uncertainty and ambiguity, we come closer to our true nature and the essential nature of things. This is a subtle concept, difficult to convey in words. An excellent attempt is Pema Chodron, *When Things Fall Apart* (1997).

The parties' legal instruments – partnership contracts, joint venture agreements – were generally of little help in resolving these problems. A well crafted legal instrument will provide structure, but it is too cumbersome, too unwieldy by itself to address the subtleties of human relationships – issues like interpersonal equity (as opposed to legal compensation), personal expectations, aspirations, or principles of effective collaboration. The blunderbuss of litigation is entirely inappropriate for strategic relationships, where there is a strong interest in continuing to work together.

A hybrid approach emerges from the precedents. The ideal process, facilitated by a skilled neutral third party, would combine incisive dispute settlement with ways to uncover serious differences at an early stage. As explained in the next section, we do not want to suppress these concerns, but to liberate and to redirect their energy in creative ways. Corporate partnering, chartering, and dispute review boards can complement a legal agreement, softening its rigidity, and adding flexibility. The parties can trust a charter, because it expresses in their own words their true feelings and concerns.

The examples suggest that rapid change and even turbulence can be turned to advantage once a vessel is in place to 'hold' the process. MITI officials were able to restructure the computer industry, not simply because of the agency's power, but also because of their powerful vision and their unswerving dedication, both as regulators and mediators, to the alliance (national) interest. CBI quickly succeeded in building consensus behind a practical solution to what might have become a public health disaster. Senator Mitchell introduced dignity and integrity into a political environment that appeared to lack both, and helped to build coalitions and alliances that, at least for a while, brought peace to Northern Ireland.

The importance of continuity must not be underestimated. After Senator Mitchell returned to his private life in the US, perhaps a necessity for him and his family, Northern Ireland once again is unstable, and as this article goes to press, the insurgency and violence is beginning again.

F. An Alliance Mediator at Work

The Texas International Oil Company (TIOC) is a conservative USD 10 billion firm, based in Houston, Texas.[64] Like many old line oil companies TIOC possesses extensive tracks of real estate, located both in the Southwest and elsewhere in the US. Some of these properties are used for exploration, refining, and distribution of oil and gas through station operators; others are leased or sold for commercial uses

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[64] This case is an adaptation from a real negotiation. The author has changed the names and significantly embellished the facts both for dramatic effect and to illustrate the key principles under discussion.

unrelated to the oil industry. To date, TIOC has placed these properties through a broker, Reliance Real Estate (RRE), located in Santa Monica, California. The business has been moderately profitable during the past three of the five years that the two companies have worked together. Perceiving an opportunity to generate healthier revenues and profits, senior management in both companies has expressed an interest in transforming the current arms length broker agreement into a high performance 'strategic alliance'. They have asked the author to help facilitate a partnering workshop.

The TIOC and RRE teams have made great progress during the last three days. TIOC is represented by its Division Chief, who is the 'champion' of the project, and his financial staff and key local operators. The head of the legal department, who is responsible for real estate transactions, is also an active and constructive participant. RRE's president and principal shareholder, its vice president for sales, and key staff, compose the RRE delegation.

In three days we have succeeded in establishing a basic 'architecture' for the new alliance. For example, the teams have articulated a powerful breakthrough value proposition (BVP) that the new alliance will capture 35 per cent of prime real estate sales in the Southwest territory within three years, will generate over USD1bn in revenues, with 10 per cent margins, and in various ways upgrade its services to its lessees and customers. The teams have also precisely identified the metrics in each of the STROI categories (noted earlier), and are now formulating their conclusions in a memorandum of understanding (MOU) and a 30-day action plan. They are ready to launch the alliance. Now, at this eleventh hour, a dispute occurs over a phrase or two in the MOU, and abruptly, as if from nowhere, the light and friendly atmosphere chills. All the old, hungry ghosts of sleeping grievances, fears, and suspicions are suddenly released.

My first task is to explain my role and to confirm their consent that I act as a mediator. This is a subtle but essential first step. Thus far I have their trust. I do not want to presume, or to go ahead of their feelings. The environment is volatile. They agree.

This is an asymmetrical, potentially uneasy relationship. Although there is some degree of 'fit' at the level of senior management, even here the dialogue is unbalanced. The smaller firm, RRE, is represented by its top executives; TIOC has dispatched one senior manager and his staff. The alliance touches the core of RRE's business; it is peripheral to TIOC's main business, which is oil. At the operational level, the respective teams are working reasonably well together, but the real problem for the two partners is the great disparity in their corporate cultures. TIOC is slow moving, bureaucratic, and risk adverse, used to having its way through sheer bulk, and skeptical of slick 'LA movers and shakers'. RRE is swift, innovative, imaginative, entrepreneurial, and impatient. In fact, RRE's people feel they have already been too patient with TIOC's lumbering procedures and processes.

I am very aware that as mediator I am entering a very delicate negotiation. The parties are negotiating with each other, but so am I negotiating with each of them,

vigorously on behalf of their alliance.[65] In fact, as an experienced negotiator and mediator, I have been aware for some time of the potential for turbulence, and have been keeping a watchful eye for ways to help the parties rediscover the original value of their enterprise.

There is no time for both sides to meet together, which is the common practice in most mediations. Each team has sequestered itself in a separate room, and there is talk of terminating the discussions and going home. I visit the TIOC team first, with the permission of RRE's president.

This is what the conversation is like:

'They are always doing this to us. Rush, rush, rush. Frankly, it's too slick. We don't know what we're getting into here. No one at top management is going to sign off with these people under these conditions'.

I ask if it is all right for me to discuss their concerns, *entirely in confidence*. Nothing you relay to me will be disclosed to RRE, I reassure them, without your explicit permission. They understand and agree.

'What is your real concern about what is going on?' I ask.

'We don't trust them'.

'But you have trusted them at least for the last five years and you've made some good money together'.

'Yeah, but we don't trust them now. It's all too quick'.

'It seems like you're very uncomfortable about being rushed. You don't trust it and you resent it'.[66]

'Right on'.

'OK – suppose there is a way to slow the process down to a pace you are really comfortable with, even so, what possible value do you see in this relationship?'[67]

'Actually, we are asking ourselves that same question'.

'Well it is possible that this relationship is not for TIOC,[68] but just suppose you could reach a breakthrough together – how might you measure its value?'[69]

'You mean the BVP?'

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[65] See *supra* note 30.

[66] This technique of reflecting back (mirroring) is often essential in building trust. If skillfully performed it will be perceived as nourishing, because the other party will sense he/she is being listened to and understood. If ineptly performed, the process can backfire and be perceived as insincere and manipulative.

[67] This is an illustration of the use of the 'brush' or open-ended (interrogatory) question. See *Piloting Through Chaos*, *supra* note 2.

[68] This technique is called the 'pendulum'. It is important that the other negotiator be given space and feel comfortable about saying 'no'. See *Piloting Through Chaos*, *supra* note 2.

[69] This technique combines the brush with the principle of 'pain'. Asking the other player to measure the value makes the pain (of not yet enjoying the benefit) more concrete and real. See *Piloting Through Chaos*, *supra* note 2.

'How might you measure its value?'[70]

'We have already covered all that in the BVP and the STROI analysis that we have been yacking over for the last 2 and a half days'.

'How much of that assessment is academic BS for you guys, and how much is real'.

'It's all BS,' says one of the field operators.

'Wait a minute, Joe, I think you're wrong,' says the champion. 'We've worked long and hard on this relationship. I think the principal problem is style and time. Not that these issues are not serious ...'.

At this point I sense some discovery. I ask for TIOC's permission to speak with the RRE team, of course preserving the confidence of the last hour's discussion.

The RRE team is in the main conference room, waiting anxiously.

'Well what did they tell you?' says the President.

I pause. 'Look, Bill, I promised them I would protect the confidentiality of what they confided in me. I am sure you would want me to keep the same promise to you'.

'Well, OK, sorry'.

'What really is going on for you guys here? You seemed to have been doing so well, and then ...'.

'Listen, these guys are bullies. This is how they treat people. They think that just because they are a big shot oil company they can throw their weight around and every one has to put up with it. We're tired of waiting and bureaucracy and no one is ever able to make a decision'.

'I understand. I hear what you are saying'.

'Yeah, well I wish they would'.

'Bill, let me ask you, what is most important to RRE – if we cut through and get to your core issue?'

'The core issue is time-to-market. That's it. We see a fabulous opportunity together, and they're too dense and slow'.

'Well let's see if we can make some headway. Suppose they need a bit of time, simply to breathe and to digest the strategy you all have designed together – really, if you don't mind my saying so, in a very imaginative way ... How much time can you spare them? 2 months, 3 months?'.

'JG, it's not so much the specifics of the time, although that is important. For us it's a matter of whether TIOC is on board in this alliance or not, whether it will work with us in making the BVP and STROI, and all the other plans we've put together happen'.

'I think I see a chance here. How would you feel about meeting together as a group, and seeing if we can sort out the differences'.

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[70] Often a negotiator will attempt to block his/her own discovery. In these situations it may be important to repeat the *same* question, and, to resist the temptation to modify it, which is usually a sign of our own neediness.

'No objection'.

I convey the information to the TIOC team that I am making some progress with RRE and that RRE would be pleased to meet in the main conference room. The TIOC team agrees and reenters the main conference room.

I begin the process with the fundamental surface issue of time. 'Why do I have the sense that time is an essential issue to both of you?' I ask, anticipating the response.

'Because you're not an idiot' says one of the TIOC team members. (Everyone laughs. The chill is thawing.)[71]

'Let's return to basics. Just suppose, you guys actually pull off what you've set out to do, what might be the bottom line for you?' I look directly at the TIOC champion.

