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Industrial Conflict Mediation in Nigeria: Principles, Practice and Procedure

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Abstract

There are constitutional and statutory provisions for industrial conflict mediation in Nigeria. These include the Trade Dispute Act; the Arbitration and Conciliation Act; and the Constitution of the Federal Republic of Nigeria. The Trade Dispute Act specifically set out in Sections 4, 5, 6, 7 and 8 the various amicable processes that should be taken when industrial disputes arise. These processes range from non-governmental amicable dispute resolution processes, to government facilitated mediation and conciliation. Recourse to adversarial industrial dispute resolution is therefore a last resort, legally, that is, only when all avenues to negotiate, mediate and conciliate have failed. Very importantly, the Constitution of Nigeria mandates the National Industrial Court of Nigeria (NICN) to set up alternative dispute resolution (ADR) centers for the purposed of administering amicable dispute resolution process to industrial disputes. The Arbitration and Conciliation Act provides that parties' arbitration clauses do not prevent them from agreeing to use conciliation in the resolution of their disputes. This paper highlights these statutory mandates for industrial dispute mediation and conciliation. It also introduces the author's 10-Step-Mediation model of amicable industrial dispute resolution. Topics covered under the10-Step-Mediation description include: understanding of disputants' emotional situation; dealing with disputants' emotions; understanding disputants' problems; understanding disputants' unmet needs that fuel conflict; setting out issues for determination in dispute resolution; strategizing (brainstorming) for options for dispute resolution; sensitizing options; doing reality-testing; making offers for settlement; and, accepting offers for settlement. The 10-Step-Mediation model provide a step-by-step approach to dispute resolution that ensures that all issues in contention in a dispute are adequately examined and resolved.

Keywords: *industrial conflict, conciliation, institutionalization of conflict mediation, strong emotions, settlement agreement, non-governmental mediation*

1. Introduction

Industrial Conflict mediation and conciliation is the application of peaceful processes to the resolution of industrial disputes. The rationale for an amicable dispute resolution approach is rooted in a deep appreciation of the genesis of the incidence of industrial conflict, human relationship fashioned to promote productivity, which relationship exists to meet the needs of workers and employers. I define conflict as "*a situation in which the needs of parties in a relationship are not being met.*" [1] It follows that the ideal approach to resolving a conflict is to understand what unmet needs are fuelling the conflict and to provide ways and means to meet those unmet needs, in order that holistic dispute resolution can truly take place.

The Nigerian Constitution and other legislations provide backing for the application of conflict mediation in industrial disputes. Section 254c of the Constitution of the Federal Republic of Nigeria 1999 (as amended) empowers the foremost industrial dispute resolution forum in Nigeria, the National Industrial Court of Nigeria (NICN) to establish Alternative Dispute Resolution (ADR) Centres. This provides a basis for institutionalization of Industrial Conflict mediation, conciliation and

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other ADR processes in Nigeria. Furthermore, Sections 4 to 8 of the Trade Dispute Act [2] make provisions for the settlement of industrial disputes through industrial conflict mediation and conciliation. Similarly, the United Nations Commission on International Trade Law (UNCITRAL) Model Law and Rules [3] on Conciliation are domesticated in Nigeria through the Arbitration and Conciliation Act [4].

Under this law, extensive subsidiary legislation making detailed provisions for procedure in conciliation are set out in Schedule 3 of the Law. It follows that what is lacking in Nigeria are not enabling laws on amicable industrial dispute resolution but the leveraging and implementation of the law for effective resolution of industrial disputes. I set out below the relevant provisions of the aforesaid Trade Dispute Act:

