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Corporate Counsel in the Era of Dispute Management 2.0

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Jean-Claude Najar*

“What is Web 2.0? It is a system that breaks with the old model of centralized Web sites and moves the power of the Web/Internet to the desktop” John Robb (2003)¹

This paper will address the topic of dispute management by corporate counsel, how to optimize it to adequately fit the requirements of our modern age and achieve its purpose: strive for ‘win-win’ solutions to, if possible, resume business relationships and avoid losses of productivity and income streams. While I have now joined private practice, near to a quarter of a century of practice as in-house counsel in one of the world’s most innovative companies has also ‘formatted’ my approach to the practice of law, and to dispute management. This paper draws heavily on my in-house counsel experience.

Introduction

With 24 years in GE as in-house counsel and 10 in private practice, I have seen the world of business and technical support change. The telex of my early years of private practice is viewed as a prehistoric tool by my children. Floppy disks have disappeared, smartphones have become indispensable, the internet is everywhere. Our way of life has changed and so has our way of doing business and managing risks: it has become integrated into the Information Age, into modernity.

Modernity is a word that has been used and re-used throughout dispute management literature: some use it to qualify globalization,² others to underline the efficient and integrated role of corporate counsel within a given company.³ One is a contextual definition and sets the scenery of the current business environment and its challenges. The other is a structural definition. Both are complementary. GE has always --I daresay successfully - embraced change and has endeavoured

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¹ John Robb is a former software entrepreneur, author and military analyst specializing in cyber warfare and resilient communities.

² Peter J. Rees QC and Kathleen Bryan, ‘How to Manage Disputes in a Flat World’, (2013) 31 ACC Docket, 54.

³ Ugo Draetta, ‘The Role of In-house Counsel in International Arbitration’, (2010) I.B.L.J., 385.

to respond to the evolving business environment with structural changes. One of the key structural changes was the implementation of dispute management processes and of a true dispute management culture.

Definition of dispute management

‘Dispute management’ is a relatively recent term in the legal linguo. If you google it in French, there are virtually no results appearing before 2009 and the publication of the Dispute-Wise study by Fidal and AAA/ICDR.⁴ In the USA, dispute management has been a topic of discussion since the early 1980s.⁵

Semantically there is a fundamental incompatibility between the words ‘dispute’ (in its legal meaning) and ‘management’. Putting the two together suggests that legal disputes can be managed, like an asset or a business. Therefore, a legal dispute, something perceived negatively as an intrusion of lawyers and claims into a business whose objective is to generate profit, has been increasingly associated in business practice as an integrated part of the business. It is not so much a paradox as an on-going revolution in the profession of corporate counsel.

This revolution went, and continues to go, both ways. It required, and continues to require for corporate counsel to gain credibility with the business people and the organizational leaders, but also for these to integrate corporate counsel in the overall business strategy –an argument I was already making close to 20 years ago.⁶ When it comes to dispute management, it has been rightfully argued in the mid-1990’s that

“conflict is generally viewed and managed in a piecemeal, ad hoc fashion, as isolated events, which are sometimes grouped by category if the risk exposure is great enough but that are rarely examined in the aggregate to reveal patterns and systemic issues. Viewing corporate management systematically provides unparalleled opportunities for an organization to learn critical information about its operations, its population and its environment – that is, to achieve a more ‘global’ perspective”.⁷

The evolution from ‘ad hoc’ dispute resolution to ‘systemic dispute resolution’ is a key notion to bear in mind: management requires a structure and a system.

⁴ GE France was one of the companies which participated in this pioneering survey.

⁵ When doing a HeinOnline search of the words “dispute management” in articles and book reviews no relevant results appeared until 1969. Between 1969 and 1980, 30 results appeared. Between 1980 and 2000 , this number rose to 400 results. Between 2000 and 2014, it reached 680 results...

⁶ Jean-Claude Najar, ‘The Inside View: Companies' Needs in Arbitration’, (1996) 12 J. Int. Arb , 361.

⁷ Cathy A. Constantino and Christina Sickles Merchant, ‘Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations’, (Jossey-Bass, San Francisco 1996), xiii.

In 1995, GE hired Elpidio ('P.D.') Villareal as Counsel for Litigation and Legal Policy with the broad direction to improve GE's response to the spiralling costs of litigation.⁸ With the support of GE's General Counsel, Ben Heineman, Villareal⁹ understood that reducing litigation costs would require to fundamentally transform GE's legal policy. His action required deep cultural changes, such as putting in place an institutionalized ADR program, changing how the lawyers viewed their role, how the company viewed its legal docket, how managers worked with lawyers to handle disputes. This evolution in corporate mentality as regards the management of disputes is a relatively recent trend which has now become a must for any multinational company involved in the global economy.

Corporate counsel have become business people

When I joined GE from private practice in 1989, I quickly understood that I was not hired just to 'state the law.' I was encouraged by the CEO to express my opinions and make suggestions even on very technical matters only distantly (if at all) related to law. For the CEO whether I was a lawyer or an engineer was not relevant at first glance: in order to better apply my legal skills, I had to know the business, the products, the actors, on all levels. My responsibilities would be not only to do what lawyers were expected to do in the traditional, historical sense of the word (draft contracts and defend the company's interests), but more importantly to devise processes that would identify and abate risk, and give the business people tools to help them perform their duties while abating the risks identified. As far as dispute management was concerned, my job was to *enable* the company to remain in control of its disputes in order for it to remain in control of its business.

