CHOOSING MEDIATION AND ICC ARBITRATION TO SECURE INVESTMENTS BY JAPANESE COMPANIES IN AFRICA

In the wake of Prime Minister Shinzo Abe's announcement at the Tokyo International Conference on African Development (TICAD) in August 2016 to invest over $30 billion in Africa, more and more Japanese companies are taking an interest in the growing and promising market of some African countries and have made international deals in order to develop their activity.[1]

It is in this context that the law firm KITAHAMA PARTNERS, in partnership with the law firm FIDAL, wishes to highlight in this newsletter how important it is for Japanese companies to insert a dispute resolution clause in their investment or business contracts with private African parties or African countries. More specifically, our lawyers will explain the reasons why they strongly recommend that companies investing in Africa opt in priority for an ICC arbitration and mediation clause, with a seat in Paris, and ensure that their contracts are governed by OHADA law.

1. The importance of including a dispute resolution clause in international contracts to better protect their investments

In the scope of investments abroad or international business contracts, it is essential to include a dispute resolution clause that will protect the business relationship or at least ensure that the dispute will be settled by neutral and experienced professionals within a timeframe and at a cost that is controlled.

A dispute resolution clause is in fact a real guarantee clause in a contract.

Without such a clause, the parties may indeed waste years in procedural battles to determine the jurisdiction and applicable law without moving forward to find a solution to resolve their dispute. A foreign investor may be sued before the national courts in the place where its contract is being performed and which may lack neutrality and impartiality in his respect. This reality of course does not escape investments in Africa.

Several dispute resolution methods may be chosen by the parties and may even be combined between them. This is the case of mediation and arbitration which together offer greater flexibility and security to the parties.

2. The interest of a combined mediation and arbitration clause to efficiently resolve disputes

Today, general counsels in large international groups confirm that it is important for companies to secure their international business and investment contracts by inserting a dispute resolution clause initially providing for mediation and, if and only if an agreement is not reached, the use of arbitration.

[1] Investment on the boom in Africa, Japan and the World, http://japanandtheworld.net/3060

Their experience is reported in two studies on "Dispute Wise Business Management" carried out by the law firm FIDAL in partnership with the American Association of Arbitration, which you may consult at the annexed pages of this newsletter.

- Mediation allows parties to try and reach an amicable agreement to resolve their dispute thanks to the intervention of a neutral third party who is independent, impartial and trained on assisted negotiation techniques.

This method of dispute resolution is largely successful as it allows the business relationship to be preserved in 85% of cases and find a solution in an average period of 2 months for a very reasonable cost. The parties may indeed move away from a strict application of the law to reach a win-win business agreement together. As mediation is developing across the world in the public's interest, it is now easy to convince a partner to insert such a clause in the contract.

- Arbitration allows the parties to choose one or more independent, impartial and experienced arbitrators who offer the security, if the parties do not reach an agreement, of settling their dispute with all the neutrality and jurisdiction expected of a court.

Like 76% of French and US companies who are satisfied with this dispute resolution method,[2] there is increasing demand for arbitration among African companies.[3]

Both mediation and arbitration also guarantee a confidential resolution of disputes preserving the parties' reputation and their trade secrets in a competitive market.

3. The ICC International Court of Arbitration in Paris: an ideal arbitration institution for Japanese companies investing in Africa

- The International Court of Arbitration of the International Chamber of Commerce (**ICC**), set up in 1923, is one of the oldest and most renowned institutions for international mediation and arbitration and has over 1,500 pending cases representing stakes of over $286 million. With its seat in Paris, its activity covers the whole world.

The ICC has a recently-updated set of rules of mediation and arbitration which allow the parties to set up these procedures easily and anticipate and control their costs thanks to the scales defined therein.

Moreover, the ICC is known for attentively verifying the arbitral awards so that no flaws affect their enforcement.

The ICC can also assist the parties in the appointment of neutral and independent arbitrators and mediators of all nationalities fluent in the language of arbitration designated by the parties.

These are the reasons why, although international arbitration institutions are flourishing, the ICC remains the preference for African[4] and international parties who do not hesitate to choose a seat of arbitration outside the African continent,[5] and most often in Paris.