'Over a billion in revenues'.

'Now I know that's not a lot for TIOC, given the big picture'.

'It's a lot for TIOC,' he interrupts me.

'What about RRE?'

'It could transform our business'.

(I am aware that RRE has an IPO in the pipeline if the alliance succeeds.)

'How would you measure the value?'

'Let's just say that RRE values its business relationship with TIOC very much'.

'Well I think that is a very important thing you've have just said, Bill. I want to make sure Ned (the TIOC champion) you've heard him say that'.

'I did. Frankly, we actually feel the same way about RRE. But we can't move as fast as they want us to. That's just not how we operate'.

'OK, I think we're making some progress. What is the fastest pace you can live with without having your people being driven insane?'

'Maybe 60 days'.

'Suppose you stretched a little more, what might RRE do to help you out, to take the pressure off a bit?'

'To trust us, that we are moving as fast as we can. Work with our teams better. Answer ALL our questions on time, clearly ... all the stuff we've already covered during the last few days'.

The team reaches a compromise – 45 days – the chill is off, and sunshine returns. But an equally important new negotiation is about to begin. I look for an auspicious moment, about an hour or so later, near to when both teams are ready to end the meeting. They're very tired after three days of discussions, but I sense there is still some bandwidth to hear what I am asking.

'Before we adjourn can I briefly summarize what you've accomplished, which is really a great lot, and raise one last fundamental question?'

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[71] Sometimes you must allow the other side to appear to have the upper hand, we must be 'not-ok-on-purpose' in order that the other player feels comfortable. At this point he or she will drop their guard. and the artful negotiator will have an opening.

'Oh no, what?' (The group sighs.) 'Sure go ahead'.

'I think both teams are really to be commended. You have covered an amazing amount of detail on very sensitive subjects in really a remarkably short period of time. And you were able to do this in spite of very different corporate styles and perspectives. How might you turn these differences to your mutual advantage, so that they don't trip you up again, the way they did a few hours ago?'.

'You tell us'.

'The critical questions, I guess, are what could be the cost to TIOC and RRE of conflict, especially once your alliance is launched, and what can you do right now that's simple and straightforward to anticipate and to prevent costly conflicts *in advance*?'.

'We're all ears ... but quickly, JG, We're tired and out of time'.

'I suggest in our next meeting in a few weeks under the implementation plan that we plan a few hours to write a charter for the alliance and put in a structure – a Dispute Review Board – just in case future differences get out of hand'.

'Not a bad idea. Can we do that legally, Bob?' (Ned turns to the attorney from TIOC's legal department for answer.)

'I don't see any real problem. Our department is now reviewing the required changes and amendments in the current brokerage agreement, so we can have a look at how a Dispute Review Board and perhaps a mediation provision might fit in'.

'I see an opening, but it is very important to have TIOC's legal department fully on board. The ideal structure I recommend would be an alliance charter, a Dispute Review Board, and a simple mediation provision'.

'Sounds like you're making some very good work for yourself, JG! No, only kidding, I think that's sensible advice. Anyway, Bob, have a look at it, and we can review your recommendations in a few weeks'.

The meeting ends. During the next few weeks I work with TIOC's and RRE's counsel in their preparation of the alliance agreement. They set up a simple process within the alliance for the review of any issues, including breakdowns in communication, and also provide for a more formal Dispute Review Board, on the lines discussed earlier in this article. The Board includes the alliance champions from each side and also the two lawyers, who have played a very constructive part in the deliberations. I am asked to be a non-voting member of the Board, with the understanding that I will participate in only really serious matters. A mediation provision is also included in the alliance agreement, naming a number of candidate mediators.

After a few weeks the TIOC and RRE teams meet again. Although time continues to be important, somehow everything is less urgent. The teams are so involved and excited about their work together, they are paying less attention to how little time they have! They do, however, take the time to discuss and to formulate a simple alliance charter, which addresses some central issues that are vague or uncovered in

the legal contracts. These include the basic principles and protocols of communication, expectations, questions of fairness, and some contingency planning, around risks and also unanticipated windfall opportunities. The lawyers for both companies agree that the dialogue is constructive and that it helps to soften the colder, more impersonal tone of the legal agreements.

During the next year the alliance's new structures and procedures are tested on several occasions. Culture clashes do not suddenly disappear, but they hold up well. In time the parties come to trust each other more. A creative synergy flows from working out their differences. Their collaboration prospers.

In fact, so productive has been its experience with RRE that TIOC begins to promote collaboration with other relationships. For example, it experiments with a few key distributors TIOC is considering upgrading into alliance partners. Ned, the champion of the RRE deal, has become an alliance mediation expert within TIOC. One day during a discussion with TIOC's president about a serious internal conflict within another division, Ned suggests establishing a DRB and an informal charter as ways for TIOC to manage its personnel matters more harmoniously. There are positive results. The senior manager in the Eastern Sales Division hears about Ned's good work with the real estate company, and decides to redesign the procedures for handling customer complaints, including a mediation provision. Reports start coming back that many customers are delighted. TIOC begins to acquire a reputation in the industry as a company that considers carefully its customer's concerns. Five years later TIOC wins the Malcolm Baldridge award as one of America's most progressive, customer-oriented oil companies.[72]

I. Some Reflections

The primary goal of an alliance mediator is to help the parties reestablish the integrity of their relationship. There is an external and internal dimension to this process. Externally, my focus is upon the alliance interest, because it is the first to be forgotten when trust breaks down. Internally, I must maintain my own integrity in volatile situations. Both are equally important and are interrelated.

Although it is not always recognized, a mediator, especially an alliance mediator, is deeply involved in a negotiation, one might say for the situation.[73] As a negotiator, my mission is to help the parties find their way back to a vital and prosperous relationship. I use all the artifice and techniques of my trade.

A negotiation is like a river. The agreements along the way are its sluice gates. But the river flows on and on. I am continually on the lookout for discoveries, and the

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[72] Although in the real case the company did not receive the Malcolm Baldridge award, the example illustrates a very important application of alliance mediation in dealing with customer concerns. Companies, which improve their services to customers by becoming more sensitive to their needs and concerns, will surely reap financial benefits, whether in the form of a government award or, more significantly, from the marketplace.

[73] See *supra* notes 29 and 30

principal discovery I hope the parties will make is the tangible and measurable value of their alliance. There is as much art as artifice in this process of discovery. One tenet is not to get ahead of the discoverer. Generally, telling people a truth will get you nowhere; they must discover it by themselves.

The players' reality is shaped by the stories they tell themselves. Change the story and you will change their reality.[74] Therefore, I encourage the parties to bypass their self-limiting stories, and seek to help them construct empowering alternatives, based on their highest beliefs and aspirations. The process is called 'appreciative inquiry'. I use interrogatory (what, when, how, why, when) questions to help the players recall and see vividly the BVP they have conceived and once held in high esteem. The greater the detail, the more powerful the recollection. A low stance – something like the third position in the Japanese art of sword (*kendō*) – is useful. At times I allow myself to be the brunt of jokes. I want the players to take off their armor. I look for openings to ask the key questions: how would you measure the upside if your alliance is a booming success? What could be the real cost of conflict?

Most standard texts on negotiation stress the importance of good listening. But listening is both external and internal. I am constantly shuttling inside, listening to my feelings, observing any images or pictures in my mind that may contain sudden clues.[75]

The energetics of conflict has also been largely ignored in the literature on mediation and negotiation.[76] All conflicts create distinct patterns of turbulence in a

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[74] I am indebted to the insights of my friend and colleague, the English psychiatrist, Dr. Elspeth MacAdam, for her pioneering work in treating patients with various psychological disorders resulting from sex abuse, anorexia and other maladies.

[75] The clues may come in a variety of forms. For example, a field of grass of deeply saturated green, may signal the importance of nourishing another player or oneself; a clammy feeling in the chest, or an unsettled stomach, may provide a hint of the presence of fear, not necessarily 'my' fear, but fear somewhere in the field. I have no assumptions. Perhaps I am picking up my opponent's fear. For a discussion of the power of imagery and its uses in the anticipation of conflict, see *supra* note 37.

[76] The subtle and elegant relationship between ethics, vital energy, and economic efficiency is virtually unexplored by western scholars, although well described in the Chinese classics. I can only connect the essential points in this brief note. In the Chinese cosmology these three domains work together in perfect harmony. The Chinese Taoists were deeply interested in the secrets of longevity and the pathways to a happy life. The virtuous person (the person of integrity), who has discovered the secrets of happiness and longevity, they taught, will continuously invest in ways to enhance life force, while attending scrupulously to people, conditions, and circumstances that waste it. The result is a great reservoir of undisturbed vitality he or she can call forth instantly, whenever required. (Many Taoist masters were also martial artists.) In their philosophy when a person conserved his vital energies wisely, he or she would keenly sense his/her powers gathering and move through the world in a flowing and easy way. (In the Chinese language this state is referred to as '*wuwei*'.) When a person lives in abundance, the Taoists believed, he or she would naturally act ethically and generously. The Taoists built a vision of the ideal society upon this model of personal integrity.

bioelectric field, which permeates and encircles every participant, including the mediator. The mediator must be aware of the undertow – in other words, the risks of being caught up in the whirl of the parties' distrust of each other, frustration, sense of betrayal, and other turbulent emotions. This is why even experienced mediators 'burn out'. How to maintain some high degree of detachment – of 'field independence' – while still acting decisively, is a paramount challenge.

