Planned Early Dispute Resolution Systems and Elements: Experiences and the Promise of Technology

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ABSTRACT

The COVID-19 outbreak has severely impacted global business communities. Experts predict a tsunami of disputes. In this unprecedented situation, rational, cost-effective and quick dispute resolution is no more an option but a need. This need may be met by Planned Early Dispute Resolution (PEDR) and technological tools. Although the uptake of both has been slow so far, the current crisis may act as a catalyst for their more extensive use. This article starts with an overview of PEDR by addressing its definition, models, elements and use, among other aspects. It then investigates actual experiences of companies with PEDR systems and elements and discusses the effect that the companies’ shift to PEDR has on law firms. The article concludes by exploring how PEDR systems can benefit from the use of technological tools and how the interaction between technology and dispute resolution can contribute to shaping the future of the legal profession.

1. INTRODUCTION

Rationalizing disputes is a necessity.¹ Disputes disrupt business; they divert the time and effort of the company’s staff and management from their core tasks, which inevitably impacts the development of business and its opportunities.² The hours spent on a dispute are hours not spent on a profit-generating activity. Except for so-called third-party funders,³ companies are not in the business of litigation. They are in the business of the economic activity they have been created for.

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¹ Jean-Claude Najar, ‘Corporate Counsel in the Era of Dispute Management 2.0’ (2014) 15(3) Bus L Int’l 237, 254.

² The focus of this article is international commercial dispute resolution.

³ Third-party funders are understood as entities that have no interest in the underlying merits of a dispute but provide funding to finance the legal costs and expenses of a litigation or arbitration. ICCA-Queen Mary Task Force, ‘Report of the Task Force on Third-Party Funding in International Arbitration’ (April 2018) 1 fn 1.
Notably, a high proportion of disputes that end up in courts settle before a judgment is given.\(^4\) The amount of arbitration cases that settle before there is an award is also considerable, although not as high.\(^5\) Settlement, however, often comes only after the parties’ lawyers engage in a lot of adversarial posturing, the parties’ relationship deteriorates further and the process absorbs party resources. At that point, none of the parties is particularly happy with the settlement anymore.\(^6\) Why do parties settle so late? This happens for a number of reasons.

Sometimes parties are concerned that even suggesting cooperation with the other side will make them look weak and encourage the other side to try to take advantage of them.\(^7\) Sometimes parties do not trust that the other side will negotiate in good faith. Lawyers may fear that potential clients will not retain them if they seem too interested in cooperation with the other side. Parties and lawyers may believe that they can achieve better results by starting with an extreme position, and later making concessions as necessary. These actions can reinforce fears of the other side and lead to a cycle of escalating conflict. Parties end up locked in a ‘prison of fear’ that keeps them paralysed in adversarial processes.\(^8\)

Apparently, businesses understand the high probability that their commercial disputes will be settled and not tried.\(^9\) However, businesses want earlier (rather than later) settlements with less internal and external expenses. This aspiration finds support in recent empirical findings. The global interest in the use of pre-escalation processes emerged as a striking area of consensus among the parties and across all other stakeholder groups participating in the Global Pound Conference Series 2016–17 (GPC) survey.\(^10\) The survey participants ranked pre-escalation processes to

\(^4\) That appears to be the case at least in common law jurisdictions. See eg Michael Leathes, *Negotiation: Things Corporate Counsel Need to Know but Were Not Taught* (Kluwer Law International 2017) 148 (referring to an observation that in the USA, only about 10% of cases in state courts and about 2% of cases in the federal courts actually get to a full-blown trial while almost all are settled); ‘The Settlement Deficit in Arbitration’ (GAR News, 17 September 2018) <https://www.akingump.com/a/web/97268/GAR-The-settlement-deficit-in-arbitration.pdf> accessed 28 October 2020 (noting that while reliable statistics are hard to come by, it is frequently reported that less than 5% of litigation actions commenced in the USA, England and other common law jurisdictions go to trial; while this does not mean that all other cases settle, as they can be resolved or discontinued for numerous reasons, it can fairly be assumed that well over half of litigation cases do settle).

\(^5\) The Settlement Deficit in Arbitration, ibid (observing that statistics published by arbitral institutions suggest much lower settlement rates in arbitration as compared to litigation; for example, statistics published by the Swiss Chambers’ Arbitration Institution show that 27% of all arbitrations it administered between 2004 and 2015 settled); see also Queen Mary University of London/Price Waterhouse Coopers, ‘2008 International Arbitration Study – Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards’ 6 <http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf> accessed 28 October 2020 (reporting a result that one third of the parties in an arbitration settle during the course of the proceedings).

\(^6\) John Lande, Kurt L Dettman, and Catherine E Shanks, ‘User Guide on Planned Early Dispute Resolution’ (Planned Early Dispute Resolution Task Force, American Bar Association Section of Dispute Resolution 2013) 1 (ABA PEDR Guide).

\(^7\) ibid 2.

\(^8\) ibid.

\(^9\) Dean B Thomson and Paul M Lurie, ‘The Guided Choice Process for Early Dispute Resolution’ (2017) 1(1) Am J Construct Arbit & ADR 23, 33.

\(^10\) More than 4000 people participated in the survey at 28 conferences in 24 countries across the globe and online. The participants included parties (users of dispute resolution services), external lawyers, adjudicative
prevent disputes as top processes (51%) that should be prioritized to improve the future of commercial dispute resolution.\textsuperscript{11}

In the current situation of crisis caused by the COVID-19 outbreak, this demand for resolving disputes at earlier stages could only have increased. As the coronavirus has severely impacted global business communities, once the dust of the crisis settles, experts predict a tsunami of disputes.\textsuperscript{12} To resolve those, parties might hesitate to go to court. As the courts in many jurisdictions were not technologically equipped to handle litigation remotely, the coronavirus has led to the suspension of civil trials in such jurisdictions.\textsuperscript{13} As a result, once the coronavirus passes, many courts are destined to face the unprecedented backlog, which will lead to greater uncertainty and costs. One could assume that in these circumstances instead of being caught in a legal action, businesses would want to resume their operations quickly. This is because those that settle disputes early will be in a stronger position to recover from the economic uncertainty.\textsuperscript{14} Although, as explained below, so far the uptake of the Planned Early Dispute Resolution (PEDR) and technology in the dispute resolution field has been slow, the current crisis may serve as a catalyst for untapping the potential of both.

The article focuses on PEDR and technology and consists of three parts. It starts by providing an overview of PEDR, while the second part presents and discusses the actual experiences with PEDR systems and elements. The article concludes by exploring the promise of technology for PEDR and how the interaction between technology and dispute resolution can help shape the legal profession of the future.

\section*{2. OVERVIEW OF PLANNED EARLY DISPUTE RESOLUTION}

This first part of the article offers an overview of PEDR by addressing its definition, models and elements, core characteristics and value, the current state of affairs with PEDR as well as dispute resolution processes used within the PEDR’s framework.

\subsection*{A. Definition of PEDR}

While no generally accepted definition of PEDR exists, it is commonly understood as a systemic approach designed to enable parties and their lawyers to resolve

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\item<11> This result is indicative despite the non-scholarly nature of this survey.
\item<12> George Lim, ‘Future of International Mediation: Post Covid-19 Pandemic and its Impact on Cross-Border Disputes’ (PowerPoint slides presented at SIMC-KCAB International Mediation Webinar, 3 June 2020) \url{https://drive.google.com/file/d/10UtR_DR1HtGJhBxRMZUjbjrIHwUMuj2/view?pli=1} accessed 26 June 2020; Naomi Neilson, ‘Courts Not Ready for Post-COVID World’ (Lawyers Weekly, 1 June 2020) \url{https://www.lawyersweekly.com.au/sme-law/28474-courts-not-ready-for-post-covid-world} accessed 26 June 2020.
\item<13> Howard J Kaplan, ‘Thoughts on ADR in the Face of the Covid-19 Pandemic – A Neutral’s Perspective’ (NAM, 17 April 2020) \url{https://www.namadr.com/publications/thoughts-on-adr-in-the-face-of-the-covid-19-pandemic-a-neutrals-perspective/} accessed 26 June 2020.
\item<14> Chuan Wee Meng, ‘Resolving Cross-Border Disputes Online: SIMC COVID-19 Protocol’ (PowerPoint slides presented at SIMC-KCAB International Mediation Webinar, 3 June 2020) \url{https://drive.google.com/file/d/10UtR_DR1HtGJhBxRMZUjbjrIHwUMuj2/view?pli=1} accessed 26 June 2020.
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disputes favorably and with reduced cost as early as reasonably possible.\textsuperscript{15} It involves strategic planning for preventing conflict and handling disputes in the early stages of conflict on a systematic basis rather than ad hoc.