Modern and sophisticated internal legal departments of corporations have become those that have understood the interconnectivity of business with disputes, where "the general counsel reports to the CEO, controls the selection of and the contacts with outside counsel and is an integral part of the management team of the company".¹⁰ Such legal departments are empowered by the top management, they become a part of the decision making process with regard to legal affairs, and act as true 'business partners' on a horizontal level.

Dispute management is a crucial cog in a complex mechanic: the company. The legal department is not a separate piece of the machine but an integrated part of it, one without which the machine breaks down. The corporate machine never stops, therefore a legal department has to have the capability to respond to the flux of disputes efficiently through wise management (or "dispute-

⁸ For a detailed account of the story, see Michael Wheeler and Gillian Morris, 'GE's Early Dispute Resolution Initiative (A)', (2001) HBS N9-801-395, 1.

⁹ Villareal is today Senior Vice President and Head of Global Litigation at GlaxoSmithKline.

¹⁰ Ugo Draetta, *op. cit.*, fn. 2, at 385.

wise”¹¹ management); and like any other venture that calls for management, managing disputes requires people, lawyers with the right skills to manage them.

Where do we come from?

While at GE, I observed that “in-house legal departments have evolved during the years, they have gained importance. They have mutated from ‘paper-shufflers’ to full fledged members of the company. The profile of corporate counsel has changed dramatically and is still changing”.¹²

GE was one of the pioneers of the corporate response to the necessity of taking into account legal disputes in the global business strategy. GE used the Six Sigma methodology as a matrix for developing its dispute management system. Six Sigma is a quality control tool designed for supervising manufacturing processes and making them close to error-free. It uses statistical measures to track performance, design solutions and monitor success in very precise terms.¹³ Although initially used in the manufacturing process, Six Sigma was subsequently extended to all processes, including dispute management. Implementing Six Sigma throughout the company implied hiring 3,000 new managers, creating new training programs and cutting product defects by 84% annually for five straight years... though costly, it achieved tremendous success (\$1.5 billion in savings for the years 1996-1999).¹⁴ Six Sigma is used in its different forms in many other major companies, including Xerox¹⁵, Dupont, Sun Microsystems,¹⁶ Alstom¹⁷ or Lockheed Martin¹⁸ to name but a few.

The construction industry was another driving force of change: used to complex chains of contracts and the inevitable breaches resulting thereof, it explored new approaches to managing

¹¹ The term was first coined by the American Arbitration Association (AAA) in a survey conducted in 2003. The executive summary of this survey was published in 2006: ‘Dispute-Wise Business Management: Improving Economic and Non-Economic Outcomes in managing Business Conflicts –Executive Summary’, (2006) AAA. The survey is available at < www.adr.org/aaa/ShowPDF?doc=ADRSTG_004327> accessed 8 March 2014.

¹² Jean-Claude Najjar, ‘*A Pro Domo Pleading*: Of In-house Counsel and their Necessary Participation in International Commercial Arbitration’, (2008) 25 J. Int. Arb, 623.

¹³ ‘What is Six Sigma?’ (GE corporate website) <www.ge.com/en/company/companyinfo/quality/whatis.htm> accessed 9 March 2014

¹⁴ Michael Wheeler and Gillian Morris, *op. cit.*, fn. 7 at 4.

¹⁵ ‘Xerox Lean Six Sigma and Quality Go Hand in Hand’ (Xerox corporate website) <www.xerox.com/about-xerox/citizenship/news/lean-six-sigma-quality/enus.html> accessed 8 March 2014

¹⁶ Brian Hindo, ‘Six Sigma: So Yesterday?’ (Bloomberg Businessweek Magazine, June 10 2007) <www.businessweek.com/stories/2007-06-10/six-sigma-so-yesterday> accessed 7 March 2014

¹⁷ Alstom, ‘Annual Results Fiscal Year 2002’ (Alstom corporate website 2012) <www.alstom.com/press-centre/2002/5/Annual-Results-Fiscal-Year-2002-1-April-2001-31-March-2002-20020507/> accessed 8 March 2014.

¹⁸ Michael Joyce and Bettina Schechter, ‘The Lean Enterprise – A Management Philosophy at Lockheed Martin’, (2004) Defense Acquisition Review Journal, 173. At < <http://handle.dtic.mil/100.2/ADA435279>> accessed 9 March 2014.

disputes, diversifying dispute resolution methods, favouring dispute boards and tailored interventions “as strategies for the early and informal resolution of the disputes”.¹⁹

Although a growing trend, such a global approach depends on the place of the legal department in the company, the legal culture of the country, the laws, the role of the corporate counsel, and the legal-friendliness of the management. This global approach has not been homogeneously adopted by companies involved in international business because redefining the role of the legal department may be particularly challenging. For instance, in jurisdictions of civil law culture, lawyers traditionally tend to follow the letter of the law. Finding creative business-driven solutions is not what is taught in law schools at the undergraduate level. Lawyers are taught to know the law, not to become businesspeople.²⁰ Times have changed and so has the demand for pure specialist lawyers in corporations. Entire generations have been applying the pre-programmed legal method: 1) identify the legal problem, 2) apply the legal solution, and 3) hope you win the case.