There are techniques for doing this. I have mentioned the shuttling technique. An essential part of this revolves around time and timing. Paying attention – simply attending – will help a lot. Paying attention to your breathing is especially important and then synchronizing your words and actions with your out-breath. This exercise in itself will restore coherence, which is one of the essential elements of a vigorous integrity. There is also a tendency in conflict for the energy to rise to the head.[77] If careless, a mediator will find his or her own energy, by induction, also rising. However, the converse is also possible. The skillful mediator will settle his vital energy (life force) in his lower abdomen, and work out from this central point of organization (integrity). In many instances this procedure will also affect the combatants, and influence the field of energy. As the example suggests, when this happens, openings will suddenly appear, and there is a shift, a softening, in the atmosphere of mistrust and acrimony.[78]

When integrity is restored, often discord will transform into value. 'Sweet are the uses of adversity,' wrote Shakespeare, and his insight was never more wise nor practical than in the robust field of alliances. Look how TIOC and RRE benefitted from their altercation. They installed a process to deal immediately and effectively with future conflicts. They strengthened their relationship. They built, not simply rebuilt, trust. They came to understand, at least a little better, that change is a normal condition.

I have tried to show by this example that each moment is a gate, an opening for discovery. The great delusion we all fall into is the belief that any moment is

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cont.

Are there parallels, or at least points of intersection, between Taoist thinking and Western legal and economic theory, especially as these relate to strategic alliances? According to some legal scholars and economists one important role of legal rules (especially the law of contract) and legal process is to enable the parties to discover ways to reduce transaction costs, and thereby to 'move' closer to the theoretical limit described by the 'production possibility frontier'. Strategic alliances and other networked enterprises, in theory and often in practice, contribute to efficiency. They can significantly reduce transaction costs and create new value by identifying synergies along each participant's value production chain. See Ronald H. Coase, 'The Problem of Social Cost' (1960) 3 *JL and Economics*. Alliance integrity, and the process of strategic alliance mediation which supports it, are powerful structures to enhance efficiency. Prosperous alliances can also be happy, ethical, and healthy alliances.

[77] This effect is palpable for any one who has practiced any of the martial or healing arts, such as yoga, *taiji quan*, or *qigong*.

[78] The alliance mediator is not causing these effects, so much as helping to build a container (by his/her own field) for them to happen.

supposed to be anything other than it is. The process of alliance navigation involves continually forgetting, then continuously relearning this basic proposition.

G. Special Challenges

We know from benchmark studies that the most successful alliances are congruent in four dimensions. There must be a close 'fit' in the allies' corporate strategies. The alliance teams must be able to work harmoniously. The corporate cultures must be compatible; in other words, they must have good chemistry. The legal framework should enable, at least not impair, the smooth implementation of the alliance. If any of these elements is deficient, the chances for the alliance will sharply diminish, and many, because of this flaw, will fail. In no area today are the risks greater, and the chance of a mismatch is higher, than the complex field of cross-cultural alliances and the whirlwind of Internet partnerships.

I. Japan

International alliances involving Japan are particularly interesting, because the track record is so poor and the lessons so instructive. Japan possesses one of the world's great conciliatory traditions. Mediation was standard practice during the Tokugawa period, and since the late 19th century mediation was regularly used by local communities to settle disputes over injuries to health and property from industrial pollution.[79] Later this traditional approach was incorporated into special legislation, the Law for the Management of Pollution-Related Disputes,[80] which established a national system for the formal training of mediators. Japan has been a pioneer in the use of pollution treaties (*kyōtei*), private quasi-contractual compacts, which resemble alliance charters, and which rely heavily on mediation for their implementation. MITI's role as an industrial alliance mediator has been mentioned. Professor Arthur Von Mehren and others[81] have also documented the effective uses in Japan of mediation in labour and family disputes, automobile accidents, and other areas. Given this rich tradition, it is curious there has been so little formal mediation of international commercial disputes involving Japan. The following case is typical. At stake are the USD 10 trillion Japanese personal savings and corporate advisory markets.

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[79] See Julian Gresser, Koichiro Fujikura, Akio Morishima, *Environmental Law in Japan* (1981).
[80] *Kógai Funsó Shōri Hó* (Law No. 108, 1 June 1970).
[81] Arthur Taylor von Mehren, *Law in Japan* (1963).

II. The Nikkos-Travelers Wrangle[82]

When the Travelers Group and Nikko Securities announced their alliance in May 1999, the headlines proclaimed that the venture would be run 'Solomon-style,' which immediately evoked awe and alarm within top Japanese financial circles. On the surface the two companies' strategies appeared compatible. Nikko was reeling from a series of scandals and years of losses. Travelers was looking for inroads to the Japanese market. In fact, haggling and wrangles accompanied the rocky venture from the outset. One part of the problem was a misfit of corporate cultures. From the outset, Travelers' hard-charging style clashed with Nikko's idea of a 'gentleman investment banker'. A major arena of battle was their joint venture in wholesale banking. When the two sides met at Travelers' sprawling complex in Armonk, New York, Junichi Arimura, Nikko's lead negotiator, was apparently relieved at Sandy Weil, Travelers' Chairman's offer of 51 per cent to 49 per cent ownership, assuming, quite wrongly, that it was intended to give Nikko majority control. When he learned Travelers intended just the opposite, tensions mounted. Eventually, Nikko prevailed. 'It must be a Japanese company,' Arimura maintained, 'There can be no compromise'.[83]

The next significant disagreement was over who would run the joint venture. Travelers lobbied for Yoshiharu Kojima, its Tokyo branch chief; Nikko naturally proposed a Nikko man. In the end, Kojima, who had risen through the ranks of Wall Street to become a past master of Solomon tactics, prevailed, although Nikko succeeded in appointing its own 'joint CEO'. Under Kojima the joint venture was to be run with a no-nonsense profits and performance ethos, which was to replace Nikko's traditional emphasis on personal relationships and seniority.

The next crisis occurred when Nikko's largest shareholder, The Bank of Tokyo-Mitsubishi, was outraged that it had not been consulted, or even given any advance warning of the alliance. According to the Wall Street Journal, for months senior Bank of Tokyo-Mitsubishi officials refused to speak with their Nikko colleagues. The estrangement of the lead bank could prove fatal for the Travelers-Nikko alliance.

Meanwhile, the negotiations dragged on over every conceivable large and petty issue. One serious controversy involved the compensation of Nikko's army of 'relationship managers,' whose task it is to wine and dine clients. Travelers viewed this custom as an unnecessary expense. Eventually a compromise was reached. The joint venture would pay 85 per cent of the employees' salaries – approximately USD 200 million in the first year – and Nikko agreed to pay the remaining 15 per cent.

Another devil in the details was business cards. The senior negotiators consumed hours and hours haggling over how large the space should be between Travelers' and Nikko's names on the joint venture's business cards.

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[82] Bill Spindle, 'Travelers, Nikko Union Is Many Things; Easy Is Not One Of Them' (1999) *Wall Street Journal*, May.

[83] Ibid.

In the end, all barriers were passed. Travelers paid USD 1.8 billion for a 9.5 per cent stake in Nikko, along with convertible bonds that could be exercised to give it an additional 15.5 per cent. Travelers obtained the first foreign seat on Nikko's board of directors and the Bank of Tokyo-Mitsubishi, thawing the chill, agreed to assign its underwriting business on a 'case-by-case' basis.

Could alliance mediation have made a difference in this case? In theory, certainly. But did the right mind set exist? For alliance mediation to succeed – indeed any mediation – the process must be entered voluntarily and with some reasonable trust and understanding. Quite likely the top management at Travelers and Nikko were so self-assured – self-assurance and arrogance are central to both corporate cultures – that they would be reluctant to include a neutral third party in their intimate conversations. Then again, it may all turn on costs. For, at the bottom, these are practical businessmen, and making money is an ethos which transcends culture. The critical questions are: What are the real costs of conflict? How much time, effort, money, and creativity would effective mediation save, not only at this formative stage, but also throughout the life of the alliance? What might be the upside value of a robust and continuing synergy between these able and powerful companies? How much faster and closer would they come to the elusive USD 10 trillion prize?

Suppose Sandy Weil and Masahi Kaneko, Nikko's President, asked you to design a process for their new alliance to help realize its full potential. What would be its elements? A blend of the techniques we have discussed would be appropriate, but with refinements to address some special cultural sensitivities. The first step would be a partnering process, facilitated by a bi-national, bilingual team of experienced alliance professionals, on the lines already described. This would help to stabilize the fragile relationship. The parties would have deferred their choice of the joint venture until they had a few months of actually working together and taken the time to think through their options. Quite possibly, their decision to rush into joint venture, before they even knew whether they could work together, was a strategic mistake, which exacerbated cultural tensions and created conflicts over control and other issues, as described.

The Travelers-Nikko alliance seems a prime candidate for a Dispute Review Board, although the selection of its members and its operations would require special cultural sensitivity. Since Messrs. Weil and Kaneko are the alliance's champions, and Mr. Kojima is its CEO, they are essential members for the Executive Committee. An interesting addition would be a senior executive from The Bank of Tokyo-Mitsubishi. Including the bank in the dispute settlement procedures of the alliance would offer one way to reaffirm its importance and to rebuild this crucial relationship. However, since these men are extremely busy, and rarely in Japan together, a two tier structure seems sensible. It might include a working group under the Executive Committee, which would be composed of the alliance managers – the people charged with daily operations – and perhaps two outside neutrals – one Japanese and the other, Japanese speaking foreigner. The two neutrals could also serve on the Executive Committee. The working level would attempt to settle most matters, and would refer unresolved issues to the Executive Committee. If the

Executive Committee is unsuccessful, the alliance agreement could provide for several outside mediators, who could give the conflict a final effort before arbitration or litigation.[84]

The alliance charter seems a useful tool for transcultural alliances, especially since most cultural subtleties are not well handled by a rigid legal instrument. The Travelers-Nikko alliance charter, which could be an important product of the partnering process, would help the parties express issues that were just bubbling beneath the surface. The charter would include protocols for communication with customers and also the highly sensitive relationship with the Bank of Tokyo-Mitsubishi. (Nikko would likely be very concerned about Travelers having direct contact with Nikko's customers.) Poor handling of these crucial relationships in itself could ruin the alliance. Control is another prime candidate for the charter. A legal instrument is simply too crude a tool for sorting out the subtleties of who controls what, differentiating legal from strategic, operational, technological, and informational control.