**B. Models and Elements of PEDR**

No strict uniform model of PEDR systems exists and businesses should tailor their PEDR systems to fit their specific needs.\textsuperscript{16} Neither is there a consensus as to what elements a PEDR system should comprise.

Addressing the possible elements of PEDR systems, a User Guide on PEDR developed by the PEDR Task Force of the American Bar Association (ABA) Section of Dispute Resolution divides them into two groups.\textsuperscript{17} The elements of the first group relate to pre-dispute planning and include signing an Alternative Dispute Resolution (ADR) pledge,\textsuperscript{18} using contractual provisions establishing procedures to deal with disputes arising from contracts;\textsuperscript{19} partnering\textsuperscript{20} and using dispute management teams.\textsuperscript{21} The elements of the second group relate to post-dispute processes and include conducting an early case assessment (ECA);\textsuperscript{22} providing for an early joint case management by business executives and for an early case management by lawyers; and using third-party neutrals.\textsuperscript{23} In addition, parties and their lawyers may use alternative legal fee arrangements to create incentives for lawyers to achieve their clients’ goals.\textsuperscript{24}

Scholars also share their views on what the elements of PEDR systems could be. Silverman suggests a four-step early dispute resolution (EDR) process comprising an ECA, document and information exchange, case valuation and negotiation or mediation,\textsuperscript{25} while Lande and Benner relying on their empirical findings include in a

\textsuperscript{15} John Lande and Peter W Benner, ‘Why and How Businesses Use Planned Early Dispute Resolution’ (2017) 13 Univ of St. Thomas L J 248, 249.

\textsuperscript{16} Different approaches are needed for different companies depending on their size, line of business, history of disputing, resources, corporate culture, the interests of key stakeholders, the nature and variety of the contracts they enter into, and the culture of their counterparties, among other factors. ibid 260.

\textsuperscript{17} ABA PEDR Guide (n 6) 6–10.

\textsuperscript{18} ADR Pledge is generally understood as a public statement in which those who sign it (corporations, law firms, etc) declare to adopt a systemic approach to dispute resolution with more focus on mediation and ADR. Rafal Morek, ‘New ADR Pledge’ (Kluwer Mediation Blog, 9 March 2013) <http://mediationblog.kluwerarbitration.com/2013/03/09/new-adr-pledge> accessed 26 June 2020.

\textsuperscript{19} This will be discussed further in Section 3.B of this article.

\textsuperscript{20} That is a mechanism to manage disputes promptly as they arise when two or more entities engage in ongoing operations. Such managements can occur, for example, through immediate consultation between the parties and referral up the chain of command under specified circumstances. ABA PEDR Guide (n 6) 7.

\textsuperscript{21} These are teams that may be created within a single party or made up of equal counterparts from each co-party with the goal of applying collective knowledge to anticipate possible problems and improve the resolution process. ibid 7–8.

\textsuperscript{22} This will be discussed further in Section 3.C of this article.

\textsuperscript{23} For example, neutral facilitators, fact finders, evaluators, mediators and/or arbitrators. ABA PEDR Guide (n 6) 10.

\textsuperscript{24} ibid 11.

\textsuperscript{25} Peter R Silverman, ‘Early Dispute Resolution: Resolving Disputes Within 30 Days of Inception’ (Paper presented at a conference on Integrating Contemporary Dispute Resolution Procedures into Today’s Courts, 13 March 2018, Columbus, Ohio) 15–19.
PEDR system the following elements: designating PEDR counsel to oversee company’s ADR activities; using dispute prevention and resolution contract clauses; conducting an ECA; determining appropriateness of cases for PEDR; systematically using dispute prevention and resolution processes (e.g., direct negotiation, mediation and arbitration); providing practice materials and training; and using alternative attorney fee arrangements to increase the law firm’s efficiency and focus on the company’s interests.27

C. Core Characteristics of PEDR and Its Value

Contrary to an ad hoc approach, PEDR approach is characterized as systemic and systematic.

Corporate counsel believe that EDR and systemic approaches are a necessity for business.28 Najar emphasizes that the evolution from ad hoc to systemic dispute resolution is a key vector in creating the right legal environment for conducting business.29 Leading scholars on the topic also advocate against an ad hoc approach. Lande and Benner are convinced that the use of ADR mechanisms such as mediation at an early stage of a dispute on an ad hoc basis can be problematic.30 Unplanned EDR efforts are less likely to be successful if the lawyers and parties have not prepared adequately, have not exchanged the necessary information and do not have the proper mindset to resolve disputes.

The importance of taking a system-based approach was recognized by the International Institute for Conflict Prevention and Resolution (CPR) in 2013 in its 21st Century Corporate ADR Pledge.31 Where the previous 1986 CPR pledge embodied a general cultural change, the new 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’.32

A systematic approach provides appropriate and adequate checks and balances to help overcome the natural human tendency to escalate conflict.33 The typical ‘escalation cycle’ means that the longer a conflict continues, the more intense and complex it becomes. In a systematic approach, early intervention and analysis create the most significant opportunities to achieve better and earlier resolution of disputes.

26 PEDR systems are generally appropriate when the parties have a continuing relationship and inappropriate, for example, in cases where a company needs a binding legal precedent or if the other side has no interest in settlement.
27 Lande and Benner (n 15) 260–88. At the same time, Lande and Benner identify an ECA and training of relevant personnel as essential elements of PEDR systems that emerged from their empirical study. ibid 290.
28 Najar (n 1) 248.
29 ibid 239.
30 Lande and Benner (n 15) 254.
31 The CPR 21st Century Corporate ADR Pledge can be accessed at <https://www.cpradr.org/resource-center/adr-pledges/21st-century-pledge> accessed 15 February 2021.
32 More than 4000 operating companies, including some European companies (British Petroleum, GlaxoSmithKline, Tesco, AkzoNobel NV, Royal Dutch Shell, etc), and 1,500 law firms have signed the 21st Century CPR pledge. Najar (n 1) 250–51.
33 Peter J Rees and Kathleen Bryan, ‘How to Manage Disputes in a Flat World’ [June 2013] ACC Docket 55, 58.
A systematic approach to dispute management has been endorsed by several studies. For example, Herbert Smith conducted an ADR usage survey of 21 European companies.\(^{34}\) One of the main findings was that as distinct from companies that managed disputes on an ad hoc basis or did not use ADR at all, embedded users (companies which used ADR consistently and earlier in the process) achieved greater savings in external legal costs and in management of time spent on dispute resolution. They also enjoyed the most constructive relationships with their external dispute resolution lawyers.\(^{35}\)

Some leading companies have decades of experience using PEDR systems.\(^{36}\) This is the case, for example, for Motorola,\(^{37}\) Georgia-Pacific\(^{38}\) and General Electric.\(^{39}\) These experiences, among others, will be discussed further on in this article. Companies report that the introduction of PEDR programmes leads to substantial financial savings. For example, Georgia–Pacific estimated that after initiating the programme in 1995, it saved $1 to $6.5 million per year through to 2004.\(^{40}\) A study at one more company, DuPont, showed that average potential litigation cost savings from the use of early mediation in commercial matters averaged $350,000.\(^{41}\)

### D. Current State of Affairs with PEDR

Considering the growing body of data demonstrating the benefits of employing a systemic and systematic approach for EDR, one could expect that using a PEDR system would be a logical course of action for businesses that regularly litigate. Nevertheless, PEDR systems appear to be scarce and many companies still tend to handle each dispute independently.\(^{42}\) This state of affairs is confirmed by a recent empirical study where the authors conclude that ‘despite strong interests in using some form of PEDR, many (perhaps most) businesses seem like proverbial lemmings, unable to change their litigation-as-usual approach’.\(^{43}\)