> "Section 4. Procedure before dispute is reported
>
> *(1) If there exists agreed means for settlement of the dispute apart from this Act, whether by virtue of the provisions of any agreement between organisations representing the interests of employers and organisation of workers or any other agreement, the parties to the dispute shall first attempt to settle it by that means.*
>
> *(2) If the attempt to settle the dispute as provided in subsection (1) of this section fails, or if no such agreed means of settlement as are mentioned in that subsection exists, the parties shall within seven days of the failure (or, if no such means exists, within seven days of the date on which the dispute arises or is first apprehended) meet together by themselves or their representatives, under the presidency of a mediator mutually agreed upon and appointed by or on behalf of the parties, with a view to the amicable settlement of the dispute.*
>
> Section 5. Apprehension of trade dispute by the Minister
>
> *(1) Notwithstanding the foregoing provisions of this Act, where a trade dispute is apprehended by the Minster he may in writing inform the parties or their representative of his apprehension and of the steps he proposes to take for the purpose of resolving the dispute.*
>
> *(2) Such steps as the Minister may, pursuant to this section, take may include- (a) the appointment of a conciliator under section 8 of this Act; or (b) a reference of the dispute or any matter relating thereto for settlement to the Industrial Arbitration Panel under section 9 of this Act; or (c) a reference of the dispute to a board of inquiry under section 33 of this Act.*
>
> Section 6. Reporting of dispute if not amicably settled
>
> *(1) If within seven days of the date on which a mediator is appointed in accordance with section 4 (2) of this Act the dispute is not settled, the dispute shall be reported to the Minister by or on behalf of either of the parties within three days of the end of the seven days.*
>
> *(2) A report under this section shall be in writing and shall record the points on which the parties disagree and describe the steps already taken by the parties to reach a settlement.*
>
> Section 7. Notice requiring compliance with sections 4 and 6
>
> *(1) The Minister shall, if not satisfied that the requirements of sections 4 and 6 of this Act have been substantially complied with, issue to the parties a notice in writing specifying the steps which must be taken to satisfy those requirements and may specify in the notice the time within which any particular steps must be taken.*

(2) Where after the expiration of the period specified in the notice issued under subsection (1) above or, if no period is specified, after the expiration of fourteen days following the date the notice is issued, the dispute remains unsettled and the Minister is satisfied-
(a) that the steps specified in the notice have been taken; or
(b) that either party is, for its part, refusing to take those steps or any of them, the Minister may proceed to exercise such of his powers under section 8, 9, 17 or 33 of this Act as may appear to him appropriate.

Section 8. Appointment of conciliator, etc.
(1) The Minister may for the purposes of section 7 of this Act appoint a fit person to act as conciliator for the purpose of effecting a settlement of the dispute.
(2) The person appointed as conciliator under this section shall inquire into the causes and circumstances of the dispute and by negotiation with the parties endeavour to bring about a settlement. (3) If a settlement of this dispute is reached within seven days of his appointment, the person appointed as conciliator shall report the fact to the Minister and shall forward to him a memorandum of the terms of the settlement signed by the representative of the parties, and as from the date on which the memorandum is signed (or such earlier or later date as may be specified therein), the terms recorded therein shall be binding on the employers and workers to whom those terms relate.
(4) if any person does any act in breach of the terms of a settlement contained in the memorandum signed pursuant to subsection (3) of this section, he shall be guilty of an offence and liable on conviction- (a) in the case of a worker or a trade union, to a fine of N200; and
(b) in the case of an employer or an organisation representing employers, to a fine ofN2,000
(5) If a settlement of the dispute is not reached within seven days of his appointment, or if, after attempting negotiation with the parties, he is satisfied that he will not be able to bring about a settlement by means thereof, the person appointed as conciliator shall forthwith report the fact to the Minister." [5]

It is apparent from the above clear provisions of the law that there is adequate law in Nigeria backing the practice of industrial conflict mediation and conciliation in Nigeria. It is however necessary to point to the skills required to leverage this rich legal regime of industrial dispute resolution. This would equip industrial dispute resolution practitioners to engage effectively in amicable conflict resolution.

2. The Ten-Step-Mediation

In order to promote best practice in conflict resolution, I designed the *Ten-Step-Mediation* model. My goal for designing this model is to free the mediator from undue pressure to resolve a conflict and to place due responsibility on the parties in conflict themselves. The *Ten-Step-Mediation* conflict resolution model also acts as a checklist for the mediator: s/he is able to determine specific action to take at every point of the conflict resolution process. Furthermore, the mediator is able to determine precisely where s/he is in each conflict resolution process. This approach restores the mediator to their veritable role as facilitator of party-controlled final decision making. The expected impact is professionalism and effectiveness on the part of the mediator as process manager and best possible outcomes on the part of the parties as settlement decision makers. I will now discuss the *Ten-Step-Mediation* as I set them out at pages 33 to 40 of the book, *How to Resolve A Conflict*.[6] but arranged as points in this article.