We should not underestimate the difficulties of introducing alliance mediation in Japan, where so many international alliances fail.[85] A first and formidable barrier is the issue of 'who' will be the mediator? Within Japan there are individuals who possess the status, substantive industrial knowledge, and legal expertise to serve as business mediators; but few of these have much experience in strategic alliances, and fewer still are trained in crosscultural mediation. The problem becomes more acute when attempting to identify these unique individuals and then persuading them to mediate in international teams.[86]

Special cultural challenges are also in play. Business consultant and author, T.W. Kang notes a deep cultural propensity in Japan to resolve conflicts by cutting differences down the middle (*tashite ni de waru*), based on a mixture of emotion and social relationship, rather than logic. A proposed settlement that would seem entirely (culturally) appropriate and 'fair' to a Japanese might seem exasperatingly illogical and unfair to a foreigner.

Cultural issues entwine with trust. What responsible top Japanese executive would trust his company's trade secrets and other highly confidential information to a neutral third party, particularly a foreigner? There may be some, but they are still

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[84] The members of the Dispute Review Board, at least at the staff level, in addition to speaking Japanese fluently, should ideally also have basic training in negotiation, mediation, and strategic alliances, and possess some grasp of the relevant issues under Japanese law.

[85] Many of these alliances were never supposed to succeed! To understand why, the reader is invited to explore the intricacies of the Japanese negotiating 'code'. See Julian Gresser, 'Understanding the Japanese Negotiating Code: The Virtual Dōjō and Other Critical Capabilities for the Late 1990s' in *Private Investments Abroad – Problems and Solutions in International Business* (1995).

[86] The author is currently attempting to interest the foreign chambers of commerce in Japan, MITI, the Japan Arbitration Association, and the Federation of Economic Organizations in launching a programme of effective training.

few, despite the great transformations now underway in Japanese society. Face is another complex cultural issue. It is not likely that Mr. Kaneko or Mr. Kojima would be willing to entrust their private issues to a mediator, especially a foreign mediator, as this might be seen within their own professional circles as a sign of failure. 'Why can't they handle their difficulties with this troublesome foreign company on their own?' people will say. Finally, speed is in these situations, as it is worldwide, the endemic problem. The Travelers-Nikko relationship is characteristic of a new breed of 'shotgun marriages' between domestic Japanese and foreign firms. Conceived and formed with a sense of urgency, the captains of these marriages leave little time to think through the selection of a proper partner, much less to put into place the processes and structures we have been discussing. Some of these alliances partially succeed, but most will fail.[87] The parties rarely know or scarcely care about the missed potential, because by then they have lurched on to the next opportunity.

Japan illustrates nicely both the value and the impediments in building a transnational alliance mediation practice. Certainly, the foreign companies that manage intelligently the costs of division and discord in their Japanese alliances, will gain a strong competitive edge. The startling rate of failure of these alliances is perhaps the most powerful argument for some innovative approach to conflict management. But the development of these business practices and customs will require much time and patience, and the momentum of constant usage and experience. We are only at the beginning.

III. Further Reflections on Fast Time and E-Commerce Alliances

Michael Miller, President of Enter Corporation, has a startling breakthrough value proposition: within five years, 20 per cent of the Internet will be 3-D, enabling users to experience all forms of entertainment from the 'inside-out' and to visualize and to discover valuable information in complex data sets.[88] Mr. Miller cannot achieve his target alone. Although a technological virtuoso, Mr. Miller recognizes that in order to succeed, Enter Corporation's 3-D enabling technology, which includes unique spatial conversion (from 2-D to 3-D) and displays, must be blended with special hardware and engaging content. Mr. Miller is in the process of building a 'constellation' alliance, mainly of start-up and smaller companies, beginning with the leading innovators of 3-D glasses, device drivers, and 'spatial Internet appliances'. From this base he will add others with complementary technologies, skills, and resources. The constellation will dominate the field, leapfrogging its competitors, possibly establishing entirely new industries unimaginable today. Mr. Miller believes the alliance as a whole will have enormous capitalized value, with good prospects for an IPO or as an acquisition by Time Warner, AOL, AT&T or some other huge entity. It is an ambitious strategy.

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[87] See *supra* note 85.

[88] This interview is reported with Mr. Miller's written permission.

Mr. Miller possesses an extraordinary ability to 'telescope' the future. In other words, what he envisions, he sees so clearly that for him the 'virtual' **is** reality! It is one of the hallmarks of genius. But this capability is also a source of vulnerability. In Mr. Miller's world people, new ideas, opportunities, and conditions all change so rapidly, there is little time or space for pause and reflection. Is it really possible for a constellation of companies to operate effectively and to sustain itself at this pace?

As Mr. Miller's friend and consultant, I have advised him to do what he can to build some 'holding capacity' (integrity) into his alliance(s). Since there have already been some strains in his lynchpin relationships, I have urged him to draft with his corporate partners an alliance charter, exactly on the lines we have already discussed. A charter seems ideally suited to the ultra-fast world of Internet alliances. It is far more flexible and adaptable than a legal contract. Moreover, it zeros in, fast time, on the crucial issues in ways the law cannot. And Enter Corporation's alliance has many flash points: the allies could quarrel over the basic premise that the whole is more valuable than the sum of its parts; or over the ownership of the intellectual property in what Mr. Miller calls a 'one-stop-shopping 3-D emporium;' or over what each is getting and who is contributing most (interpersonal equity). These are serious and weighty issues to have to hash out in fast time. Better, I have urged, for Enter to have some simple process already in place that could intercept real conflicts early on.

To support my recommendation, I cite a recent case of a Silicon Valley fabless (no factory) semiconductor maker, which entered into a supplier-manufacturing alliance with one of the mainstream Japanese producers. The purpose of the alliance was to enable the US firm to take advantage of the excess capacity in the Japanese partner's facility. A dispute arose over compensation of the employees in the alliance. No process to deal with serious disagreements was in place. Employees started to leave and the allies' positions became more entrenched, but in the meantime the window of excess capacity closed. There was no second source facility. The US company's market share declined and its stock price plummeted.[89]

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[89] A prominent recent example of the costs of rushing an e-commerce relationship is Taligent. Between 1992–1994, IBM, Apple and Hewlett Packard formed an alliance called Taligent with the avowed purpose of creating an operating system capable of competing with Microsoft's. Almost immediately, difficulties in the alliance began to surface from a number of sources. Taligent was producing products that competed with its parent company, IBM's OS/2. The allies placed different emphasis on their contributions. Apple did little to incorporate and prepare for Taligent's technology, while IBM created software to be highly compatible. After three years of wrangling and over USD50m of investment, IBM announced Taligent's complete dissolution.

Reflecting upon the alliance's collapse, Stratton Sciavos, former Taligent's former Marketing Director observed, 'Both Apple and IBM had competing projects in-house. This left us fighting to establish control. Partners didn't have their best people focused on the effort. Decisions were slow to come by, and feedback was always inconsistent'. Commenting on the case, Professor Ranjay Gulati identifies conflicting agendas, micro-management, and lack of accountability and slow decisions, all of which contributed to an 'internal imbalance,' or a critical impairment of the alliance's integrity.

IV. We Do Not Have Time for Conflict

Given my interest in the psycho-dynamics of fast time, I enjoyed having my theories turned on their head in my recent interview with John Place, General Counsel and Vice President of Yahoo.[90] We met in his office for about a half an hour. (He had no more time, as he was running out to a strategy conference with the top brass.) It was the day before Yahoo announced an increase in earnings of 233 per cent, which exceeded all estimates and expectations.

'How often does Yahoo propose mediation clauses in its alliance agreements?' Since he was rushed, I thought I would dispense with pleasantries, and so I got to the point.

'Never'.

'Never?'.

'Never. I'm not really a fan of ADR, and I really don't believe very much in process'.

I gulped. 'But how do you deal with conflict in these alliances? What has been the cost of conflict, in wasted time and effort, money, or creativity?'.

'Look, we don't really have time for conflict. This might sound crazy, but we are a highly focused and reactive company. We live in each moment. Right now. Of course, we don't know what any moment will bring. But that's OK. Since everything's moving and changing rapidly and there is so much ambiguity and uncertainty, some formal structure process wouldn't be of much help. We don't need a religion. We rely on ourselves'.

'But suppose Yahoo has a major disagreement with one of its alliance partners, how do you work it out?'.

'You have to understand a bit about Yahoo's culture. First of all, we don't believe in top down management. Look at our offices. They're all about the same size – even the president's. Only the lawyers have offices, because of confidentiality. We focus on the greater good of the company and we support each other. We treat each other with respect and kindness and common decency. I ask my lawyers to concentrate on this single question: 'What's the

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Could strategic alliance mediation have saved the alliance? Although at this point any conclusion is purely speculative, it is certain that the process would have illuminated for all parties the specific decisions and actions that were placing their investments in jeopardy. Without a strong advocate for integrity and balance, the alliance was lost. An effective in-house alliance mediation team might have flagged the problems early on. And an outside mediator might have helped back up their efforts. Although alliance mediation is not a panacea, nor a guaranty of success, a strong intention to learn and a continuing outside source of wisdom and good counsel might have brought the alliance through the storm. (The author expresses his appreciation to Professor Ranjay Gulati for furnishing this case in the materials he presented at the ASAP E-Commerce Summit, May 2000.)