This necessary mutation of the legal profession was reflected in the 2013 Fidal/AAA/ICDR Dispute-Wise Business Management survey which, building upon the lessons learned from the 2009 edition, underlined that

“over the last few years, French companies have undergone a drastic change in the way they view legal matters and disputes, which until then had been regarded merely as legal ‘problems’. Now, these subjects are a part of the ‘course of business’ and can even be a *source of opportunity*”.²¹

In certain cases, when for example a dispute is resolved through mediation, parties may find creative and efficient ways to preserve --and even improve-- their business relationship. As two experienced litigators rightly underline, “the resolution of the dispute can only result from an agreement between the parties. . . . A party cannot be blamed for not reaching an amicable settlement through mediation. That is an opportunity left to the parties, not an obligation”.²²

¹⁹ Thomas J. Stipanowitch and J. Ryan Lamare, ‘Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations’, (2013) 16 Pepperdine University School of Law, 7.

²⁰ This is changing. For example, in France, the law school of Sciences Po and the private venture of HEAD, Hautes Etudes Appliquées au Droit, present novel approaches to teaching law. More ‘classical’ law schools are also adapting their curricula to the changing needs and to globalization.

²¹ Richard Naimark, Isabelle Vaugon, Mark Appel, ‘Dispute-Wise Business Management - Best Corporate Practices in Conflict Management From France’ (2013) FIDAL/American Arbitration Association/ International Centre for Dispute Resolution, 3. (emphasis added) The survey is available at www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2013413 accessed 8 March 2014.

²² Pierre Raoul-Duval and Alexandra Munoz *in* Nancy Nelson and Thomas J. Stipanowitch, ‘Better Solutions for Business: Commercial Mediation in the EU’, (2004) CPR, 4.

France is a particularly interesting example when looking at the evolution of dispute management. The legal literature speaks of the “Americanisation” of alternative methods of dispute resolution such as arbitration found in the growing use of private remedies, which are often rooted in American procedure (disclosure and cross-examination in arbitration for instance). The 2013 Fidal /AAA /ICDR survey shows that French companies have incorporated the management of disputes into their corporate culture, the choice of shifting corporate cultures not being based on trend or image, but on true pragmatic/economic reasons.

To illustrate how complex a shift in corporate culture can be, I will turn to GE Oil & Gas, where I became group general counsel in 1999. I undertook to implement P.D Villarreal’s dispute management plan at Nuovo Pignone, the then flagship headquarter company of GE Oil & Gas based in Florence.

In 1999, Michael McIlwrath, a former litigator from a prestigious Wall Street firm, was hired to manage the litigation docket of GE Oil & Gas, and rationalize the number of disputes in which Nuovo Pignone was involved. Before his arrival, the legal department was often not involved in the disputes until it was too late to move away from a full-fledged court dispute, some of which lasted for years. The legal department’s efforts to work closely with the managers to accelerate settlements and reduce costs were hindered by major cultural obstacles and the engineering culture of Nuovo Pignone – engineers being notoriously different from lawyers, and wanting to see measurable, trackable, implementable, practical tools. McIlwrath’s efforts to streamline the disputes were extremely successful: litigations were reduced from 143 large litigations in 1999 to 25 in 2002, i.e. more than 80%.

One of the main cultural obstacles to early dispute resolution, and more particularly mediation, is the unwillingness of business people to cooperate in early case evaluation, and manage the paperwork that goes with it. Even today, the idea of disclosing information to the opposing party is frowned upon by some lawyers, not to mention business operatives, in countries like Italy or France. It is simply not in the “dispute resolution culture” of these countries, used to the “philosophy of litigation by surprise”.²³ However, sometimes all it takes for a culture shift is a successful mediation. Every corporate counsel has this story: a business operative is facing a dispute; the in-house counsel recommends mediation; the business operative cringes at the idea of revealing what may be key strategic data to the other party; the mediation is a success; and the business operative becomes an advocate, and even a convert of mediation. In every future dispute, the business operative will envisage mediation.²⁴

In the United States, this trend toward a more rational approach to dealing with disputes was embedded in the 1984 pledge of the International Institute for Conflict Prevention and

²³ Michael Wheeler and Gillian Morris, ‘GE’s Early Dispute Resolution Initiative (B)’, (2001) HBS N9-801-453, 3.

²⁴ Richard Naimark, Isabelle Vaugon, Mark Appel, *op. cit.*, fn. 20, at 18.

Resolution (or CPR) known as the “Corporate Policy Statement on Alternatives to Litigation” which promotes the use of ADR in order to reach mutually-advantageous business solutions. To this day over 4000 companies have signed the pledge, recognizing the economic benefit of considering mediation and other ADR processes.²⁵

This trend echoed in France in 2005. The Paris Centre of Mediation and Arbitration, CMAP by its French acronym, formed under the auspices of the Paris Chamber of Commerce and Industry (CCIP), adopted the Inter-companies Mediation Pledge,²⁶ a pledge whereby signatory companies undertook to consider and advocate in their dispute policy amicable dispute resolution. This pledge was the result of a study of the Mediation Academy’s working group on mediation and ADR, which pointed out the underdevelopment of mediation in the French dispute resolution culture.²⁷ This effort to promote a more business-oriented way to resolving disputes, aimed at preserving business relationships, gained strong support from over a hundred of the largest French companies. The CMAP pledge is representative of a shift in the dispute resolution culture in France, where the larger companies with an international presence push toward a uniform business-oriented approach to dispute resolution.