2.1 Understanding of disputants' emotional situation

In *How to Resolve A Conflict* [7], *it was submitted as follows:*

> "The very first step a mediator must take is to see that each party expresses the feelings that the conflict has generated: the pain, the shame, the anger, the fear, the guilt, how they have been hard done by etc, all of the feelings. This step is crucial for effective conflict resolution because when these feelings are not dealt with, they impede the parties' ability to express deeper concerns

> and to think out effective options for resolution. More importantly, conflict resolution is largely a healing process. When the malaise is not discovered, you cannot heal it.
>
> Because unexpressed feelings block effective conflict resolution, this first step must be seen as the key to the conflict resolution process. And you, the mediator, must not go further until this first step has been exhaustively covered.
>
> Conflict resolution is a flexible process. Each mediator should design his own way of helping particular parties bring their feelings to the surface. However, in addition to the effective use of caucusing to get parties talking and thereby expressing their feelings, some conditions facilitate full expression of feelings. The first is the atmosphere of courtesy. The second is the confidentiality agreement or understanding binding all parties and the mediator. The third is parties' trust in the mediator. Feelings run deep. Only an insightful, empathic, patient, careful and wise mediator can make parties lay their feelings open. Parties know who they can trust with their feelings. They trust people with tact, gumption, self-control especially mouth-control. Of course, mouth-control is the key to listening, listening and listening with a good heart. It follows that if you can generate the confidence of the parties, you are the one they will let into their feelings. And it is only when they have been able to express their feelings fully that those parties' minds can be freed for productive solution-bound thinking."[8]

Further to the above submissions, I should add that there may be the tendency to think that feelings are not important in commercial or business disputes. I however consider this fallacious. All conflicts and disputes affect human beings: human beings are involved. It follows that irrespective of the nature of particular conflicts, the actors and participants faced with an unresolved conflict would tend to develop feelings at one level or another. These inevitable feelings cannot be ignored because the way we feel does affect the way we think and the choices we make. [9] It is the same way the way we think affects the way we feel. It follows that effective conflict mediation cannot take place if we underplay the power of feelings in conflict resolution. [10]

Industrial disputes are essentially human disputes. It follows that when resolving industrial disputes, emotions of disputants, which arise and flow from the incidence of their conflict, cannot be ignored, so that they do not constitute an impediment to the effective resolution of the dispute. The rationale is that strong emotions, as we have argued above, affect the way we think.

2.2 Dealing with disputants' emotions

It was further argued in *How to Resolve A Conflict* [11] that:

> "When parties have exposed the way they feel, you have the corollary duty of managing those feelings, say, of soothing them. Of course, the fact that you succeeded in drawing out their feelings is part of step 2: when people have expressed their feelings, the emotion is reduced. As they bare their minds to you, as they express exactly the way they feel, they are automatically soothed. Your remaining task is to encourage parties to work towards finding a solution to what had brought about the negative feeling. And, of course, if one's conflict resolution skills are intact, a solution could be found which would finally lay the feelings to rest."[12]

It is one thing to understand how people's feelings have been altered by a conflict and another thing to know how to alter the feelings so that they do not constitute an impediment to the conflict's resolution. My approach to dealing with feelings in addition to allowing for venting by the parties is to point out to parties that effective conflict resolution would address the roots of their hurt feelings

and thus improve the way they feel. It follows that the ultimate cure for hurt feelings is effective mediation, which presupposes adequate skills for conflict resolution.

In one industrial dispute between the labour union of an industry and a government to whom I was labour and conflict management consultant, strong negative emotions bordering on deep distrust blocked the final settlement. My being able to identify and proffer a solution to the hindrance led to the resolution of the conflict.