[90] This interview is reported with permission from John Place.

smart thing to do in this situation?' Each person takes full responsibility and that enables management to push down decisions. There is no finger-pointing, no back-biting, no politics, almost a complete lack of attitude. And we hire people with the same values'.

He paused, stretched his feet up on the conference table, and seemed to study my reaction. I indicated that I thought it fascinating how Yahoo's corporate culture itself appeared to contain the stresses of the speed culture. He continued.

'I don't want to give you the impression this is some Taoist hippy place. We are a highly disciplined company. Everyone is outstanding in his or her field. There is no room for slackers or mediocrities. We are tough. We don't hesitate to litigate when necessary'.

'I still find it amazing,' I pressed on, 'that as you say, you have no time for conflict. What a motto! I wonder whether your alliance partners also have no time for conflict?'.

'What you must understand about our industry is the number of companies like Yahoo whose partners are also their competitors. Although Yahoo is one of the oldest and largest of the Internet companies, we approach our relationships with great care and consideration. No one knows where or when you will discover some real value around the corner'.

I have since given much thought to John Place's reflections. As with any good interview, I am left with more ideas and questions than when I began. For example, will Yahoo be able to scale up its culture as Yahoo grows from its present size of 2400 employees to a much larger company? How well will Yahoo handle differences, when the self-nourishing Yahoo is challenged in alliances or acquisitions with more stratified, hierarchical, traditional companies? So far it appears there have not been major conflagrations. For me the most intriguing question is this: is it possible that fast time can actually be a source for building alliance integrity – because it filters out all the noise, all the pettiness, and virtually forces the allies to attend in a businesslike way to what is most essential?

H. Next Steps in Building the Field

During his presidential campaign, John F. Kennedy proclaimed that the US within a decade would put a man on the moon and bring him back alive and healthy. He could have said more blandly that the US would stake out and hold a role of leadership in space exploration. But such a statement would have lacked sizzle. Kennedy's Breakthrough Value Proposition (BVP) contained four essential elements: It was:

(1) clear;
(2) powerful;

(3) measurable; and
(4) implausible.

The juxtaposition of the measurable with the implausible triggers the breakthrough.

What might be a BVP for building a new profession of strategic alliance mediators? Let us foresee the development of a new profession within five years, trained to assist any troubled alliance, anywhere in the world, that is committed to transforming breakdowns into breakthroughs.

I. The Challenge

In some sense the timing for so ambitious an adventure is auspicious, because the expedition can catch the momentum of several important currents. The first is the extraordinary and growing interest in ADR, in particular mediation, mainly in the US and in Europe, but also, and to a lesser extent, in Central and South America and Asia. The second is the tide of strategic alliances as the vehicle of choice in business. The third is the powerful movement of lateral leadership away from rigid, top-down, command-and- control structures toward the networked enterprise. The last is the Internet.

Nonetheless, there are significant barriers to be surmounted in launching the new field. Most alliance professionals are unfamiliar with strategic alliance mediation, and therefore do not understand its great potential contribution. In a recent questionnaire, ASAP asked its members to identify those areas in which they would like ASAP to provide support through seminars, lectures and other special events. High on the list were alliance risk management, metrics, forming and implementing high performance alliances, protocols for the digital economy, and ways of regenerating underperforming alliances. Strategic alliance mediation was not regarded as a core capability.

Early adaptors express concerns about the costs and risks of alliance mediation. For example, some managers worry that alliance mediation will be unacceptably expensive (how odd when compared to the costs of litigation!). And one large aircraft manufacturer has a policy of restricting mediation to its lower level disputes, preferring litigation as a safer method for handling high stakes controversies.

The international bar has also thus far been slow to recognize the opportunities of strategic alliance mediation. Given the strong interest in ADR among business and trial lawyers, whose practice is primarily confined to national and local matters, it is curious how few international lawyers, even those who are advising joint ventures and whose offices have developed ADR practices, provide for mediation in their agreements.[91] In

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[91] This is a curious blind spot. I believe there are several reasons. First, few international business lawyers have any practical experience with mediation. Secondly, inserting an arbitration clause is habitual behavior, with little conscious thought given to alternatives. Thirdly, many lawyers do not see the advantage of combining mediation and arbitration. Finally, an international joint venture's dispute settlement machinery is often treated as boilerplate, an appendage to the main body of the agreement.

some cases this practice is intentional and tactical. In June 1999 in Beijing, at a conference on strategic alliances and joint ventures, sponsored by the Conference Board, a Chinese lawyer from New York, who was presenting on the same panel as the author, stated proudly, 'Our aim is to make it as hard as possible for the parties to settle their disputes'. 'But why is this sensible,' the author protested, 'when a productive working relationship is usually so crucial to the success of an alliance?' The lawyer scowled and went on to the next question.

Finally, there is also a disconnection on the side of alliance professionals, many of whom, as noted, view lawyers with a mixture of mistrust and trepidation. It is well earned in some cases. All too few lawyers take the time to understand the special needs of strategic alliances and to look for ways to adapt legal structures, processes and procedures to their requirements.[92] There is much work to be done in building new and sturdy bridges between alliance professionals and their counsel. The frontier is virgin forest in most countries of the world.

II. A Work in Progress

1. The Open Architectural Model

In the author's view the appropriate model for building this new field is an 'open architecture'. This term originated in the computer software industry to refer to systems in which the parts are completely interchangeable.[93] The development of the software programme, Linux, is a good example, where programmers from all over the world began almost simultaneously to work together to engineer an alternative to Microsoft Windows. The Internet itself is another excellent example of an open architecture.

The development of strategic alliance mediation should follow the same model. Especially in this early stage we should seek out the very best thinking and experimentation, without criticism or judgment, in a spirit of generous dialogue.[94] A

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[92] See Julian Gresser, 'A New Legal Model for Breakthrough Strategic Alliances' (1999) *TEC Newsletter*, also available at <www.logosnet.com>.

[93] I do not mean to imply that intellectual property should be in the public domain. To the contrary, I believe the field is best built by encouraging and rewarding excellence, including profitable returns from one's labor, all in a spirit of expansive co-operation and tolerance.

[94] Another key will be the principle of 'paying forward'. In his famous essay *On Compensation* Emerson wrote, somewhat opaquely, 'Beware of too much good staying in your hand. It will fast corrupt and worm worms. Pay away quickly in some sort'. Carl Bode and Malcolm Cowley (eds), *The Portable Emerson* (1946). In the practice of integrity it is essential not to cling to results or the fruits of our actions, to the 'wins' and 'losses'. Thus when you win, you look to help someone in pain or difficulty, and you pass on a part of your gains. Sometimes this payment is financial, but not always. Simply giving a person a sense of joy or hope is sufficient. We do this not out of any sense of duty or obligation. It simply flows naturally from the exuberance of life. Paying forward is the most powerful means of training the adaptive capability of the professional negotiator, because when we are no longer attached to results, we are free. For a general discussion of paying forward,

natural location for this experiment is the newly formed Association of Strategic Alliance Professionals (ASAP).

2. Association of Strategic Alliance Professionals

The ASAP is a non-profit corporation, established in 1998 to serve as a central repository and exchange for the development of professional skills among a new generation of managers, who are primarily responsible for strategic alliances in their industries. ASAP's founding corporate sponsors include Hewlett-Packard, Lucent Technologies, 3-M Company, Unisys Corporation, and Reebok International. Its growing members now number a cross section of over 150 companies, mainly operating in the US. To date, ASAP has sponsored two major summits on the networked enterprise and e-commerce alliances, has published a guidebook of best practices, maintains an online library, has launched a series of specialized training programmes, and is developing a professional certification programme. Within ASAP a Council on Alliance Law and Mediation has been established, whose mission closely tracks that of the organization as a whole:

The mission of the Council on Alliance Mediation is to help ASAP's member companies apply the best international practices for transforming differences and disputes into strategic alliance assets. The Council will:

- support its members through furnishing information on best alliance mediation practices;
- conduct live and on-line seminars and training programmes;
- foster the development of the field by compiling a database of cases, reviewing articles, publishing a newsletter, and encouraging high standards of research and scholarship;
- build a network of alliance mediation professionals in every major country of the world.

3. Best Practices

ASAP has just released its 'Alliance Formation and Management Best Practices Guidebook'. Very much a work in progress, the initial formulation reads as follows:

(A) STRATEGIC ALLIANCE MEDIATION/BEST PRACTICES

(1) All alliance agreements, whether domestic or international, should, at a bare minimum, include mediation clauses.[95] *Recognizing the high stakes in*

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cont.

see *Piloting Through Chaos*, *supra* note 3. For an interesting experiment in building 'a field of mind' on the Internet based on the principle of paying forward, see 'The Logos Experiment ' at <www.logosnet.com>.

[95] See Frank E.A. Sander, 'Should There Be a Duty to Advise of ADR Options?' (1990) *ABA Journal*, November.

strategic alliances, it is the professional responsibility of counsel to apprise clients of the possibly cheaper, faster and less divisive ways of achieving alliance objectives through mediation rather than litigation or even arbitration.