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34 Herbert Smith, ‘The Inside Track – How Blue-chips Are Using ADR’ (November 2007) <https://sites-herbertsmithfreehills.vuturevx.com/20/10753/landing-pages/6398-adr-report-d4.pdf> accessed 26 June 2020.
35 See also studies reported in Craig A McEwen, ‘Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation’ (1998) 14 Ohio St. J. on Disp. Resol. 1 and American Arbitration Association (AAA), ‘Dispute-wise Business Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts’ https://www.aminz.org.nz/Attachment?Action=Download&Attachment_id=46> accessed 26 June 2020.
36 Lande and Benner (n 15) 250.
37 Richard H Weise, ‘The ADR Program at Motorola’ (1989) 5 Negot J 381.
38 Phillip A Armstrong, ‘Georgia-Pacific’s ADR Program: A Critical Review After 10 Years’ (2005) 60 Disp Resol J 19.
39 Elpidio Villarreal, Jeffrey Paquin, and Jennifer Victor, ‘General Electric’s Integrated Conflict-Management System: The Prevention, Early Identification and Early Resolution of Disputes’ [2002] Chief Legal Officer 35.
40 Armstrong (n 38) 20.
41 David H Burt, ‘The DuPont Company’s Development of ADR Usage: From Theory to Practice’ (2014) 20 Disp Resol Mag 5, 8.
42 Rees and Bryan (n 33) 56.
43 Lande and Benner (n 15) 252. Earlier studies came to the same conclusion. See, for example, a study following up the 1997 Cornell survey or the 2003 Business ADR Benchmarking Study sponsored by the Maryland Mediation and Conflict Resolution Office. Both studies are discussed in Thomas J.
E. Dispute Resolution Processes in PEDR

One may wonder what distinguishes PEDR from the extant dispute resolution processes. As mentioned in section 2.A, PEDR is a systemic approach to systematically preventing and handling disputes as early as reasonably possible. It is not a procedure, mechanism or a dispute resolution process per se. Rather, it is a framework for their use, including (apart from already mentioned negotiation, ECA, mediation, PEDR counsel and arbitration) collaborative law, cooperative law, mini-trial and early neutral evaluation. The options are not merely stand-alone. Many can be combined with others in creative hybrids.

In addition, innovative variations of some well-known ADR processes emerge and may be considered for the purposes of PEDR. One example is Planned Early Two-Stage Mediation (PETSM). If everyone assumes that mediation normally involves one session, parties may feel pressure to settle their case even if they do not have enough information or are not ready to make a decision. This can cause buyer’s remorse, leading parties to go back on agreements, file a lawsuit to invalidate them or even sue neutrals or lawyers. These problems generally can be avoided if parties plan for two possible mediation sessions. The first session should occur soon after some basic fact-finding and legal research. In this session, everyone could plan tasks to be completed before the second session. Mediators can identify uncertainties, unrealistic assumptions and encourage people to check them out. This should reduce a possibility for a mediator to provide own assessments and to pressure parties into settling. If parties, however, settle in the first session, no second session is needed.

3. EXPERIENCES WITH PEDR SYSTEMS AND THEIR ELEMENTS

The second part of the article brings together publicly shared experiences of companies with PEDR systems and their elements as well as discusses the effect that the companies’ shift to PEDR has on law firms. In particular, it examines the stimuli

Stipanowich, ‘ADR and the “Vanishing Trial”: The Growth and Impact of Alternative Dispute Resolution’ (2004) 1(3) J Empiric Legal Stud 843, 883–93.
44 Collaborative law provides for an agreement by the parties and lawyers, under which the lawyers commit to terminate their representations if no settlement is achieved and the matter proceeds to litigation. Stephanie Smith and Janet Martinez, ‘An Analytic Framework for Dispute Systems Design’ (2009) 14 Harv Negot L Rev 123, 166.
45 Cooperative law is a process, which incorporates many of the hallmarks of collaborative law but does not require lawyers to enter into a contract providing for their disqualification if no settlement is achieved. ibid 166–67.
46 Mini-trial is a hybrid process by which the parties present a limited form of their legal and factual contentions to a panel of representatives selected by each party, or to a neutral third party or both. The objective is to enable resolving the matter on commercial rather than legal terms. ibid 168.
47 In this process, an evaluator (an experienced attorney with expertise in the subject matter) hosts an informal meeting of clients and counsel to hear each side present its basic evidence and arguments. Then the evaluator writes a private evaluation of the case’s prospects and presents it to the parties. ibid 167.
48 Michaela Keet, Heather Heavin and John Lande, ‘Use PETSM to Improve the Quality of Decision-Making in Mediation’ in John Lande (ed), Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement (2020) 206 <http://indisputably.org/2020/02/heres-your-theory-of-change-book/> accessed 26 June 2020.
49 Sometimes people have unplanned two-session mediations, where they unsuccessfully push to settle in one session and mediate again later. Although this may eventually produce good resolutions, it does not provide the benefits of a PETSM process of being better organized and more humane. ibid.
triggering the companies’ switch to PEDR and what such PEDR systems comprise; two most frequently addressed elements of PEDR systems: contractual clauses and an ECA; adjustments that the companies’ relationship with their law firms undergo following a shift to PEDR and changes that some law firms introduce to their approach to dispute management in an attempt to respond to the changing clients’ demands.

Not many companies jump to share their experience with PEDR.50 The article relies on the publicly shared experience with PEDR systems and/or elements of multinational corporations like DuPont, Eaton Corporation, Eversource Energy, General Electric (GE) and its former division GE Oil & Gas, Georgia–Pacific, GlaxoSmithKline, JPMorgan Chase, Monsanto, Motorola, Northeast Utilities, Schering-Plough, Shell and WestLB. It also considers accounts of law firms like Bartlit Beck, Bird & Bird, Eversheds, Nabarro, Seyfarth Shaw and Valorem Law Group as to how they adapt to the evolving companies’ expectations in terms of dispute management. It is important to note that sometimes the discussed experiences date back to up to 30 years ago, like in the case of Motorola.51 Some companies in the meanwhile have seized to exist. For example, in 2015, Northeast Utilities adopted and started to operate under the Eversource Energy brand.52 Nevertheless, the discussion of these experiences is useful because they present tried and tested PEDR know-hows that may inspire and stimulate other companies and law firms to follow the path of PEDR and benefit from PEDR systems and elements.

Where possible, the article analyses the experiences of the mentioned companies and law firms in the context of the empirical study on PEDR by Lande and Benner.53 Notably, the available data on PEDR systems and elements shows that the changes in dispute management in different companies sometimes are taking place under the leadership of the same individuals that can be regarded as true champions of PEDR. For example, that is the case for Elpidio Villarreal who brought changes to the way disputes are handled at GE, GlaxoSmithKline and Schering-Plough.54

A. Making a Switch to a PEDR System

This section highlights the stimuli that triggered the companies’ switch to a PEDR system and identifies the core components of those systems, where possible.

50 To the contrary, Hanft believes that companies that are really good at this do not share their experiences. They do not share their savings when implementing ADR policies because they see it as a competitive advantage. And, it truly can be. Alexander Insam, David Huebner, Juergen Briem, Noah Hanft, and Thomas Stipanowich, ‘Promoting Conflict-Competent Leadership and Holistic Conflict Management’ (2016) 16 Pepp Disp Resol L J 233, 248.

51 Motorola’s programme is the earliest publicly reported programme identified by the research conducted for this article. Weise (n 37). In January 2011, Motorola demerged into two independent public companies, Motorola Mobility and Motorola Solutions.

52 ‘Northeast Utilities Becomes Eversource Energy’ (Businesswire, 2 February 2015) <https://www.businesswire.com/news/home/20150202005461/en/Northeast-Utilities-Eversource-Energy > accessed 26 June 2020.

53 Lande and Benner (n 15).

54 This was identified through research conducted for this article. However, the influence of Elpidio Villarreal most probably extends beyond these companies.
An aspiration to reduce the numbers and costs of pending litigations stimulated a change at Georgia–Pacific\(^55\) and GE Oil & Gas.\(^56\) Savings in legal expenses also emerged as a principal factor, along with savings of management time, in establishing the ADR programme at Motorola.\(^57\) PEDR systems appear to be most effective, if they are integrated as a valued part of the culture of the legal department and the company generally.\(^58\) This is what happened at Motorola where the programme complemented the existing corporate culture.\(^59\)

At GE, the PEDR programme was developed due to mushrooming litigation, but also a mandate to apply the Six Sigma Quality Initiative across the company.\(^60\) Six Sigma is a management approach aiming to achieve defect-free process 99.9% of the time. Litigation management, as a process, also needed to be defined, measured, improved and controlled. In 1995, it took P.D. Villarreal, Counsel for Litigation and Legal Policy at GE, two years to transform the company’s management of corporate disputes from ad hoc to a system. Through this transformation, GE sought increases in efficiency and relationship preservation to advance its corporate profitability.

Monsanto, acquired in 2018 by Bayer, is a company that emphasized in its PEDR programme relationship preservation most. Due to the programme’s uniqueness, Monsanto’s experience will be discussed in more detail. Scott Partridge, Vice President of Global Strategy at Monsanto until the company’s acquisition by Bayer, recalls what it took to develop and introduce the PEDR system.\(^61\) In 2006, he joined Monsanto as the Chief Deputy General Counsel after 27 years of private practice.