Most of the corporate counsel from French companies interviewed during the 2013 Fidal/AAA/ICDR survey saw themselves as ‘agents of change’,²⁸ creating legal departments that are more responsive to the needs of business units, aligned with the company’s goals and focused as much on enabling business development as on managing risk.

This need for structural change responds to the new challenges of corporations in the ever changing globalized environment. Facing legal uncertainties stemming from the diversity of legal systems, the different approaches and corporate cultures throughout the world, companies call for a new corporate governance fit to respond to the challenges of globalization.

Despite it still being an on-going process, it seems that companies, at least the most sophisticated ones, have understood that a system-based approach is a key vector in creating the right legal environment for conducting business. Until the mid-1990s, “no one thought to implement such a systems-based approach for litigation, even as corporations spent millions of dollars a year on

²⁵ ‘CPR Corporate Policy Statement on Alternatives to Litigation’(1984)

www.cpradr.org/Portals/0/About_CPR/Pledge/CPR%20Corporate%20Pledge%20on%20Alternatives%20to%20Litigation.pdf accessed 7 March 2014.

²⁶ CCIP, Charte de la Médiation Inter-Entreprises - pour la Résolution Amiable des Conflits Commerciaux’ (2005) www.etudes.cci-paris-idf.fr/rapport/188 accessed 7 March 2014.

²⁷ *Ibid.*, at 4.

²⁸ This is a term I often heard during my GE career. The GE leaders were required to be ‘change agents’ in their respective fields and for the benefit of their business as well as the overall benefit of the company at large, of GE.

litigation costs by continuing to deal with conflicts on a case-by-case basis. It was considered just another cost of doing business and entered on the expense/liability side of the ledger”.²⁹

In 2013, CPR issued a new pledge: the 21st Century Corporate ADR Pledge. Where the 1986 CPR pledge embodied a general cultural change, the new pledge addressed the need of the companies for more specific structural change. Thus the 21st Century pledge encourages legal practitioners to focus on “a systemic approach to dispute resolution” as a *means* “to change the culture of litigation in Corporate America”.³⁰

Today, a dispute management policy is nothing less than a key element in a sound global business strategy. Numbers speak for themselves. In the 2006 Queen Mary/PWC survey on “International Arbitration: Corporate Attitudes and Practices”, 86% of respondents stated that a dispute resolution policy with an effective management of the dispute process had cost saving effects.³¹ In their 2013 survey “Corporate choices in International Arbitration Industry Perspectives”, Queen Mary and PWC explain this trend by the desire of corporate counsel to “control costs better”.³²

‘*Control*’ is another word that should be underlined. Over the last few years, what I have called the primary, the real international arbitration users, the companies have made efforts to regain control over their disputes by increasing their involvement in the decision-making process related to arbitration.³³ The CCIAG,³⁴ a group made of more than 100 corporate counsel working in companies from all around the world that acts as the voice of the users in international arbitration, recently realized that arbitration could not be perceived separately from the conflict itself which led to the arbitral process. Following the trend toward an increased use of mediation with the advent of multi-step clauses the CCIAG added mediation to its mission statement.

²⁹ William H. Webster and Kathleen A. Bryan, ‘Urgent Need for New Litigation Approach’ (The National Law Journal 2013) <www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/776/Urgent-Need-for-New-Litigation-Approach-Article.aspx> accessed 5 March 2014. It is not surprising that Kathy Bryan, CPR’s President and CEO, would be such a strong advocate of these changes -she was the Corporate Vice President and Director of Litigation Management for Motorola’s Corporate Law Department.

³⁰ ‘CPR Launches 21st Century Corporate ADR Pledge at Annual CPR Meeting in San Diego’ (Press release 2013) (emphasis added), <www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/775/CPR-Launches-21st-Century-Corporate-ADR-Pledge-at-Annual-CPR-Meeting-in-San-Diego-Press.aspx> accessed 8 March 2014.

³¹ Queen Mary University of London and PriceWaterhouseCoopers, ‘International Arbitration: Corporate Attitudes and Practices’, (2006) PWC, 9.

³² Queen Mary University of London and PriceWaterhouseCoopers, ‘Corporate Choices in International Arbitration’, (2013) PWC, 4.

³³ Jean-Claude Najar, *op. cit.*, fn. 5 at 361. The other stakeholders, law firms, lawyers in private practice, arbitral institutions and arbitral tribunals, are, it could be argued, *service providers* to these users and their needs to have their disputes resolved in private and in optimal conditions.

³⁴ Corporate Counsel International Arbitration Group, which I have founded in 2006.