2.3 Understanding disputants' problems

As a follow up to the preceding step 2 above, it was further submitted in *How to Resolve A Conflict* [13] as follows:

> "Having put the feelings aside, the parties are better positioned to tell you the problem at the root of the conflict. Again, here, the key is your ability to deploy your listening skills. If they have your ears, they will tell you their story. If they tell you their story, you will hear in it both their discomfort (feelings) and the problem or concern or challenge generating the discomfort."[14]

There is the tendency to confuse feelings, problems and interests or unmet needs, which last we shall discuss under step 4. Whilst the three are related, they are not the same. A feeling, negative feeling or hurtful feeling is the first manifestation or symptom of a conflict. But the negative or bad feeling is not the problem, albeit provoked by the problem. The real problem is the challenge that is birthed or triggered by an unmet need. A very basic example from an industrial dispute is where there is a feeling of anger on the part of a labour union leadership, due to the loss of trust in them by their members as a result of persistent failure of the union to secure an urgently needed improvement in their working conditions. The feeling is the anger. The problem that provoked it is the loss of trust. The mistrust arose from the unmet need. A skilful mediator while listening to and engaging the parties must not confuse these phenomena: s/he must properly classify them so as to deploy the appropriate tools for dealing with the different situations. What is needed for addressing a feeling is different from what is needed for dealing with a problem, which is equally different for the skills needed for addressing unmet needs or interests.

2.4 Understanding disputants' unmet needs fuelling their conflict

Again, as a follow up on section 3 above, it was stated in *How to Resolve A Conflict* [15] as follows:

> "We have already established that behind the problems (step 3) are the unmet needs. So progress can only be made when we have identified, not just the problem, but what must be put in place for the problem to go and to have a new relationship. Let us use a simple example. If I am hungry and you have been able to expose this problem, then you want to identify what I (not you the mediator) need to address my hunger. And a good mediator would NOT say, "Oh, you are hungry? Take food!" Maybe I do not want your food, maybe I cannot eat now, may be.... There may be a countless number of reasons why your poisonous suggestion camouflaged as 'generosity' may be inadequate.
>
> Therefore, as we have emphasized again and again, the solution is in the parties themselves and they know what they need more than the mediator does, even when the mediator is so 'sure' he or she knows what they need. Always remember, "He who feels it knows it". So again, the mediator's pair of good ears is the only solution to identifying what the parties need for their specific individual problems. And they will tell you, if you listen. You will hear it in their story. Even without asking them. Inside their story and your understanding of it you will hear their feelings, you will hear their concerns or problems and you will hear and identify their unmet needs. Their story engendered by your initiated ears."[16]

The core of conflict is unmet needs. Where needs continue to be met in a relationship, be it business or otherwise, conflict would be in abeyance and dispute would not arise. People do not engage in conflict when their needs at various levels are met. It follows therefore that the core duty of the mediator is to help parties identify their unmet needs, followed by the secondary duty of helping them design ways and means of meeting them.

In the industrial dispute resolution, I referred to above, the core need of the union was the financial security of their members who had to be retrenched as a fallout of the conflict mediation, if successful. For the government, their core need was to privatize the industry, which required the retrenchment. Agreement came when parties agreed to provide for respective needs: workers were given severance pay and placed on pension by government. Government was thereafter able to sell of the industry to the private sector as it had planned.

2.5 Setting out issues for determination in dispute resolution

Submitting further in *How to Resolve A Conflict* [17] it was stated as follows:

> "Having identified the needs, you would go on to frame them into questions, one question per need. This is all you do in step 5. You do not answer the questions here. That is done in step 6. You only pose the questions in step 5. Let us take the hunger example above. Assuming you discover that my need is just any food, then in step 5, you simply pose the question, "How would you get food"? Then you move on to step 6. Of course, if there are more needs identified, there would be more questions. And the questions must be posed separately. If possible I would write down each question on a different piece of paper, for clarification and to avoid confusion as well as a real possibility of forgetting to deal with all questions and all needs, which would amount to an incomplete conflict resolution, even if the parties do not notice the lapse. They will notice it when they get home and the conflict would then resurface." [18]

Step 5 is simply for clarity and orderliness, which help to avoid mistakes and omissions. We have already argued that conflicts arise as a result of unmet needs. We cannot muddle the unmet needs together. If one is not considered, conflict would remain: an unmet need signifies a conflict and therefore no unmet need can be overlooked in holistic conflict resolution. If we fail to provide for each unmet need as we have set out above, that is, if we do not clearly and separately formulate an issue or question as to ways and means of meeting each specific need, we run the risk of not providing for it in the ultimate resolution. The resultant effect is that the dispute resolution process would have to be recommenced afresh, which would amount to an unnecessary waste of time and resources.

In an industrial dispute, there may be several heads of conflict tied to various needs that have to be provided for by either side of the industrial dispute. It is of utmost importance to set out the exact issues one by one to ensure that they are all provided for in the final settlement agreement.