When he joined Monsanto, the company had one last patent fight against their most significant competitors that Partridge identifies as Acme. Acme was infringing one of Monsanto’s flagship products. Monsanto filed a suit. Acme filed a massive antitrust counterclaim. Partridge contacted the president of Acme and suggested that they try to settle that one billion-dollar judgment. Partridge also offered to discuss licensing Acme to Monsanto’s next-generation product in the field, which Acme was found to have been infringing. The parties came together, and their communication went tough. Acme had a big team, so did Monsanto. The parties spent half a year, including 68 days straight, face-to-face negotiating a resolution and a set of licenses, which they eventually achieved. What it took was breaking down barriers: communication on a personal level and creating an environment of trust first between the Acme’s president and Partridge that then flowed over to the 20-person teams who were negotiating these agreements.

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55 Armstrong (n 38) 20; Michael T Jr Colatrella, ‘A Lawyer for All Seasons: The Lawyer as Conflict Manager’ (2012) 49 San Diego L Rev 93, 136.
56 Bennet Picker and Michael Lewis, ‘Interview with Michael McIlwrath’ (2013) 19 Disp Resol Mag 11, 12. In July 2017, GE Oil & Gas merged with Baker Hughes, a GE company.
57 Weise (n 37) 352.
58 Lande and Benner (n 15) 293.
59 Weise (n 37) 382.
60 Smith and Martinez (n 44) 151–53.
61 Debra Gerardi, Nancy Vanderlip, Scott Partridge, and Jeremy Lack, ‘Navigating, Building, and Strengthening Relationships’ (2016) 16 Pepp Disp Resol LJ 163, 165–71.
When it became apparent to Partridge that the parties were going to reach an agreement on the license, instead of stopping there, Partridge suggested to the president of Acme that they try to change how companies interact with each other from then on. This led to pounding out a concept that started out with a relationship principles document. This document was signed by Partridge and the president of Acme, and endorsed by the CEOs. The endorsement by the CEOs of both companies as well as the board and chairman of both companies was critical. The parties agreed that they would try to resolve all of their existing disputes and identify areas of potential future conflicts. If they had a legitimate fight where they needed a third-party assistance, they would not fight in the media or in the halls of congress. Rather, if one party thinks that the other's behavior violates the law, the goal should be to change such behavior not to hurt the other. The parties agreed that they would isolate any legitimate dispute and try to create a private process for resolving it. Where possible, they would proceed sequentially from mediation to executive mediation, and then to arbitration.

The process the parties created was owned by relationship teams. Partridge led the Monsanto team and the president of Acme led the other team. They were joined in the room by antitrust lawyers, lead commercial persons and scientists, researchers as well as the heads of government and public affairs. They met quarterly. There were three parts of the agenda: resolving existing disputes, identifying problem areas and, within the bounds of antitrust law, figuring out what they could do together to put newer tools in the hands of growers around the world. The parties agreed that they could combine research and development capabilities in certain fields. If new products were developed, parties concurred that they would license broadly externally and go to the marketplace separately and compete against each other. They had antitrust guidance to make sure that kind of work was appropriate and did not run afoul of any competition laws. Notably, initially they had 15 to 20 people at a big long table. Monsanto’s team was on one side and Acme’s team was on the other side, and they would work through the agenda spending the majority of their time focusing on existing and potential disputes. Then the presidents of Acme and Partridge decided to create sub-teams comprising content knowledge experts for the disputes, lawyers for both sides as well as commercial people, and assign them to fix disputes. Sub-teams were instructed to come back to Partridge and Acme’s presidents, if they failed to achieve a solution. The disputes started to disappear. What happened was that teams started mingling and there was no more ‘we’ on one side and ‘they’ on the other side. Rather, people focused on building relationships with each other that resulted in problems being solved and opportunities being created. This progressed to the point that the parties had relationships teams, project teams and sub-teams. The majority of time was spent with scientists and business people talking about how the parties could collaborate. The programme was applied not just in relation to Acme. Monsanto instituted this type of programme with its major competitors and customers. There were different forms of the programme, cultural versions of it based on different sensibilities of different parts of the world. What united various versions of the programme was their focus on creating collaborative space where time was spent on looking at solutions instead of problems. Monsanto’s
programme was honored by the CPR in 2016 for being a unique proactive industry-wide dispute identification and resolution programme.\footnote{62}

In all the above-mentioned cases, PEDR systems were initiated through conscious planning. In all cases, in-house counsel took the initiative to develop these systems. In addition to similar cases, the study of Lande and Benner identified companies where PEDR systems evolved gradually and eventually became formalized.\footnote{63} In these companies, lawyers started by applying the elements of PEDR systems in their own cases often without authorization of their superiors. Over time, the procedures became more formalized and lawyers enlisted support of the general counsel and top business leaders. While developing PEDR systems can be challenging, the User Guide of the ABA’s PEDR Task Force provides useful guidance to companies interested in doing that.

\subsection{(ii) PEDR systems’ focus}

As for the focus of the companies’ PEDR programmes, the core components of Motorola’s programme comprised the use of ADR case evaluation worksheet to screen the cases for their ADR potential; proactive endeavors like including ADR clauses in contracts and designing a dispute prevention programme; and training of the key personnel in ADR.\footnote{64} At GE Oil & Gas, the programme revolved around mediation.\footnote{65} A key feature of the Georgia–Pacific’s programme was assessing the legitimacy of a claim.\footnote{66} The company was highly selective in qualifying cases for EDR. The programme applied only to bona fide disputes; bogus claims and lawsuits against the company were excluded from it.\footnote{67} Georgia–Pacific attempted to settle cases selected for the programme by using primarily negotiation and mediation. The company continually educated its management and lawyers about ADR and included ADR clauses in its contracts.\footnote{68} Virtually all claims underwent an ECA and ADR analysis.\footnote{69} As per Phillip Armstrong, the company’s Principal Counsel for Litigation and ADR, appointing one person in charge of advancing the cause of the programme within the company was essential to its success.\footnote{70} Top management’s support was similarly crucial in instituting and running the programme.\footnote{71}

\footnotesize{\begin{enumerate}
\item \footnote{62} ‘CPR to Present Inaugural ‘Inspiring Innovation Award’ Honoring Monsanto and VP of Global Strategy Scott Partridge’ (CPR, 25 January 2016) <https://www.cpradr.org/news-publications/press-releases/2016-01-25-cpr-to-present-inaugural-inspiring-innovation-award-honoring-monsanto-and-vp-of-global-strategy-scott-partridge> accessed 26 June 2020.
\item \footnote{63} Lande and Benner (n 15) 261–62.
\item \footnote{64} Weise (n 37) 384–85. An abbreviated version of Motorola’s 1989 ADR Programme can be found ibid in Appendix 1.
\item \footnote{65} Picker and Lewis (n 56) 12.
\item \footnote{66} Colatrella (n 55) 137.
\item \footnote{67} Armstrong (n 38) 20.
\item \footnote{68} Colatrella (n 55) 138.
\item \footnote{69} Armstrong (n 38) 21.
\item \footnote{70} ibid 22.
\item \footnote{71} ibid 20.
\end{enumerate}}
At GE, the established conflict management system comprised prevention, management and resolution processes.\textsuperscript{72} In terms of prevention, the system included an early warning system to identify litigation trends at the earliest stage and an after-action review to identify the lessons learned and recommend how to prevent future problems. As for the management and resolution part, once a dispute was identified the system required in-house counsel to prepare an ECA and management plan. At Level 1, informal business discussions and direct negotiation would take place. If no solution was achieved, this would be followed by mediation or arbitration at Level 2 and, if needed, by adjudication at Level 3. The programme required training for both management and legal counsels.