This change of perception led the CCIAG to move the paradigm one step further and incorporate conflict management as one of its fields of discussion and advocacy.³⁵ The CCIAG's reflection on its role for corporate counsel shows how corporate counsel are perceiving *their* role as more and more in-line with the businesses they represent: an exclusively ad hoc perception of disputes has become obsolete. Some authors refer to this 'modern', more global approach to disputes, as "holistic".³⁶ The main difficulty of a holistic approach is to integrate it within a sound system based on a *scientific method* and allowing for the better understanding of the interrelations between disputes and business.

We are entering the era of '*dispute management 2.0*' where disputes are managed on a multitude of interfaces on all levels of the company.

What do we aim for?

What is the response, when dealing with disputes, to the challenges of a global economy?

Structurally, corporate culture, communication and a more horizontal involvement of the legal department are the key elements to enabling and *integrating* a dispute management policy in a company.

During a training I recently gave at the Union Internationale des Avocats (UIA) on the topic of compliance a participant asked me whether risk management should be taken into account when building a compliance program.³⁷ My answer was yes. The compliance program overlooks all the areas of legal risks, certain being more obviously identified (such as corruption, competition law, or environment, health and safety, to cite but a few). Compliance is a novel field of law which creates a new *framework* for identifying risks and responding to them through an internal regulatory system with policies, codes of conducts, and structural changes. It aims at enforcing and improving these policies so employees on all levels remain compliant with the laws and regulations.

During my GE years, compliance ranked high among my responsibilities. The assessment and abatement of risk is the cornerstone of a thorough compliance program. Risk assessment is also a

³⁵ Jean-Claude Najar, 'How to Mitigate Legal and Arbitration Costs: Considerations by a User', (2013) 17 ICCA Congress Series, Kluwer, 319. *See also* Isabelle Hautot, 'Update from the CCIAG', (April 2013) ICCA Review, 5.

³⁶ Susan R Chema and Steven A. Lauer, 'A Holistic Approach to Corporate Compliance and Dispute Management', (2004) 34 The Lawyer's Brief, 2; Kathleen Bryan, 'Use Mediation Training to be a Client Centered-Lawyer From the Experts' (Corporate Counsel 2014)

www.corpcounsel.com/cs/Satellite?c=Article_C&childpagename=CC%2FArticle_C%2FArticle%2FLayouts%2FPrinterFriendly&pagename=ALM_Wrapper&cid=1202645801916# accessed 8 March 2014.

³⁷ 'Compliance – Challenges and Opportunities: How to Build and Implement an Effective Compliance Program' held on 6-7 March 2014 in Paris.

pillar of a sound dispute management process. Could dispute management be considered as an integral part of a broader compliance program, aiming at responding in a structured and systemic way to disputes within a given corporation ?³⁸

What about the policy in itself?

A dispute management policy must respond to the changing world (more mobile, more international), the new professional fields, the more flexible societal standards (in most globally exposed cultures), and above all it must contribute to facilitate business and the generation of profit.

- **Firstly, there is no ‘one size fits all’. Solutions are tailor-made.**

A ‘one size fits all’ approach negates the reality of global business. The dispute management solutions have to take many parameters into account: the size of the company, the nature of the business, its geographical reach, the means at its disposal, and, as I stated before, the willingness of management to manage conflict like any other process.

If a company-wide approach is vital to insure coherent risk management and cost-effective dispute resolution, the GE experience in Nuovo Pignone revealed that *translating* foreign concepts and practice in a new, European (in this case), context was a major challenge. McIlwrath did not copy-paste Villareal’s dispute management program; instead he found ways to adapt the key principles to the particularities of Nuovo Pignone. The dispute management plan, in this case an Early Dispute Resolution plan (EDR), was thus conceived as a ‘toolkit’ encouraging managers to assess the costs of pending disputes and consider creative ways to solve them.³⁹

Similarly, Shell’s policy also involves approaching disputes with a focus on cost and length of dispute resolution. Shell’s ‘Litigation Objective Realization Process’ (LORP) aims at identifying and assessing litigation objectives and risks as early as possible, selecting a strategy adapted to the nature of the conflict and business involved, resolving this conflict in accordance with the strategy put in place and eventually reviewing the result of the process and communicating about it globally within the group.⁴⁰

AkzoNobel has developed a dispute resolution policy encouraging early resolution and a reporting structure and process. The company appoints business-led case teams, provides regular

³⁸ For an argument which supports this proposition, see Albert C. Peters II, Madeline Cahill-Boley and Steven A. Lauer, ‘Disputes and Litigation: Tame the Two-headed Beast’, (2013) 31 ACC Docket, 50.

³⁹ Michael Wheeler and Gillian Morris, *op. cit.*, fn. 22 at 4.