2.6 Strategizing (brainstorming) for options for dispute resolution

The follow up to Step 5 is Step 6. I explain in *How to Resolve A Conflict* that:

> "Having posed the questions in step 5, we look for options to each question in step 6. To one question there may be many options which is the advantage of setting out each question on a different piece of paper, so that as the options are being floated, they can be noted in the relevant piece of paper containing the question being addressed. Again, here, the parties will answer their own questions. For example, in the instance cited of my need for food, I am the one that needs food, so I am the one to think out options for getting the food that I need. And your own business as my mediator is simply to note down my options. Also, if we allow parties to talk, it

> is from their story that we would hear the options, freely given, even without our specifically asking for them. Once the forum is right, the tongue would flow, letting out feelings, soothing them, revealing problems, identifying needs, setting out questions, brainstorming for options. All I do as a good mediator is take notes and tick off my checklist of ten steps."[20]

Brainstorming is the heart of mediation: it is here that the options that produce the resolution is generated. Thorough brainstorming lead to rich options, which produce holistic conflict resolution.

Industrial disputes involve, as a rule, several players and stakeholders. The inputs of a cross-section of the myriads of stakeholders have to be collated to ensure that sufficient options are on the negotiation/mediation table for consideration.

2.7 Sensitizing options for dispute resolution

In *How to Resolve A Conflict*,[21] it was explained as follows:

> "As the options are coming out in step 6, some of them may sound unfriendly. You would remember that for us to have a resolution, one or more of the options proposed by one party must be acceptable to the other party. Options that sound hostile, though good on merit, may not be considered by the other party simply because they hurt their feelings. It is the duty of the mediator to make the options palatable. For example, it is better to say, "We do not understand one another anymore", rather than to say "He has an attitude problem". You would convey the same message without being verbally abusive. It is very much like what our counterparts in physiological healing do: If they want an unwilling patient to take a necessary but bitter pill, they simply coat it in sugar. All options must be made to look attractive. No one suffers thereby because they are still only options and not yet considered for final acceptability."[22]

It is noted that step 7 serves a critical aesthetic purposes. If the options coming out of either party is presented raw to the other party, possible hostility in the language of presentation may make the receiver of the message repulse and reject them. This could impede resolution because the hostile sounding option may in fact contain a workable resolution if it is considered objectively. However, because it is hostile in tone, it loses receptivity and is rejected. The mediator therefore has the duty of ensuring that all options look good and friendly, irrespective of their original tone. This will make them worthy of consideration by all for adoption as the way forward.

Industrial dispute resolution is particularly a good example of where verbal sensitivity is important. This is due to the fact that the way options for settlement are framed determines whether or not the generality of union members subscribe to the points proposed for settlement agreement.

2.8 Doing reality-testing

It was argued in *How to Resolve A Conflict* [23] that:

> "The fact that options are all looking good does not make them all really good or, better put, realistic and practicable. For example, coating a bitter medicine in sugar only kills the bitterness. Suppose the medicine also itches? And suppose the patient cannot tolerate itching? Obviously the option of the particular medicine has to be jettisoned for another option out of the many others that may be available. The same goes for options in conflict resolution. That we have used our best skills to make them look good does not mean we have made them workable. That is what we have to examine in step 8. For example, again, that a party agrees to pay a certain amount is not realistic if he does not have the capacity to pay the money. We retain only the options that would work. All others must be set aside."[24]

I would add that section 8 above is another major step. This is simply because only realistic options can form the basis of effective and durable dispute resolution.

In industrial disputes, sensitivity to realistic options is again of the utmost importance: an unrealistic industrial agreement is not an effective industrial dispute resolution but only an 'invitation' for renewed and future conflicts. This probably explains the perennial industrial disputes between government and a host of industrial unions and professional bodies. Usually, these industrial unions have signed settlement agreements with government which are not implemented for years. I am of the opinion that if these settlement agreements had been rooted in reality and what works, both parties would have been eager to implement them.