Finally, Monsanto’s relationship-based programmes with its major competitors and customers provided for quarterly solutions focused face-to-face meetings between the relationship teams headed by business leads and comprising antitrust counsel, lead commercial persons and scientists.\textsuperscript{73} The involvement of CEOs and executives was seen as instrumental in Monsanto’s approach.\textsuperscript{74}

The above analysis of companies’ experiences resonates with the finding of Lande and Benner’s study that no uniform model of PEDR systems exists.\textsuperscript{75} Each company’s system is influenced by numerous factors. Lande and Benner also emphasize the importance of distinguishing between early assessment of cases and early resolution.\textsuperscript{76} In a PEDR system, companies routinely assess some or all of their cases at an early stage but may decide not to pursue early resolution in certain cases. Georgia–Pacific’s programme vividly demonstrates this approach. The programme assessed whether a claim was legitimate and applied only to bona fide disputes.\textsuperscript{77}

Empirical data shows that adopting a PEDR system is hard when it does not have the support of the top business leaders.\textsuperscript{78} The survival of PEDR systems is also ultimately dependent on the leaders.\textsuperscript{79} This state of things is reinforced by the described experiences of Georgia–Pacific and Monsanto that regarded top management’s support as crucial for the launch and functioning of their PEDR programmes.\textsuperscript{80} Noting that generally it is hard to get business managers to appreciate the advantages of PEDR because they have higher priorities, Lande and Benner recommend proponents of the PEDR approach that they develop strategies to deal with possible resistance.\textsuperscript{81} One of the suggestions is an ongoing training and education for people to appreciate the benefits of a PEDR system. As mentioned above, Motorola, Georgia–Pacific and GE reported investing resources into the training of their management and lawyers in EDR. Appointing in-house counsel to advance the cause of the ADR, as done by Georgia–Pacific, appears to be a relatively frequent

\textsuperscript{72} Smith and Martinez (n 44) 151–53.
\textsuperscript{73} Gerardi and others (n 61) 165–71.
\textsuperscript{74} ibid 170–71.
\textsuperscript{75} Lande and Benner (n 15) 260.
\textsuperscript{76} ibid 261.
\textsuperscript{77} Armstrong (n 38) 20.
\textsuperscript{78} Lande and Benner (n 15) 272.
\textsuperscript{79} ibid 287.
\textsuperscript{80} Armstrong (n 38) 20; Gerardi and others (n 61) 170–71.
\textsuperscript{81} Lande and Benner (n 15) 272.
practice according to the study of Lande and Benner.\textsuperscript{82} These authors recommend designating a PEDR counsel to optimise companies’ PEDR systems.\textsuperscript{83}

\textbf{B. Contractual Clauses}

Research conducted for this article reveals that one of the two elements of a PEDR system most frequently addressed by the companies is contractual clauses, which are an element of pre-dispute planning as per the User Guide of the ABA’s PEDR Task Force.\textsuperscript{84} They can provide for an issue resolution ladder,\textsuperscript{85} negotiation, mediation, arbitration or court proceedings.

The standard contractual dispute resolution clauses that this research identified demonstrate an overwhelming preference of companies for multi-tiered clauses. This was the choice of Motorola,\textsuperscript{86} Eversource Energy,\textsuperscript{87} DuPont\textsuperscript{88} and Georgia–Pacific.\textsuperscript{89} The initial stages in all identified clauses are negotiation and mediation. In case of Motorola, the last stage is litigation, while the clauses of Eversource Energy and DuPont provided for arbitration as a last tier. At Georgia–Pacific, the clauses evolved from those used in 1995 that finalized with arbitration as a third stage to those used in 2005 that ended with mediation with the prior two stages being negotiations between the managers and those between the senior executives.\textsuperscript{90} If parties would not settle in mediation, the 2005 clause provided for the use of litigation or any other remedy available. Thereby, Georgia–Pacific did not commit itself to arbitration upfront but kept its options open. Monsanto was similarly cautious in terms of consenting to arbitration in advance. It regarded arbitration, like litigation, as a last resort and opted for its minimal use.\textsuperscript{91} Whenever possible Monsanto attempted to resolve disputes directly with another party through negotiation or mediation.
The study of Lande and Benner also found that many companies used dispute resolution clauses in their contracts as an important form of planning for EDR. Apart from tiered procedures, companies relied on arbitration clauses, mediation clauses and those providing for dispute prevention in addition to dispute resolution. That study revealed that companies’ preferences for dispute resolution processes varied, which aligns with companies’ experiences described above.

C. Early Case Assessment

An ECA is another element of a PEDR system that companies most frequently describe, as found by this research. This element belongs to post-dispute processes as per the User Guide of the ABA’s PEDR Task Force. An ECA is generally understood as a structured process for evaluating a case early and arriving at solid analyses of strengths and weaknesses relying on limited information. In-house counsel speaking at a conference on corporate dispute management in 2018 concurred that an ECA is a critical element to any dispute resolution. It should be the first step in any dispute and is fundamental to understanding the business needs. A good ECA will serve in many ways: it will help shape the ADR process; guide the relationship with outside counsel; and highlight the skills and expertise to look for in the designation of a mediator or arbitrator, or in the selection of experts.

Companies demonstrate variations in approaches to conducting an ECA. At GE, in-house counsel were tasked with preparing a comprehensive ECA and management plan (including ADR and litigation) within 60 to 90 days since identification of a dispute. At Shell, an ECA would be conducted even sooner, within 30 days of a dispute arising, to ensure the correct resolution strategy was adopted at the earliest possible stage. Head of litigation at Shell, Carla Herron explained: ‘ECAs force both internal and external lawyers to crystallize the legal issues that may have to be proved and the facts that support them. They identify the end game. You have to work out your objectives and ask whether there are possible business solutions or whether a case will involve a legal issue you want to take to court. Cases can be handled differently depending on your preferred outcome.’ With the aid of its own

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92 Lande and Benner (n 15) 274.
93 ibid 282.
94 ABA PEDR Guide (n 6) 8.
95 Elpidio Villarreal, ‘Chapter 7: ADR in the United States - A Practical Guide’ in Jean-Claude Goldsmith and others (eds), *ADR in Business: Practice and Issues across Countries and Cultures* 1 (Kluwer Law International 2006) 142. Several ECA tools have been developed. Two most comprehensive ones are Ole, Concise Case Analysis & Evaluation Tool (available on the International Mediation Institute website) and the CPR’s Corporate ECA Toolkit (available on the CPR website).
96 Vanessa Alarcón Duvanel, ‘A Report on the CPR European Congress on Business Dispute Management’ (CPR, 16 August 2018) <https://blog.cpradr.org/2018/08/16/a-report-on-the-cpr-european-congress-on-business-dispute-management-part-i/> accessed 26 June 2020. Kenneth B Reisenfeld (BakerHostetler) moderated the panel, which was exclusively composed of in-house counsel: James Cowan (Shell International Ltd); Noah J. Hanft (CPR); Isabelle Robinet-Muguet (EAB Vice-Chair, Orange); and Gill Mansfield (Media Law Services).
97 Smith and Martinez (n 44) 152.
98 Rees and Bryan (n 33) 62.
99 Quoted in Diana Bentley, ‘Managing Litigation’ (April 2010) 6(2) In-House Perspective 19, 20.
ECA template, Shell put cases into different risk categories and assessed the possible financial exposure and reputational risk they entailed.

Schering-Plough also had its own custom-built ECA template for in-house and outside lawyers. Although an ECA required an upfront investment, the company was convinced that the process would save money down the road. Much of what was done during the ECA process represented expenditures that would have to be made later anyway. Also, the information developed during that process put the company in a superior position to manage the case and make decisions about it at an earlier point. An ECA could help bring about an earlier resolution of the case at a cost that was acceptable and realistic.

At JPMorgan, an ECA was not recommended where a party would make irrational demands instead of engaging in a realistic case analysis, while Northeast Utilities used an ECA with respect to virtually all commercial disputes. In the latter company, in-house lawyers always performed an informal assessment of disputes. However, an ECA took more formality with respect to more complex disputes. It involved then a consideration of whether ADR could provide an appropriate path for resolving a dispute earlier, with a default assumption being that it did.

As reported in 2020, at Eversource Energy outside and in-house counsel perform an ECA in relation to most large disputes and commercial disputes in accordance with the company’s template. The ECA provides a framework for the counsel to consider and evaluate:

- potential liability of the company (including the probability of success on key issues);
- potential exposure of the company (including damages, recoverable attorneys’ fees, insurance coverage and contribution);
- potential impact on the business through disruption of operations, distraction of management or key employees;
- potential for unfavorable publicity, or regulatory or political action; and
- potential for early resolution through ADR or motion. The company’s presumption is that cases should proceed swiftly to formal mediation, generally within 90–120 days of filing.

A developed ECA is then discussed with the responsible business representatives to establish a plan for resolving the dispute.