⁴⁰ Peter J. Rees QC and Kathleen Bryan, *op. cit.*, fn. 1 at 66.

trainings for their in-house dispute specialists and systematically requires a risk analysis of each case. Early Dispute Resolution has been used in a variety of cases from IP infringement to antitrust allegations.⁴¹

Siemens also adopted an approach aimed at rationalizing the resolution of disputes. In the context of construction disputes, contrary to common practice in the civil construction industry, Siemens makes a cost/benefit assessment when considering the establishment of dispute boards. In an interesting paper on international construction arbitration co-drafted by two former CCIAG Steering Committee members, the authors remind us that “all the parties involved in dispute settlement have to be aware that dispute resolution is one aspect of project management”.⁴² Dispute boards are one of the ‘tools’ of the dispute resolution ‘toolkit’: they are permanent boards providing decisions or recommendations in cases of disputes, the decisions become binding if they are not objected to by one of the parties.⁴³ For cost reasons, “Siemens usually only establishes dispute boards on an ad hoc basis to deal with a particular dispute” as “the number of disputes associated with major power station projects is not [...] high enough to justify keeping a dispute board throughout the duration of a project”; however, “crisis projects” likely to be the subject of numerous disputes may require Siemens to establish permanent dispute boards.⁴⁴

Other major companies, like Areva, Bombardier, Total, American Express, GSK, Thalès or Orange to cite but a few, have put in place similar dispute management processes.

- **Secondly, Early Dispute Resolution and systemic approaches are a necessity for business.**

The early focus on settlement is generally accepted as the most cost-efficient approach to dispute management. Indeed a sound dispute management policy implies identifying conflicts as early as possible, trying to avoid disputes whenever possible and feasible, and otherwise looking for the fastest and most appropriate dispute resolution process.⁴⁵ In a 2010 research comparing trial results with rejected pre-trial settlement offers, 61% of plaintiffs and 21 to 24% of defendants obtained an award at trial that was equal to or lower than what they could have achieved by

⁴¹ Michael Leathes, ‘Conflict Leadership’ (2009) < <http://imimmediation.org/conflict-leadership> > accessed 11 March 2014.

⁴² Paul Hobeck, Volker Mahnken and Max Koebke, ‘Time for Woolf Reforms in International Construction Arbitration’ (2006) 2 Int. A.L.R., 90. Volker Mahnken and Max Koebke were these two members.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ ‘Conflict’ and ‘dispute’ are two distinct concepts. According to Professor Douglas Yarn a ‘conflict’ is a state whereas a ‘dispute’ is a process. “People who have opposing interests, values, or needs are in a state of conflict which may be manifest, in which case it is brought forward in the form of a dispute” *in* Douglas H. Yarn, ‘Dictionary of Conflict Resolution’, (Jossey-Bass, San Francisco 1999), 115.

accepting their opponent's pre-trial settlement proposal.⁴⁶ The 2013 Queen Mary/PWC survey reveals that the majority of disputes are settled (57% against only 32% referred to litigation or arbitration).⁴⁷ Early resolution of disputes is simply a better deal than litigation/arbitration.

GE's EDR initiative implied a collaborative and systemic dispute resolution process designed to facilitate early (including pre-lawsuit) assessment or resolution of disputes. It encouraged early and informal dispute resolution techniques and mediation in particular. The GE process was a rational one. It required:

- Firstly, identifying the right people connected to the dispute, business owners, stakeholders, and experts.
- Secondly, conducting an Early Case Assessment (ECA) , analysing the best case/worst case scenarios, identifying the best alternative to a negotiated agreement.
- Thirdly, involving the business owner/business operative in the process and agree on a strategy.
- Fourthly, executing the strategy and considering mediation.

The systematic use of mediation is an essential element in the rationalization of disputes. It may help pin-point the conflict that has led to the dispute.⁴⁸ When the dispute is too complex, mediation may help understand the issue at stake; if too emotional, mediation may help diffuse the tension. In any case, mediation may help preserve the business relationship between the parties, where a litigation/arbitration would scar it at best. Mediation implies perceiving a dispute differently. Parties that agree to mediation accept the idea that they might not fully understand the problem at stake; they recalibrate the dispute from its purely legal perspective (what is right/wrong) to its business aspects (what is gained/lost). A rational approach to disputes will require 'soft skills': the skills to overcome emotional barriers, to take a step back and acknowledge feelings and dilemmas as part of the problem in order to find constructive ideas to facilitate a mutually beneficial resolution of the conflict. In other words, when taking a global approach to disputes, the psychological elements that form the conflict in which the dispute is rooted need also to be taken into consideration.

The systemic use of mediation does not mean that mediation will always be used, but instead that it will always be *considered*, that the company, its lawyers and its business operatives will acknowledge this facet of dispute resolution.

⁴⁶ Kathleen Bryan, *op. cit.*, fn. 35.

⁴⁷ Queen Mary University of London and PriceWaterhouseCoopers, *op. cit.*, fn. 31 at 5.

⁴⁸ *See* fn. 44.

Including stepped dispute resolution clauses with preliminary mediation has become a standard in modern contracts.⁴⁹ Incorporating such clauses in a contract creates an obligation not only for the opposite party, but also on an internal level for the counsel and business operatives in the company. Standardization is a vector of communication, an expression of the company's culture and a tool for change.

- **Thirdly, measuring and monitoring results enable the perpetual improvement of the policy.**

I have mentioned earlier that a holistic or global approach, must be integrated within a system based on a *scientific method* and allowing for the better understanding of the interrelations between disputes and business. Science can be defined as “systematized knowledge derived from observation, study and experimentation carried on in order to determine the nature or principles of what is being studied”.⁵⁰ Therefore, a scientific method requires to constantly analyse the disputes solved and verify the principles affirmed. This can only be achieved through thorough measurements: of the costs of the dispute, the duration, the efficiency of the process, the money and the time saved. The data gathered will allow to improve the dispute management system and give legitimacy to the chosen dispute resolution tools with home-grown results.