2.9 Making offers for settlement

In How to Resolve A Conflict, [25] it was stated as follows:

> "When parties have been individually helped to select workable options, the workable options from both sides must be merged and presented to each party, preferably, in caucus, to test its acceptance. I would do this in caucus because it enables me to help each party arrive at a resolution they can live with. If, for example, a party sees the merged workable options and rejects them in caucus, I would be able to help him determine whether or not he has an alternative, because he may not. If he does not, then, not only would he change his mind about rejecting the offer, he would also not have lost face by first rejecting and then accepting. Also offering the workable options in caucus helps me determine if I have done a good job as a mediator. Suppose a party rejects and shows me he has a better alternative, then I could not have led the process properly. If I did, then the best options would have been suggested by the parties because they own the process and the process they own must bring out their best. However, because I discovered my mediator-error in caucus, I don't lose much face and I can go back and make amends where I had gotten it wrong."[26]

I only need to add that offers in conflict resolution are the result of painstaking options-formulation through brainstorming, selection and distillation. Options that would not work would have been jettisoned at step 8. Only options that constitute ingredients of conflict resolution are offered in step 9. And if they are truly the solution, the next step would occur.

In the industrial dispute resolution, I referred to, above between government and a union, what the union was perceived to have offered the government later became contentious long after the settlement agreement had been signed. In a subsequent industrial arbitration case related to the settlement agreement, I acted as counsel to government, which was one of the parties at the Industrial Arbitration Panel (IAP). At the IAP, the critical issue for determination was whether an offer to accept severance pay amounted to disengagement from government service. While it was clear in my mind that this was an issue to be resolved in the positive, counsel for the union urged the arbitration tribunal to resolve it in the negative. The arbitral tribunal agreed with counsel on the other side and declared that the union members were still in government service. Whilst we have gone up to the superior court, the National Industrial Court of Nigeria (NICN), to have the IAP award set aside, the incidence reinforced for me the need to be abundantly clear at the stage of offer what precisely the parties are offering one another.

2.10 Accepting offers for settlement

Finally, in *How to Resolve A Conflict* [27] It was observed that:

> "If we truly have workable options, then both parties would accept the terms of their new relationship as set out in the merged workable options. We can then fine tune the joint option(s) to clearly set out who is to do what, when and what happens if it is not done."[28]

In view of the foregoing, step 10 is the end of the dispute resolution process. It flows naturally from all preceding steps, hence it is totally dependent on them. No one step is dispensable if we want to have a durable agreement. Step 10 is a detailed formulation of the future. It clearly sets out what must be done to truly resolve the conflict. We also add in the agreement what happens if what must be done is not done because good mediation is sensitive to the fact that agreement to resolve is only an agreement. The process of implementation is not necessarily guaranteed by the mediated agreement, which must be consciously worked out after the agreement has been reached. It follows that there is a real possibility that the agreement or aspects of it may not be implemented. It is for this reason that we add to a mediated agreement what happens if it is not carried out wholly or in part. This way, implementation is fully facilitated as much as possible.

The industrial dispute I described in the discussion above under step 9 is again relevant here. The question is: "When the parties accepted the various offers presented to them, was it clear to them and onlookers what they each accepted?" In the light of the dispute which arose on the settlement years after, especially given the recent award of the IAP, it has become arguable that the parties' acceptance was not fully articulated. Hence the need to fully and clearly articulate at the final stage of dispute resolution what precisely each party has to do, when to do them and what happens if it is not done. If the parties in this particular case had done this, it is very unlikely that the dispute that arose subsequently would either have arisen or ended up in litigation: the parties in articulating in their settlement agreement what would be done if the agreement became problematic, could have provided for reference to an amicable dispute resolution mechanism, for example, formal non-governmental mediation.

3. Conclusion

Ten-Step-Mediation has been set out, a step-by-step procedure for taking a conflict from dispute to resolution. It has also been suggested that the relevance and application of mediation to industrial disputes is necessary for the achievement of industrial harmony. However, in order to master and be able to effectively apply the ten-step-mediation model in industrial dispute resolution, each industrial conflict resolution practitioner would derive greater benefits from the ideas discussed here by looking for case studies of live or simulated industrial disputes and resolving them using the ten steps: 'practice makes perfect'. It is thus recommended that books such as 'How to Resolve a Conflict' [29] should be studied by industrial administrators in order to grasp the full details discussed in this paper. It would also be useful to subscribe to and watch the YouTube lecture series titled "How to Resolve A Conflict" [30] anchored by the author and based on the book.

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Additional Materials

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