In the study of Lande and Benner, virtually all participants reported the use of an ECA by their companies often referring to it as a critical element of their PEDR systems. Similarly to experiences of some companies described above, that study also found that the ECA process often requires communication between in-house coun-

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100 Editorial, ‘CPR’s ECA Toolkit – A Great Contribution to Controlling Litigation Costs’ (interview with PD Villarreal) The Metropolitan Corporate Counsel (November 2009) 18. At the end of 2009, Schering-Plough merged with Merck & Co. with the new company taking the name of Merck & Co.
101 Editorial, ‘ECA: Perspectives of Members of CPR’s Corporate ECA Commission’ (interviews with Lawrence Chanen and Duncan MacKay) The Metropolitan Corporate Counsel (November 2009) 18.
102 ibid.
103 MacKay (n 87) 2–3.
104 Lande and Benner (n 15) 276.
sel, their clients and outside counsel. Like Shell, Schering-Plough and Eversource Energy, some companies in Lande and Benner’s study have developed their own ECA templates to identify issues that need to be addressed.

The results of a survey conducted on 28 February 2020 at the CPR’s annual meeting demonstrate that an ECA is commonly used by outside and in-house counsel. When asked about cases that their company or law firm litigates, a vast majority of counsel (89%) reported conducting ECAs routinely in most types of cases, in certain categories of cases, or on a case-by-case basis. Only 11% said that they rarely used ECAs.

**D. Law Firms Adjusting to PEDR**

Companies report a variety of adjustments that their relationship with law firms underwent further to a switch to PEDR. At GE, corporate adoption of PEDR required a shift to preventing disputes and to pursuing more interest-based processes for resolving disputes. As a consequence, GE’s outside counsel needed to broaden their skill sets to perform an expanded role of process advisors. The resistance from GE Oil & Gas outside counsel while implementing a PEDR programme helped the company weed out law firms. As a result, it continued working only with those that aligned with its programme. Eaton’s ADR policy provided for the initial ADR training for the selected law firms and tracking of ADR experiences and it required outside counsel to consider ADR on case assignment. Eversource expects its law firms to ensure that the lawyers assigned to work on its disputes are knowledgeable about ADR. In-house and outside counsel design case-specific ADR processes where appropriate. GlaxoSmithKline and WestLB exercised cost control by moving away from the billable hour model to alternative billing arrangements like the use of fixed fees or fees based on outcome.

The issue of alternative fee arrangements has been addressed in the ABA PEDR Guide and the study of Lande and Benner. The Guide points to the benefit of such fee arrangements in some cases. A fee arrangement for a party interested in resolving a matter promptly could provide bonuses to lawyers for resolving the matter (meeting designated goals) within specified periods. Value billing is another option.

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105 ibid 279.
106 ibid.
107 ‘CPR 2020 Survey Results’ (27 February 2020) <https://secureservercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/LIRA-Data-CPR-2020-Program.pdf> accessed 26 June 2020. Sixty people participated in the survey. The respondents were outside counsel (42%), private neutrals (30%), in-house counsel (13%) and others (15%). The questions about litigation interest and risk assessment practices generally were addressed to the outside and in-house counsel. There were 33 counsel in the sample. John Lande, ‘LIRA @ CPR’ (Indisputably, 7 April 2020) <http://indisputably.org/2020/04/lira-cpr/> accessed 26 June 2020.
108 Smith and Martinez (n 44) 153–54.
109 Picker and Lewis (n 56) 12.
110 Peter W Benner, ‘Corporate Conflict Management 4.0: Reflections on How to Get There from Here’ (2016) 16 Pepp Disp Resol LJ 289, 301.
111 MacKay (n 87) 2.
112 In June 2012, WestLB was downsized and continued to operate under the name of Portigon Financial Services.
113 Bentley (n 99) 20.
114 ABA PEDR Guide (n 6) 11.
Although there are various ways to structure value billing, they generally share the feature that the party has some discretion in setting the fee at the end of the case based on the party’s satisfaction with the lawyer’s services.

In Lande and Benner’s study, companies reported the use of alternative fee arrangements like requiring law firms to conduct ECAs for a fixed fee to incentivize law firms to handle their cases effectively.\(^{115}\) It is important that such arrangements do not lead to lower-quality work, inappropriate decisions to settle cases too quickly, but create incentives for individual lawyers within the law firm to produce better procedures and outcomes than through litigation.\(^{116}\) The companies should incentivize not only outside lawyers to align with the company’s PEDR programme but also in-house litigators.\(^{117}\) This could be done through considering their carrying out of PEDR-related tasks in performance reviews and setting compensations. The best approach may involve a general qualitative assessment of lawyers’ performance including their ability to implement PEDR strategies effectively.

Law firms acknowledge that changing client expectations are a strong incentive to adjust their billing practices. For example, Michael Hales, a partner at Nabarro (now CMS) in London and secretary of the IBA’s Litigation Committee observed that more clients wanted certainty on costs.\(^{118}\) ‘There’s more pressure to have fixed fees for certain parts of the litigation process and clients want to monitor costs with periodic budgets. Conditional fee arrangements are now more common, and clients can also use third-party funders and after-the-event insurance for the other side’s costs’, said Hales. ‘We’re obliged to advise clients about how they can fund cases so the news about these resources is spreading. Outsourcing some tasks can save money too.’ John Wright, senior counsel in dispute resolution at Bird & Bird’s London office, reported the firm’s efforts to meet client expectations on costs.\(^{119}\) ‘It’s no longer good enough to do estimates. We usually offer fixed fees for ECAs. Fixed fees for longer disputes are harder but we can do them. Our case management system, which we have developed internally, enables us to divide cases up into sections so we can assess the costs for each section and can monitor them closely.’

In an attempt to respond to the changing clients’ demands, some law firms have gone beyond adjustments for a complete overhaul of their approach to dispute management. Alternative fee arrangements have often become part of a new approach.

One example is RAPID Resolution System of Eversheds.\(^{120}\) It was a project management tool standing for Review, Analyse, Plan, Implement and Deliver, recognized as a contribution to ADR excellence.\(^{121}\) Having the concept of the ECA at its heart, it focused on measurable results and cost predictability, gave clients control of the

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\(^{115}\) Lande and Benner (n 15) 292.

\(^{116}\) ibid 293.

\(^{117}\) ibid 292.

\(^{118}\) Bentley (n 99) 19.

\(^{119}\) ibid.

\(^{120}\) In 2017, Eversheds merged with Sutherland Asbill & Brennan and the new firm started operating under the name Eversheds Sutherland.

\(^{121}\) John Heaps, ‘CPR Recognizes Eversheds’ Contribution to ADR Excellence’ (CCBJ, 1 December 2007) <https://ccbjournal.com/articles/cpr-recognizes-eversheds-contribution-adr-excellence> accessed 26 June 2020. CPR presented honorable mentions to two law firms, one of which was Eversheds.
process and provided realistic ADR options.\textsuperscript{122} The firm also used DealTrack, a project management tool for non-contentious transactions and Unity, a matter and client management collaborative platform.\textsuperscript{123}

At Valorem Law Group, lawyers discuss the business case and objective with a client to establish an approach that would deliver value to the business.\textsuperscript{124} For each step in the process, they identify the tasks, evaluate the objectives and estimate the fee. After every matter, the lawyers do a self-assessment and seek feedback from the client. About 80\% of the firm’s revenues is generated using alternative fees. Primarily, these are flat fees with a holdback,\textsuperscript{125} plus premium based on milestones. Every invoice contains an agreed upon fee and a value adjustment line that provides clients with a space to make any adjustment they feel is needed.\textsuperscript{126} In this way, the firm wants to demonstrate that whatever fee arrangement a client has chosen, the firm has an economic incentive to consistently put forth its best effort.

Another firm, Bartlit Beck is also not keen on hourly billing. Instead, it enters into fee arrangements that reward results and efficiency.\textsuperscript{127} It expects to be paid more if it wins and less if it loses.\textsuperscript{128} The firm employs a variety of fee arrangements, including partial and pure contingency fees and flat monthly fees. Regardless of a particular arrangement, the fees are fixed and certain.

Seyfarth Shaw lawyers work together with clients at every stage of the case to ensure that the legal strategy and desired outcomes support the client’s objectives.\textsuperscript{129} The firm uses SeyfarthLean, a value-driven client service model designed to create more consistent, high-quality legal services; improved communication and collaboration; right-sized staffing approaches; transparent pricing; as well as ease-of-use service.\textsuperscript{130} In working towards achieving the goals of the client, the firm focuses on functional optimisation (by striving to improve efficiency, consistency, quality and cost efficacy), programme management (by designing robust solutions for the most complex legal work) and shared solutions (by developing and managing solutions to support high-volume legal work that shares common characteristics).\textsuperscript{131} The firm regularly seeks feedback from clients on service delivery. Although only about 20\%
of Seyfarth’s matters is billed on a non-hourly basis, the law firm wishes more clients were receptive to alternative fee arrangements because they motivate the firm to find the most efficient solutions.132

Relying on the results of their study, Lande and Benner call for outside counsel to help companies interested in developing a PEDR system.133 Although some lawyers might perceive this as going against their interest in maximizing litigation fees, it might be a way to deepen relationships with clients and get more business in the long run.