(2) *Alliance professionals should become aware of the high risks and costs of conflict, because if conflict is poorly managed, it can prove an extremely powerful source of competitive disadvantage.* The costs are not only financial, but also involve largely 'hidden' charges against time, energy, and creativity, which can equal, and often exceed, financial costs. The sources of conflict in alliances involve not only relatively well studied issues such as poor selection of partners, poor communication, crossed expectations, unrealized value, and changing corporate strategies, but also mismatching legal structures and the largely unnoticed risks and challenges of 'fast time' decision making.

(3) *Alliance professionals should take all necessary steps to assure that their alliances install internal and external systems not only to settle active disputes efficiently, but also to anticipate conflict and to create value from difference and discord.* Strategic alliance mediation is a form of corporate decision making with these three objectives.

(4) Strategic alliance mediation at present is based on an 'open architecture,' which involves a number of tested processes and procedures, including best accepted mediation protocols, techniques and tools of effective negotiation, dispute review boards, 'alliance charters', – all processes which, in contrast to arbitration, are controlled by the parties themselves.

(5) Strategic alliance mediation applies equally and usefully to all forms of alliances, across all industries and national cultures, and at all stages in the life cycle of an alliance – formation, early growth, maturity, regeneration, and dignified termination.

(6) An essential and distinguishing feature of alliance mediation is its primary objective of fortifying the 'integrity' – or adaptive vitality of the alliance. Effective alliance mediation helps to build a 'container' which allows differences – so essential in alliances – to thrive and to transform in new and productive ways. *In helping to build the integrity of an alliance, the strategic alliance mediator must be neutral toward all the parties, but is, at the same time, a powerful integrator of their alliance.* At times this dual function can be performed by a single person, such as the alliance champion or a skilled outside alliance mediator. In many cases, however, it is advisable to separate these functions, including neutrals and an alliance integrator on an alliance mediation team.

(7) *The development of an internal capability in alliance mediation will require a commitment by the parties to training in new skills of mediation, negotiation, law, and the best practices of strategic alliances.* In some cases a basic familiarity with different business practices of other cultures and the technical issues in a specific industry will also be useful.

(8) *Because strategic alliance mediation involves a complex skill set, it is advisable for mediation to be conducted in teams.* It is not necessary for an alliance

mediator to be a lawyer, although some basic legal training is often useful and the alliance mediation teams should work closely, when necessary, with counsel. The alliance champions are often prime candidates for inclusion in an alliance's internal mediation teams.

(9) An alliance's in-house alliance mediation teams will most effectively be supported by external neutral mediators, who, if possible, should be specifically nominated in the alliance agreements.

(10) Alliance mediation is an evolving art, which is still in its infancy. ASAP, through its Council on Alliance Law and Mediation, will work continuously to gather new ideas on best practices from around the world, to develop model protocols and clauses, to document cases, to encourage the highest professional standards, and in all other ways to contribute to the open and generous development of the field.

4. Training

What are the core skills for an effective alliance mediator? In the author's opinion four skills are central:

(1) an alliance mediator must be an artful negotiator;
(2) an alliance mediator must have a thorough grasp of the standard principles, techniques, and tools of mediation;
(3) he or she must be acquainted with the best alliance practices; and
(4) the alliance mediator must be able to work in teams.

The arts of negotiation and mediation intersect. The effective mediator and the artful negotiator must both be keen listeners. A clarity and curiosity of mind is essential, and also a high degree of emotional *gravitas*. In negotiation, emotional balance is fundamental to carrying out the mission, steering through crazy situations or dealing with difficult people. The inner negotiation with our own fears, vanity, and conceits is always primary. And the lodestone is integrity. Integrity is both the enabling condition for success and also, one might suggest, the ultimate purpose of all negotiations, that is, to discover and to test our connection with the world. In mediation the skill of integrity is equally fundamental, because the mediator's integrity – in plain terms, his or her decency, humility, clarity, adaptability, resourcefulness, and humour–will create the enabling conditions for the essential breakthroughs in awareness.

Other skills, of course, are relevant. These days, the term 'multidisciplinary practice' is being touted by the large international accounting firms to describe the blend of accounting, legal, and other training, which their professionals receive. An alliance mediator will be best served by adding to the repertoire a basic understanding of legal process, including some of the rules of evidence and court procedure, and an understanding of the constraints and limitations of the law of contracts – if for no other reason than to help the parties identify more flexible ways of accomplishing their alliance objectives. As noted earlier, in special cases a

familiarity with the law and customs of a particular industry or of another country may also be essential.

The greatest boost to alliance mediation will come through the effective teamwork of alliance champions and their in-house lawyers. The objective of training is to draw out the best creative energies of these two talented groups of people, and then to align in a coherent team their skills and experience. The same procedures, used in the preparation of high performance negotiating teams, are directly applicable. For example, every effective negotiating team will have a powerful mission statement, a clear allocation of roles and responsibilities, reliable tools for tracking performance, and intelligent feedback from an experienced coach. By working together and creating real value, the teamwork of champions and their lawyers will mobilize two critical resources, which in most alliances are disconnected and often at odds.

Where is such training best carried out? Certainly, ASAP's Council on Alliance Law and Mediation is one appropriate forum. ASAP's first programmes will begin in July 2000. But ASAP's resources are for the moment extremely limited, and for many years ASAP will not be able to accomplish its ambitious vision on its own. It will be necessary to encourage other organizations to introduce special courses that are complementary with their existing programmes. A natural ally is the Centre for Dispute Resolution (CEDR) in London, which has established a reputation as the preeminent mediation training institute in Europe.[96] The International Chamber of Commerce (ICC) in Paris and the American Arbitration Association (AAA) are also excellent candidates.[97] International arbitration today is beginning to suffer from many of the deficiencies of the court system, which in the early days it was designed to remedy. Arbitration can be expensive, cumbersome, time-consuming and inflexible, and often offers no advantage over litigation. Recognizing that mediation provides a flexible preliminary process, the AAA has produced an excellent manual for training mediators in the construction industry.[98] Special training in strategic alliance mediation could be easily harmonized with its current training programmes.

Strategic alliance mediation is also an excellent topic for continuing executive education, as business and law schools come to recognize that the mediator's core skills are applicable to a broad range of strategic and managerial decisions, quite beyond their specific applications to conflict resolution.[99] International organiza-

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[96] CEDR has now translated its training materials into French, Italian, and Spanish and is actively expanding in Europe.

[97] CPR, the Institute for Dispute Resolution in New York, one of the early pioneers of ADR in the US, and the Dispute Resolution Committee within the American Bar Association are also potentially strong allies.

[98] See '*Training Manual for Construction Industry Mediators – Fundamentals of the Mediation Process*' American Arbitration Association (1997).

[99] For a discussion of the uses of mediation as a decision making tool, see Samuel Passow, 'Catalyst for Unlocking Value From Decisions' (2000) Financial Times, 13 February. Harvard Business School is one of the first business schools to offer a seminar on this subject. For an interesting way of teaching these skills see 'The Alliance Game®' at <www.logosnet.com>.

tions, such as the United Nations Commission on International Trade Law (adopted on 15 December 1976) (UNCITRAL), the Organization for Economic Co-operation and Development (OECD), and the World Bank are also well advised to encourage training in alliance mediation, especially in light of the importance of strategic alliances in international commerce and economic development.

5. Model Clauses, Protocols and Procedures

The practice of ADR generally, and mediation specifically, is now so widespread there are readily available standard mediation clauses, protocols, and procedures. In the appendix to their book, *International Mediation*, CEDR's founders, Eileen Carroll and Karl Mackie, set out a very useful 'fast track' guide of key clauses with comments. These include suggestions on core wording, triggers for initiating mediation, timing for mediation, juxtaposition with litigation and arbitration, stays of litigation after interim legal procedures, obligatory mediation, mediation with arbitration, along with some very practical data on mediation costs. ASAP's Council on Alliance Law and Mediation should work closely with CEDR and other ADR organizations to adopt existing models to the special needs of strategic alliances.

6. Case Studies and Research

Today there is still no centralized reporting system on mediation cases, most likely because mediation is a confidential process. At least in the alliance field, ASAP can make a valuable contribution by beginning to document and publish cases of strategic alliance mediation, even as abstracts, in furtherance of the art.

There is also a need for scholarly research in this new field, since the most interesting questions are essentially unanswered. For example:

- At what stages in the life cycle of a strategic alliance will alliance mediation be most helpful?
- Will alliance mediation be more effective in some industries than others?
- What special adaptations will be necessary as alliance mediation is implemented in different cultures?
- How can alliance mediation best be harmonized with standard mediation and other ADR practices?
- Will speed have a disintegrating influence upon many alliances, and how can alliance mediation best be used to restore balance?
- What special conflicts may arise in e-commerce alliances and how can they best be handled?
- Will alliance mediation prove useful in mergers and acquisitions, where clashes of culture can be at least as severe as in strategic alliances?
- What can be learned for mediating alliance disputes from mediations of public conflicts in Northern Ireland, Palestine, and other turbulent areas of the world?

7. Certification

It is still too early to require certification of strategic alliance mediators, but not too early to begin to consider it. ASAP itself is currently exploring establishing professional certification programmes with leading graduate schools of management. At the same time CEDR, under a grant from KPMG and Dipp Lupton Alsop (DLA), a major UK legal firm, has invited sixty distinguished ADR professionals to London in November 2000 to formulate a protocol for the international certification of mediators.[100] Since the objective of certification is to establish high professional standards, and since there is little value in encouraging a multiplicity of certification programmes, a reasonable course would be for strategic alliance mediators to be certified by ASAP, but for ASAP's programme to be harmonized with CEDR's qualifications for mediators.