Where are we now?

We have gone a long way from the ‘action-reaction’ approach to dispute resolution. Legal departments have undergone a change in status and role, as their leaders are now increasingly involved in the company's strategic decisions.⁵¹ The management of dispute has become more rational, responding to a purely practical purpose: making the dispute compatible with the company's global business strategy.

As stated above, more than 4,000 operating companies and 1,500 law firms have signed the 21st Century CPR pledge. Interestingly, and although the pledge promotes “a systemic approach to dispute resolution and offers a means to change the culture of litigation in Corporate America”⁵² some European companies (British Petroleum, GlaxoSmithKline, Tesco, AkzoNobel N.V, Royal Dutch Shell...) have also signed the pledge, suggesting that this effort to impact corporate culture in America is actually spreading beyond US borders. Indeed in 2013, the CMAP and the CPR entered into a mutual recognition agreement aiming at promoting their respective pledges,⁵³ thus broadening the scope of these initiatives far beyond corporate America.

⁴⁹ Derek Roebuck, ‘Time to think: understanding dispute management’, (2011), 77(3) *Arbitration*, 348.

⁵⁰ ‘Webster's New Twentieth Century Dictionary Unabridged’, (Collins and World, 1978), 1622.

⁵¹ Richard Naimark, Isabelle Vaugon, Mark Appel, *op. cit.*, fn. 20 at 3.

⁵² *Op.cit.*, fn. 29.

⁵³ ‘New Partnership between CMAP and CPR’ (CMAP News 2013) <www.cmap.fr/CMAP-news-182-en-detail-25.html> accessed 10 March 2014.

Other systems, which may seem almost futuristic, take into account the latest technological developments. In Italy, GE Oil & Gas has implemented an online system for cyber-settlement in order to deal with small manufacturing disputes of less than €50,000. If no settlement is reached, the parties may then proceed with cyber-arbitration (no hearing, the arbitrator deals with the parties only via internet tools). The resolution is particularly quick: less than three months. With a rate of 65% settled cases, this system is in line with the rate of settlement of disputes before litigation/arbitration.⁵⁴

The way dispute management is perceived is unquestionably shifting toward a business-centred approach. Organizations like the CCIAG and the ACC, as well as institutions like the ICC, the AAA/ICDR, the CPR to name but a few, symbolize this global dynamic. Companies which have signed the CPR's 21st Century Pledge are often also represented by their corporate counsel at the CCIAG. Cross-fertilization, and 'exchange of best practices', is in the move.

Other institutions are playing a crucial part in enabling companies to fulfil their dispute management objectives. Arbitral institutions have tried to adapt to the needs of the corporations, and in particular the need for comprehensible and adequate alternative dispute resolution mechanisms. For example the ICC has incorporated its 2014 Mediation Rules in its Arbitration Rules booklet, suggesting that mediation should always be considered when contemplating arbitration. Indeed, the introduction to the rules underline that "the two sets of Rules are published together [...] in answer to the growing demand for a *holistic* approach to dispute resolution techniques".⁵⁵ The International Mediation Institute (IMI), a non-profit organization promoting mediation and providing certification for mediators has recently started a collaboration with the CCIAG on the issues related to mediation.⁵⁶ This global interconnectivity reveals a common effort of businesses, dispute resolution providers and organizations to create and maintain a sustainable business environment.

It has become indispensable to help prepare corporate counsel to the efficient management of disputes. Not all companies are equipped or sophisticated enough to face this challenge. Therefore, organizations and arbitral institutions have taken the initiative to inform corporate counsel on the dispute resolution and dispute management technics via so-called "toolkits". A toolkit can be characterized as a compendium of key data in a practical format, enabling the less experienced parties to make informed choices.

⁵⁴ Vanessa O'Connell, 'At GE, Robo-Lawyers Oil-and-Gas Unit Tests Online Resolution to Control Cost' (The Wall Street Journal Online 2011)

<<http://online.wsj.com/news/articles/SB10001424052970203633104576620902874155940>> accessed 9 March 2014.

⁵⁵ ICC Arbitration Rules Mediation Rules booklet, (2013) ICC Publication, 1. (emphasis added)

⁵⁶ 'CCIAG and IMI to collaborate' (IMI website 2013) <<https://imimediation.org/cciag-and-imi-to-collaborate>> accessed 11 March 2014.

In October 2013, an ICC task force composed of corporate counsel, a private practitioner, an arbitrator, and representatives of the ICC Court of International Arbitration Secretariat finalized a guide for the effective management of arbitration by in-house counsel and other party representatives.⁵⁷ This project, the culmination of a 3 year joint effort, aims to provide in-house counsel and other party representatives, more particularly government representatives in investment arbitrations (but also external counsel), with practical tools for customizing the arbitration process. This guide enables them to make effective time and cost decisions having regard to the complexity and the value of the dispute at hand. While designed with the ICC Rules of Arbitration in mind, the vast majority of the toolkit can be used in all arbitrations. Noticeably, this toolkit addresses the modern need for a rational and holistic approach to the management of disputes: it draws a roadmap through the dispute, from its pre-arbitration stage, by discussing settlement considerations, to the arbitration itself. With its step-by-step approach through a series of 11 topic sheets, each dealing independently with a specific step in the arbitration process, the toolkit facilitates sound cost-risk/benefit decision making. This ICC toolkit will set a new standard in the management of arbitrations by giving in-house counsel tools and tips to be more involved in the arbitration process.