4. THE PROMISE OF TECHNOLOGY

Don’t build your business where the highway is, build your business where the highway is going.134

This last part of the article analyses how technology can contribute to companies’ PEDR systems by saving money and time and reducing conflict. It also investigates the possibilities offered by the interaction between technology and dispute resolution to the future of the legal profession.

A. Technology and PEDR

PEDR systems can benefit from the use of technology in at least two ways. First, they can incorporate some of the existing Online Dispute Resolution tools to increase time and cost efficiency of dispute resolution and achieve improvement in terms of dispute prevention. Second, time and money can be saved where PEDR systems providing for the use of negotiation, mediation and arbitration use technology to streamline these processes. While both ways of using technology are beneficial to the dispute resolution field overall, given businesses’ preference for early settlements pre-COVID-19 outbreak and the increase in demand for resolving disputes early post-outbreak, reliance on technology may make PEDR systems even more attractive to businesses than prior to the outbreak.

(i) Online Dispute Resolution

The use of technology in dispute resolution does not equate Online Dispute Resolution (ODR). ODR, just like virtual hearings, is only a part of the set of the available technological tools.135 It is a mechanism for resolving disputes via electronic communications and other information and communication technology (ICT) using an ODR platform—a technology-based intermediary and a system for generating,

132 Lamb (n 123) 46.
133 Lande and Benner (n 15) 289–90.
134 Colin Rule, 'Integrate Technology into the Practice of Dispute Resolution' in John Lande (ed), Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement (2020) 114 <http:// indisputably.org/2020/02/heres-your-theory-of-change-book/> accessed 26 June 2020 (noting that this is what his grandfather always used to say).
135 Mirèze Philippe, 'Offline or Online? Virtual Hearings or ODR?' (Kluwer Arbitration Blog, 26 April 2020) <http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/?doing_wp_cron=1592906133.2673130035400390625000> accessed 26 June 2020.
sending, receiving, storing, exchanging or otherwise processing communications in a manner that ensures data security. The main perceived advantages of ODR appear to be the accessibility, low cost and speed of communication through technological tools.

Some companies keep abreast with ODR. For example, GE Oil & Gas implemented an online system for cyber-settlement to deal with small manufacturing disputes of less than €50,000. Others are still weighing up their options, while there are numerous ODR tools available for incorporation into a company’s dispute management programme. Companies do not have to invent a wheel, but they can build on the existing ODR platforms to drive savings. They may start by consulting a list containing more than one hundred ODR providers on ‘the main ODR space on the web’—the odr.info website—that is run by the National Centre for Technology and Dispute Resolution (University of Massachusetts). Notably, ODR can substantially enhance the capacity of a PEDR system in terms of dispute prevention. This is because the use of ICT allows ODR to identify systemic contributors to conflict and opportunities to reduce conflict.

(ii) Increasing reliance on technology due to the COVID-19 outbreak

Following the COVID-19 outbreak, we should prepare for tsunami of disputes. As a result, we can expect that the demand for efficient ways of resolving disputes will only increase. While so far the use of technology in dispute resolution has been lagging behind, the outbreak, as unfortunate as it is, may lead to a breakthrough in this field. Technology may finally become instrumental in the new dispute resolution reality. Its use can streamline negotiation, mediation and arbitration. This will save money and time, among other benefits, for the companies with PEDR programmes providing for the use of these processes.

Because of the coronavirus crisis, clients might increasingly participate in dispute resolution procedures by video. While often negotiation is conducted solely between lawyers, there is potential for clients to participate more because of the convenience of video. Reliance on technology might also address the recurring problem

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136 ‘UNCITRAL Technical Notes on Online Dispute Resolution’ (United Nations, New York 2017) paras 24 and 26 <http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf> accessed 26 June 2020.
137 Orna Rabinovich-Einy and Ethan Katsh, ‘Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment’ (2014) 1 IJODR 5, 23.
138 Najar (n 1) 251.
139 M Poblet and G Ross, ‘ODR in Europe’ in M Abdel Wahab, E Katsh, and D Rainey (eds), Online Dispute Resolution, Theory and Practise (Eleven Int Publishing 2012) 469.
140 The list is available at <http://odr.info/provider-list/> accessed 15 February 2021 and includes providers like Smartsettle, MODRON Spaces and The Virtual Court House.
141 Rabinovich-Einy and Katsh (n 137) 27.
142 Lim (n 12); Neilson (n 12).
143 See Miréze Philippe, ‘What Does It Take to Bring Justice Online?’ (2019) (6)2 International Journal of Online Dispute Resolution 183, 189–91 (discussing the possible reasons for this situation).
144 Philippe (n 135).
145 John Lande, ‘The Next New Normal in Law, Dispute Resolution, and Legal Education’ (Indisputably, 14 April 2020) <http://indisputably.org/2020/04/the-next-new-normal-in-law-dispute-resolution-and-legal-education/> accessed 26 June 2020.
of lack of engagement of ultimate decision-makers in large organizations. High-level executives usually are not prepared to invest the time to travel to a mediation location and go through a lengthy process in which their input is not needed most of the time. In the new normal, ultimate decision-makers could be engaged by video for the limited, critical moments when their input is necessary. As no one will have to travel, there might be less need to complete proceedings at once. Also, apart from saving time and cost of travelling, participating in proceedings by video will contribute to saving the environment.

In the new normal, not only might Planned Early Two-Stage Mediation become normalized, but so might Planned Early Multi-Stage Mediation. With video, lawyers and clients could avoid waiting while mediators caucus with the other side. Mediation could be scheduled in several steps unfolding over a specified period, such as a week.

In arbitration, virtual hearings may become the norm in the near future. The hearings, however, should not replicate what is done offline. Rather, practitioners need to consider aspects like whether many witnesses are necessary, whether hearings may last few days rather than weeks, and whether an ability to manage COVID-19 problems should factor in deciding whom to nominate as arbitrators.

The COVID-19 outbreak will also affect the way evidence is created, gathered and transmitted. Reliance on paper documents is likely to reduce in favor of digital signatures and document transmissions to avoid spreading the virus. In turn, parties are more likely to conduct document searches, reviews and production digitally. Tribunals might prefer digital memorials and document submissions as well. The hard-copy evidentiary bundle is likely to go by the wayside. Adoption of digital solutions may lead to an increased implementation of artificial intelligence (AI) and other new technologies.

B. Technology and Dispute Resolution

Apart from the above, technology is bringing more fundamental changes to the dispute resolution field. Many professions have already been transformed by technology. Nevertheless, the fields themselves did not go away. The introduction of

146 ibid.
147 John Lande, ‘The Next New Normal – In General’ (Indisputably, 13 April 2020) <http://indisputably.org/2020/04/the-next-new-normals-in-general/> accessed 26 June 2020 (observing that as we go through the current crisis caused by coronavirus pandemic, we will develop a ‘crisis new normal’ and, after we recover from the crisis, a ‘normal new normal’).
148 Philippe (n 135).
149 Lande (n 145).
150 Philippe (n 135).
151 Gary L Benton, ‘How Will the Coronavirus Impact International Arbitration?’ (Kluwer Arbitration Blog, 13 March 2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/13/how-will-the-coronavirus-impact-international-arbitration/> accessed 26 June 2020.
152 Rule (n 134) 112. For example, while in the 1950s, the practice of medicine was very much a hands-on discipline, today technology is everywhere, from telemedicine to MRIs to laser surgery.
technology increased the efficiency, but it did not replace humans. It just changed their role.\textsuperscript{153}

This kind of change has now come for dispute resolution. Notably, the drivers behind the change are not so much lawyers, bar associations, or courts but disputants, including companies. Disputants of today demand faster, more affordable and efficient resolution processes. Even more than before, they are no longer willing to be billed by the hour to resolve their cases over a long period of time. Technology is giving disputants the means to push for the kind of change they want, which forces the dispute resolution community to think differently. If the dispute resolution field is to stay relevant and useful to the younger generation that will become the older generation some day, it needs to engage with these changes and learn when and how to leverage technology.\textsuperscript{154}

We are yet to discover the whole spectrum of possibilities offered by technology to the field of dispute resolution. Some authors share their ideas in this respect pushing the boundaries of how we commonly understand the interaction between technology and dispute resolution. For example, Carrel suggests that the dispute resolution field should enter the conversation about technology and innovation and help shape the future of the legal profession in three ways.\textsuperscript{155}

First, this can be done by adopting a new competency model integrating skills from both dispute resolution and technology. A new competency model for the 21st century legal professionals should reflect the interplay between technology, problem solving, data analytics and emotional intelligence. Delta Model is an example of such model. It emphasizes the important role of problem-solving skills, communication and empathy due to the increased focus placed on technology and innovation.\textsuperscript{156}

This model comprises three competency areas: the law (understanding clients’ legal issues), business and operations (understanding the tools and technologies related to the delivery of legal services, business of law, and legal operations) and personal effectiveness skills (having the self and relationship awareness to work with others and understand clients’ issues beyond the law). Each area is important in the development of legal professionals. Every lawyer must have all these skills to be successful, but not necessarily an equal skill level in each area. The balance of the three areas that individuals need will vary depending on their role and the organizations they work for. Apart from representing the skills necessary for lawyers to succeed in the 21st century, Delta Model is a design tool that helps law students and legal

\textsuperscript{153} ibid. Nowadays there are even more people employed in the field of medicine than there were before the introduction of technology, but now people manage the technology instead of doing all the work manually.