8. A Constellation Alliance

All the elements are in play for some of the players to form a co-operative, perhaps in time a constellation alliance. The market is huge, for it comprises every company or organization that is already involved in, or is considering, a strategic alliance. No single player has the resources, expertise, or time to take full advantage of this opportunity. Together the participants can gain leverage and fill their respective gaps and deficiencies.

Let us begin modestly. Prove collaboration with a few entities. Remain flexible. Resist cumbersome legal arrangements. But move swiftly, once an effective alignment of strategies and operations is in place. We can then add suitable parties to the alliance in every country.

As the alliance proceeds, no doubt it will have its share of differences, rivalries, and conflicts. But what undertaking of any merit does not have its fair share of these? For example, the idea of allowing a third party neutral into highly confidential alliance business is still pretty radical thinking for most companies. After all, it has taken over twenty years for ADR to achieve the level of acceptance it now has in the US and a few other countries.[101] Although some respondents have indicated they would find an early warning on serious conflicts valuable, most business people are simply too busy struggling with the present to provide much store for the future. Strategic alliance mediation will also challenge the bar to think differently. It will require lawyers to relinquish some control, to design more flexible legal structures, to be willing to blend legal structures with non-binding, non-legalistic processes, to be more open to working

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[100] Some of the interesting questions to delegates include: Do we need international standards for mediators? How can a pool of principles be established in a protocol? How can differences be reconciled in a multicultural environment? How can training be tailored to individual circumstances and yet accepted on a universal basis?

[101] In the US and in UK the law and the courts have strongly influenced the development of the field. The practice of alliance mediation will be driven, at least in the beginning, by its palpable economic benefits, which in the end may also provide its most powerful incentive.

with non lawyers in a spirit of equality and mutual respect, and to recognize that at least in the realm of alliances, risk is a source of value and it is your friend.[102] This is a lot to ask of US lawyers. It is uncharted terrain for the rest of the world.[103]

But what excellent opportunities to test the concept! And what a bold new arena for the international business lawyer to place the profession's creative imprint. Few alliances will present greater challenges than this one, with its mix of private and public purposes. All of the procedures, protocols, and precedents described in this article are pertinent.

What spirit can best guide the alliance? In the martial arts there is a saying: 'Continuity is power' meaning, keep moving, always look for the opening. This seems the way forward – confident, surefooted, and with the sense of wild surmise.

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[102] See *supra* note 39.

[103] As of this writing it is unclear whether the various bar associations around the world will be open and embracing to strategic alliance mediation; or whether lawyers, perceiving a new and important profit center, will act parochially and seek to exclude foreign and non-lawyers from the practice.

Chart #1. Comparison of Arbitration/Mediation Costs (Kluwer, 1999)

	ARBITRATION 4 years	MEDIATION 1 year	POTENTIAL NET GAINS FROM MEDIATION
Amount at issue	USD12.8m	USD12.8m	–
Time to reach result	Award at end of year 4	Settlement at end of year 1	3 years
Management time to handle dispute	1000 hours	200 hours	800 hours
Direct costs of process	USD0.8m	USD56,000	USD744,000
Legal costs and party expenses	USD2.56m	USD380,000	USD2.18m
Possible results:	Range Win Loss USD12.8m* USD[5.56m]	Range High Low USD8.0m** USD2.0m	Mediation creates opportunity for faster and possibly higher net return at less risk.

* There would be interest on an award but we have assumed this is cancelled out by deductions for irrecoverable costs and arbitrator cutback on some heads of damages.

** Assumes for pragmatic purposes a 60 per cent recovery minus costs is the likely maximum mediation outcome.

Source: Carroll and Mackie, *International Mediation – The Art of Business Diplomacy* (Kluwer, 1999)

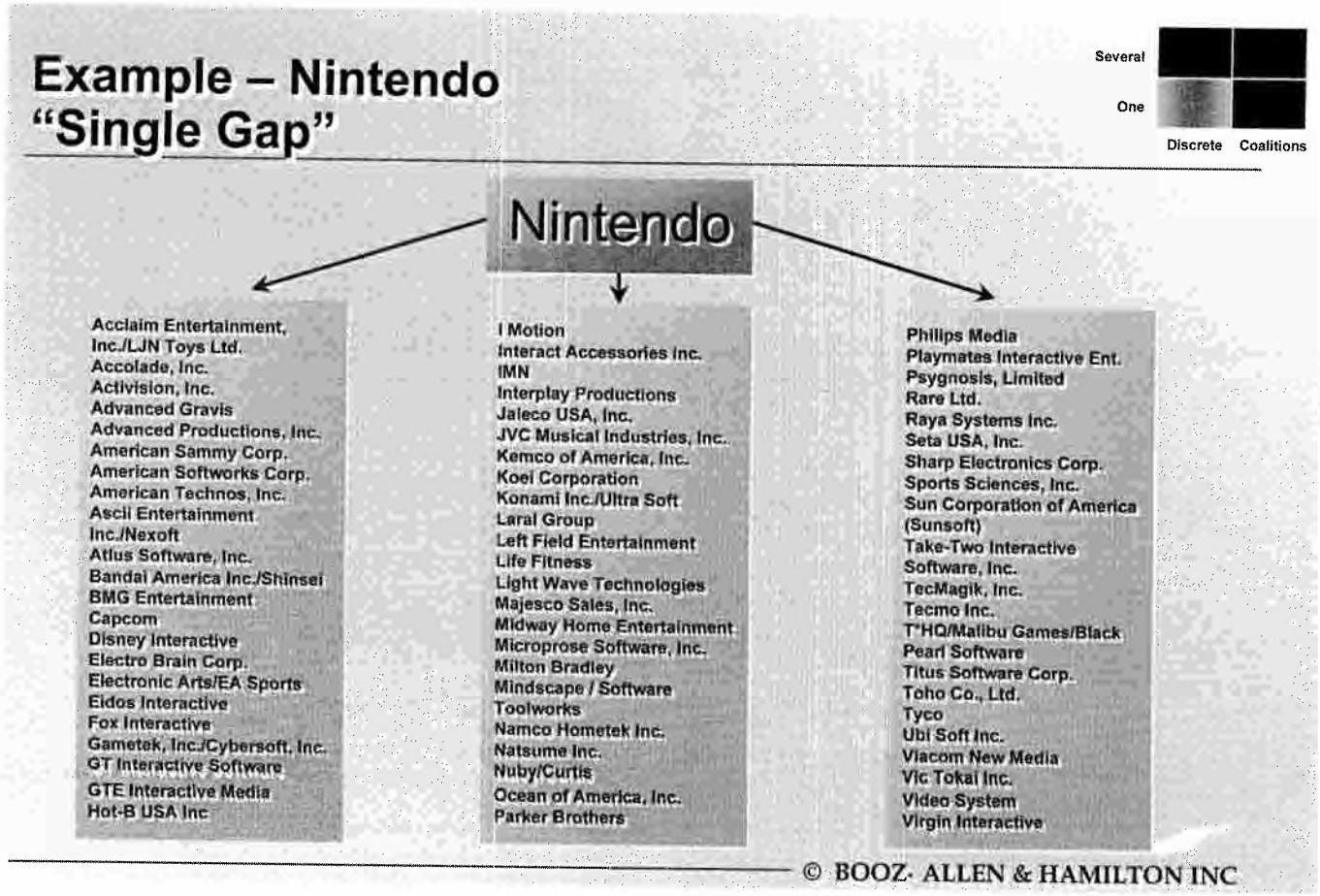

Exhibit #1. Franchise Model – Nintendo. Source: Booz. Allen & Hamilton. Reprinted with permission.