This trend is slowly growing. CPR's European Executive Board is currently developing its own arbitration toolkit for corporate counsel. The IMI has implemented a number of web-based 'tools' in order to help those facing the choice of mediation to tailor the proceedings to their dispute, and has also developed the "IMI web app",⁵⁸ a smartphone application with a mediators database.

The application format is remarkably in line with the current technological standards and oddly enough, quite under-used by the institutions and the organizations: if we look at the major arbitration institutions only SIAC⁵⁹ and AAA⁶⁰ have developed smartphone applications. It is only a matter of time before other institutions and organizations join this trend. A debate between a young and a more senior practitioner of arbitration, which took place during a conference on the choice of arbitrator organized by the CCIAG with the ICC Institute of World Business Law,⁶¹ illustrates the shifting paradigm accompanying the rise of the so-called 'Y Generation':

⁵⁷ 'Effective Management of Arbitration: a Guide for In-house Counsel and Other Party Representatives'. The guide was unanimously approved at the bi-annual meeting of the ICC Commission on Arbitration and ADR held in Boston on 5 October 2013, and was launched world wide on 6 June 2014 at the ICC headquarters in Paris.

⁵⁸ 'IMI website' <www.imimmediation.org/research-resources> accessed 11 March 2014.

⁵⁹ Blackberry application store at

<<http://appworld.blackberry.com/webstore/content/49817/?lang=en&countrycode=FR>> accessed 12 March 2014.

⁶⁰ Google application store at <<https://play.google.com/store/apps/details?id=org.adr.mobileapp.android>> accessed 12 March 2014.

⁶¹ CCIAG/ICC Institute of World Business Law conference, 'Choice of the arbitrator: conditions of a renewed

the discussion on transparency of arbitrator performance and the reluctance by the senior practitioner for too much divulgation resulted in a statement by the young corporate counsel that ‘in five years, there would probably be a ‘choose your arbitrator’ app on cell phones’; the majority of the audience laughed. I think this young corporate counsel was right, if not in the detail, certainly in the prediction that the pace of technology will force change.

Conclusion

Throughout my quasi quarter-century practice as a in-house counsel, I have isolated some key elements that enable a thorough dispute management in a company :

- **Integration:** integrating legal departments within the company’s business (remember that in a company, legal problems are first and foremost business problems).
- **Dispute management policy:** risk management (of which ‘dispute management’ is a sub-category) is closely related to a company’s compliance program: dispute management systems imply a dispute management policy, embedded in the overall compliance program (in the widest sense of the term).
- **Awareness and communication:** a policy can only be functional if it is efficiently made known globally on a company level.
- **Monitoring:** improving the dispute management policy and systems will require a thorough monitoring of the results of the disputes. Monitoring will allow to identify patterns, which will help improve the systems in place.
- **Tone at the top:** willingness of senior management to be involved in the management of conflicts and their readiness to be involved in the resolution of the disputes is key.⁶²

Rationalizing disputes is a necessity. Disputes disrupt business, they divert the time and effort of the company’s staff and management from its ‘core competencies,’ which inevitably impacts the business, its development, its opportunities... These hours spent on a dispute are so many hours *not spent* on a profit generating activity. Most companies are not in the business of litigation, they are in the business of what they have been created for.⁶³ Implementing systems and

legitimacy’ (conference held on 21 October 2013) <www.cciag.com/conferences/first-cciag-conference/> accessed 11 March 2014.

⁶² The building blocks of a dispute management process bear very close, if not almost identical, similarities to those of a compliance program: (i) tone at the top, (ii) risk assessment and abatement, (iii) tracking mechanism, (iv) communication, (v) training, and (vi) reporting and resolving concerns.

⁶³ For a discussion of this aspect, see Jean-Claude Najjar, ‘Inside Out : A User’s Perspective on Challenges in International Arbitration’, (2009) 25 J. Int. Arb, 517. , which is adapted from the Eighth Clayton Utz / University of

processes, shifting towards a more business oriented culture in legal departments facilitates the company's income generating activity. These processes are elements that compose a company-wide self-regulatory system.

For a business, a thoroughly self-regulated company is the guarantee of a coherent global strategy. It enables corporate counsel and business people who may come from different environments to speak the same language, maybe not literally, but in their own distinctive way they will share the same processes, the same policy, and the same corporate culture which will transcend their differences.

Modern dispute management breaks with the old model, where management would instruct their lawyers to manage a dispute because it is 'what they are paid to do'. Corporate counsel have to learn to 'think different', to adapt their function to the needs of the company. In a world of increased interconnectivity, the notion of dispute management needs to be constantly 'updated'. Today has become the beta version of tomorrow.

Sidney International Arbitration Lecture the author gave in Sidney in 2008. Australia showed, in the author's opinion, foresight in inviting a corporate counsel to speak on how to manage disputes.