\textsuperscript{154} ibid 113.

\textsuperscript{155} Alyson Carrel, ‘Opportunity to Influence at the Intersection of Dispute Resolution and Technology’ in John Lande (ed), Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement (2020) 116 <http://indisputably.org/2020/02/heres-your-theory-of-change-book/> accessed 26 June 2020.

\textsuperscript{156} Delta Model has been developed by a working group comprising Alyson Carrel (Northwestern), Cat Moon (Vanderbilt), Shellie Reid (Michigan State), Natalie Runyon (Thomson Reuters) and Gabe Teninbaum (Suffolk). More information about this model is available at <https://www.alysoncarrel.com/delta-competency-model> accessed 15 February 2021.
professionals chart a course for a successful career in law.\textsuperscript{157} As of 2020, a model’s prototype is being tested that creates individualized delta maps and visualizes the skill gaps an individual should consider filling to achieve their career goals. Law firms and corporate legal departments may consider using Delta Model to enhance their hiring process.

The second way is by exploring the use of legal technology and innovation platforms in offline dispute resolution processes.\textsuperscript{158} Although discussion of technology in dispute resolution is understood almost entirely as the use of dispute resolution where the parties are meeting online, legal technology can do a lot more than just recreate offline processes in an online environment. It can enhance offline processes when parties meet face-to-face. Technology can enhance parties’ and lawyers’ abilities to access and analyse massive amounts of information. Lawyers may increasingly use sophisticated legal tools including legal analytics that involve mining data contained in case documents and docket entries, and then combining that data to provide insights into the behaviour of the individuals (judges and lawyers), organizations (parties, courts, law firms) and the subjects of lawsuits (such as patents) within the litigation ecosystem. Litigators may use legal analytics to reveal patterns in past litigations that inform legal strategy and anticipate outcomes in current cases. In recent years, more and more companies provide ‘big data’ and AI services to better identify similar cases and estimate likely court outcomes. Mediators in face-to-face mediation may rely on the use of predictive analytics tools to help parties assess their BATNA and undertake decision-tree analyses.

Examples of tools that parties, lawyers and mediators may use are numerous. These include TreeAge Software,\textsuperscript{159} Litigation Risk Analysis,\textsuperscript{160} Countermeasure Legal,\textsuperscript{161} Litigation Analytics—WestLaw Edge,\textsuperscript{162} Picture It Settled,\textsuperscript{163} Oracle Crystal Ball\textsuperscript{164} and ArbiLex.\textsuperscript{165} The available empirical data shows, however, that so far, the uptake of such tools is low. This was the result of the CPR 2020 survey of

\textsuperscript{157} ibid.
\textsuperscript{158} Carrel (n 155) 118.
\textsuperscript{159} <https://www.treeage.com/legal/> accessed 15 February 2021. The software allows to create a model to quantitatively analyse a case to best advise clients before proceeding to trial. Attorneys and clients need to assess all scenarios with respect to verdicts and damages to plan for settlement negotiations and trial strategy.
\textsuperscript{160} <www.litigationrisk.com/> accessed 15 February 2021. This tool offers two types of litigation risk analysis solutions for two types of cases: analysing complex, high-exposure cases by performing a full litigation risk analysis and analysing frequently arising claims by using pre-constructed litigation risk analysis software models.
\textsuperscript{161} <www.countermeasure.legal/> accessed 15 February 2021. While most litigators’ analysis is unstructured, CounterMeasure combines litigators’ judgment and expertise with analytics and automation to amplify case analysis, strategies and predictions.
\textsuperscript{162} <https://legal.thomsonreuters.com/en/products/westlaw/edge/litigation-analytics/> accessed 15 February 2021. Litigation Analytics on Westlaw Edge delivers the context to build a strategy. It mines court and docket data to provide data-driven insights on judges, courts, attorneys, law firms, and case types across the broadest coverage of state and federal court dockets in the industry.
\textsuperscript{163} <www.pictureitsettled.com/> accessed 15 February 2021. Using neural networks to examine the behaviour of negotiators in thousands of cases, Picture It Settled can predict what an opponent will do, saving time and money while optimising settlements.
\textsuperscript{164} <www.oracle.com/applications/crystalball/> accessed 15 February 2021. Oracle Crystal Ball is a spreadsheet-based application for predictive modelling, forecasting, simulation and optimisation. It
lawyers in CPR member firms. When asked about the proportion of cases in which they use technological tools such as databases of comparable cases or statistical models (eg Monte Carlo simulations), the answer of 81% of lawyers was ‘in almost none of our cases’. The situation, however, might change following the COVID-19 outbreak.

The third way is by teaching dispute resolution skills in legal technology and innovation courses. There is a number of legal technology and innovation initiatives relating to practical problem-solving skills, in which dispute resolution instructors could play a significant role. One example comes from Dentons, one of the world’s largest law firms, which has created NextLaw Labs, a new entity focused on innovation. NextLaw Labs Head of Product Maya Markovich has noted, ‘As technology begins to take on more of the quotidian tasks in industries like law, the most valuable skills [for teams] will be those ... attributes like inclusiveness, emotional intelligence, and empathy’. To support their lawyers acquiring these competencies, Dentons launched a professional development initiative called NextTalent, which highlights the importance of skills such as leadership, team development, mindfulness, emotional intelligence and resilience, to enable professionals in the firm to develop and realize human potential in the digital era.

As legal technology initiatives along with problem solving, communication and emotional intelligence take the center stage, the dispute resolution field can contribute to developing the legal profession of the future. The goal is to teach legal professionals to think creatively to better serve clients.

5. CONCLUSION

The unprecedented situation, in which the world finds itself today will accelerate changes within the dispute resolution field. The COVID-19 outbreak leaves companies and law firms no choice but to think differently. Due to the rising number of disputes, companies can be expected to prioritize time and cost-efficient ways of resolving disputes even more than before the outbreak. Those companies that have not done it yet, could give a serious thought to introducing a PEDR system or at least some of its elements. PEDR systems are beneficial not only for the reason of financial savings, but also because they help parties preserve business relationships, minimize diversion of attention from business activities and achieve parties’ top priorities. This article has presented tried and true solutions in relation to PEDR systems and elements. These may serve as a source of inspiration to companies that are considering the introduction of similar systems and elements. As the number of companies switching to PEDR increases, so will increase the number of law firms adjusting to the evolving companies’ expectations in terms of dispute management. Law

builds on existing Monte Carlo and predictive modeling tools and gives an insight into the critical factors affecting risk.

165 <www.arbilex.co/welcome> accessed 15 February 2021. ArbiLex brings AI and predictive analytics to international arbitration to enhance decision-making by law firms and litigation funds.

166 Lande (n 107). For the complete survey data, see CPR 2020 Survey Results (n 107).

167 CPR 2020 Survey Results (n 107).

168 Carrel (n 155) 118.

169 ibid.
firms will have to do this to remain relevant. This article has illustrated how law firms can best meet the changing companies’ demands. Finally, a need to adhere to the rules of social distancing due to the COVID-19 outbreak will increase demand for conflict management and dispute resolution at a distance. As a consequence, we can expect that technology will play a much more prominent role in dispute resolution. In managing conflicts and resolving disputes, companies and law firms will inevitably rely on technology steadily more than they currently do. More broadly, through interaction with technology the field of dispute resolution will contribute to educating legal professionals to think creatively so that they can deliver service of better quality to their clients.