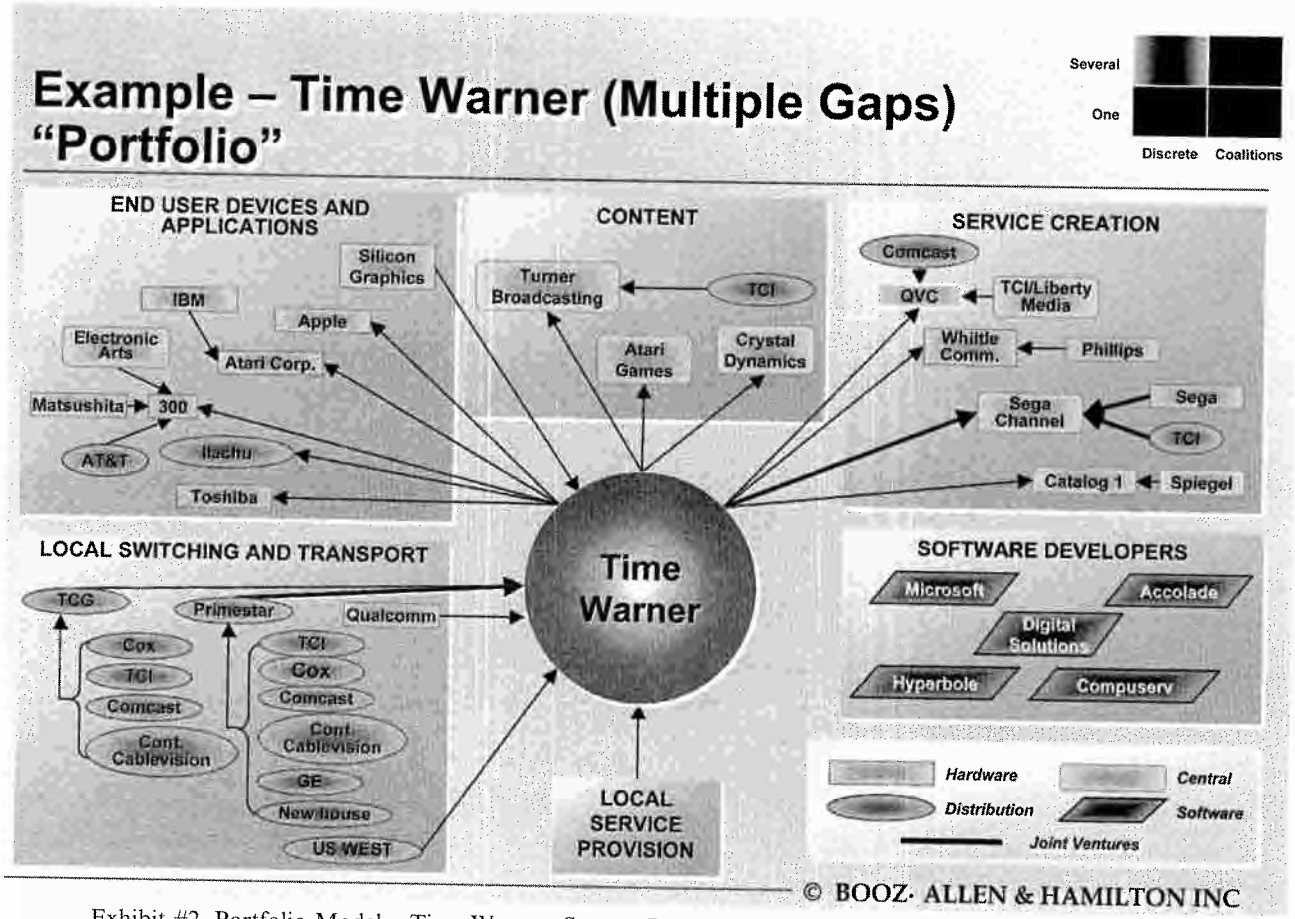

Exhibit #2. Portfolio Model – Time Warner. Source: Booz. Allen & Hamilton. Reprinted with permission.

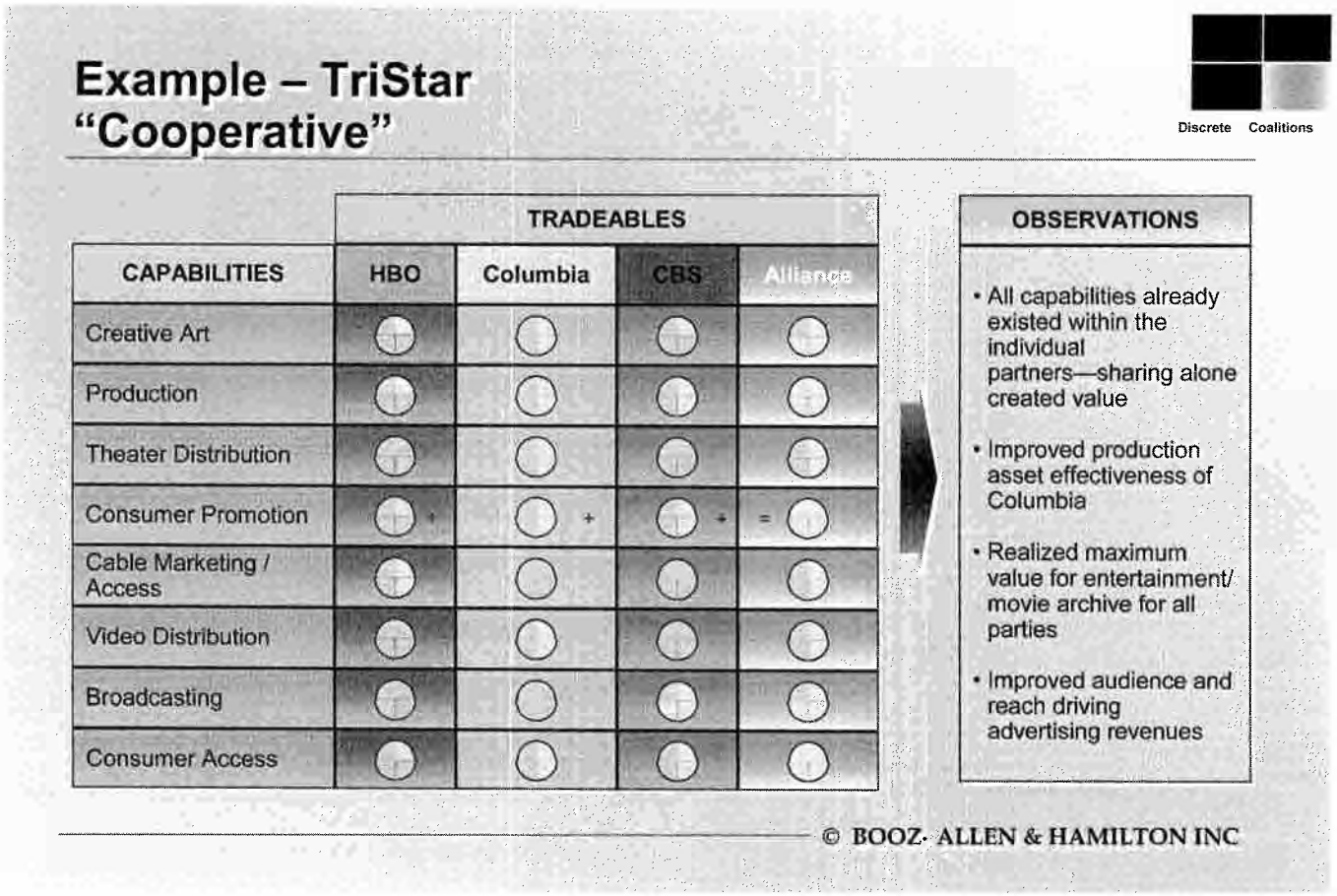

Exhibit #3. Cooperative Model – Tristar. Source: Booz. Allen & Hamilton. Reprinted with permission.

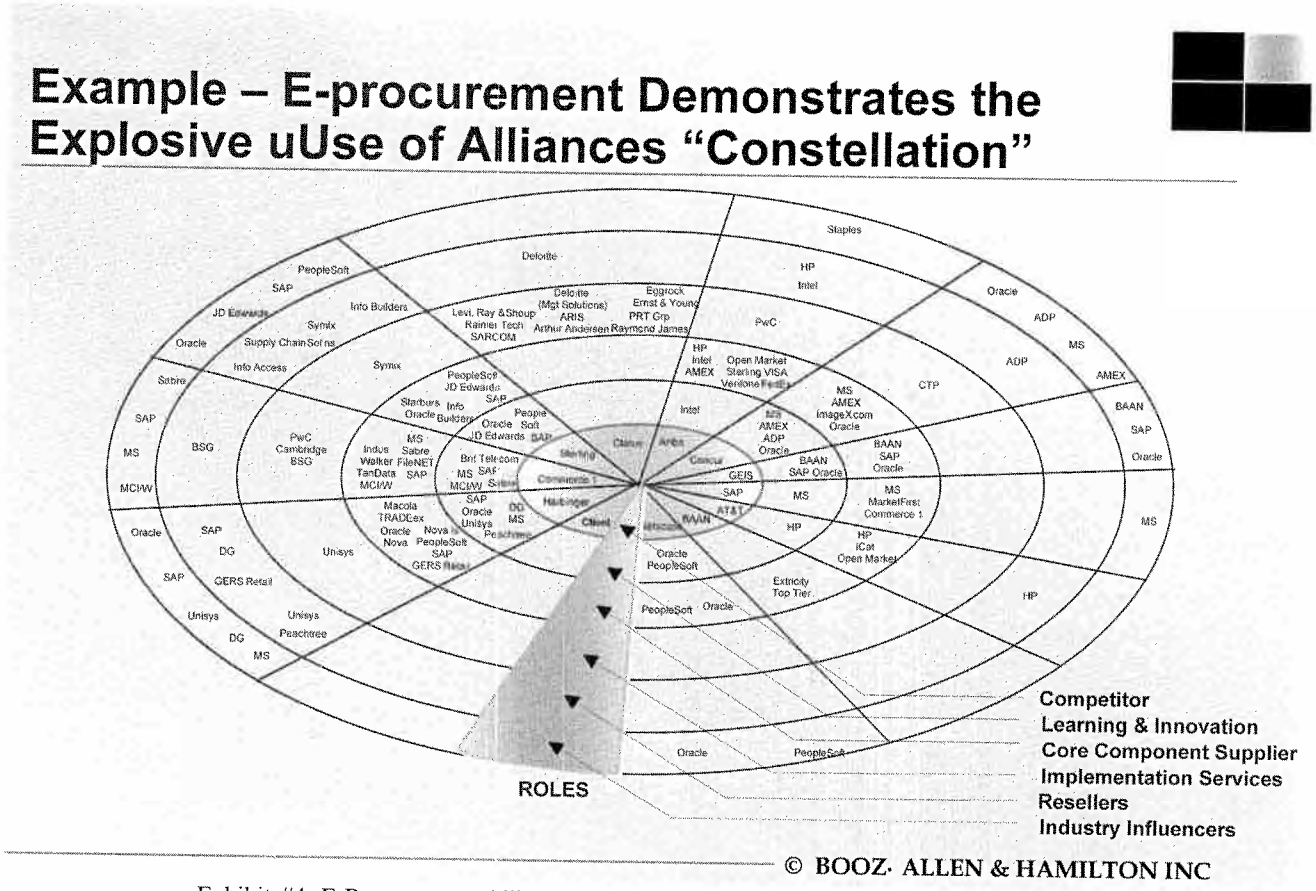

Exhibit #4. E-Procurement Alliance Portfolios – Ripe for Evolution to Constellations.
Source: Booz. Allen & Hamilton. Reprinted with permission.