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[2] American Arbitration Association & Fidal, Dispute Wise business management – To an optimized management of disputes – *Améliorer les résultats économiques et non économiques de l'entreprise par une gestion avisée des conflits*, 2009, p 14.
[3] The financial, ICC OHADA partner to boost arbitration practices in Africa, June 2016 (http://www.finchannel.com/index.php/business/57522-icc-ohada-partner-to-boost-arbitration-practices-in-africa)
[4] Delphine Constantin, Dispute resolution in Africa for Indian investors: an Overview of Civil-Law OHADA Jurisdictions, Indian Journal of Arbitration Law, Jodhpur 20158, Volume IV Issue 2, p 125
[5] E. Onyema, the transformation of Arbitration in Africa: the role of arbitral institutions, Kluwer Law international, p. 4; or details see, 2013 ICC Statistical Report vol. 25 no. 1 ICC

- Paris is a historical and world-renowned seat of arbitration,[6] where most international arbitration cases are in English. It is also a capital through which parties in business relations with the African continent frequently transit and where African parties frequently go.

The Paris courts also guarantee the efficiency of the arbitration procedure as they very strictly interpret the grounds for annulling an award, almost systematically uphold ICC arbitral awards and grant exequatur rapidly.

Moreover, like the Japanese system, the French legal system is based on Civil Law, which makes it easier to understand for Japanese companies, unlike the systems of other seats of arbitration such as London; Hong Kong or Singapore which are based on Common Law.

Moreover, if among all of the possibilities offered to foreign investors in Africa, it is clear that ICC mediation and arbitration with a seat in Paris is a wise choice, whether in French or in English as the parties wish, it is also recommended that their contract be governed by the law adopted by the Organization for the Harmonization of Business Law in Africa (**OHADA**).

4. OHADA law, a relevant choice to secure the performance of agreements concluded with African economic operators

Set up in 1993 and composed of seventeen African Member States,[7] OHADA has harmonized legislation relating to the business law of its Member States by adopting nine Uniform Acts on commercial law, commercial companies or cooperative societies law, contracts for the carriage of goods by road, organizing securities, organizing simplified recovery procedures and measures of execution, as well as arbitration law.

The objective described in the preamble to the OHADA treaty, namely *"securing the legal security of economic activities, in order to promote their growth and encourage investment"* seems to be a success as the organization has managed to create a modern body of legislation available in several languages,[8] adapted to the new challenges of the economy and broadly recognized by the international community both in terms of the wording of the acts and their content.[9]

The 2016 *"Doing Business"*[10] report highlights the 17 OHADA member countries and points out that the region has 5 of the 10 economies that have best improved the business climate in the world.[11]

Therefore, Japanese companies are advised to plan for the application of the OHADA Uniform Acts in their contracts concluded with the African parties members of this organisation in these areas of business law in order to facilitate their enforcement.

As OHADA law is very broadly inspired by French law and case law, most arbitrations but also mediations involving African or foreign countries or private parties are implemented then handled by French lawyers with solid knowledge of these issues.

Bulletin 5 (2014).
[6] Ibid
[7] Benin, Burkina-Faso, Cameroon, Central Africa, Ivory Coast, Congo, Comoros, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Democratic Republic of Congo (DRC), Senegal, Chad and Togo.
[8] English, French, Spanish and Portuguese
[9] P. Bourel, about OHADA: free opinions on the harmonization of business law in Africa, Recueil Dalloz 2007, p. 969
[10] The Doing Business reports are comparative studies carried out by the World Bank group on business regulations and their effective application in over 190 economies across the world
[11] The World Bank, Measuring Regulatory Quality and Efficiency, Doing Business report, 2016, p. 14

This is the case of the law firm FIDAL, the largest law firm in France and in continental Europe in terms of the number of lawyers and turnover (1,400 lawyers – €350 million in turnover), and more specifically its international litigation and arbitration department and its Africa Desk, which has a network of correspondents in Africa.

To handle such cases and their multi-cultural aspects, FIDAL always works in partnership with a firm representing the interests of the foreign clients concerned by these procedures, and, for Japan, with the law firm KITAHAMA PARTNERS, whose large team of lawyers has expertise in international arbitration.

Our teams therefore remain available to answer all your questions on these issues and assist you in drafting dispute resolution clauses and in handling such mediation and arbitration proceedings.

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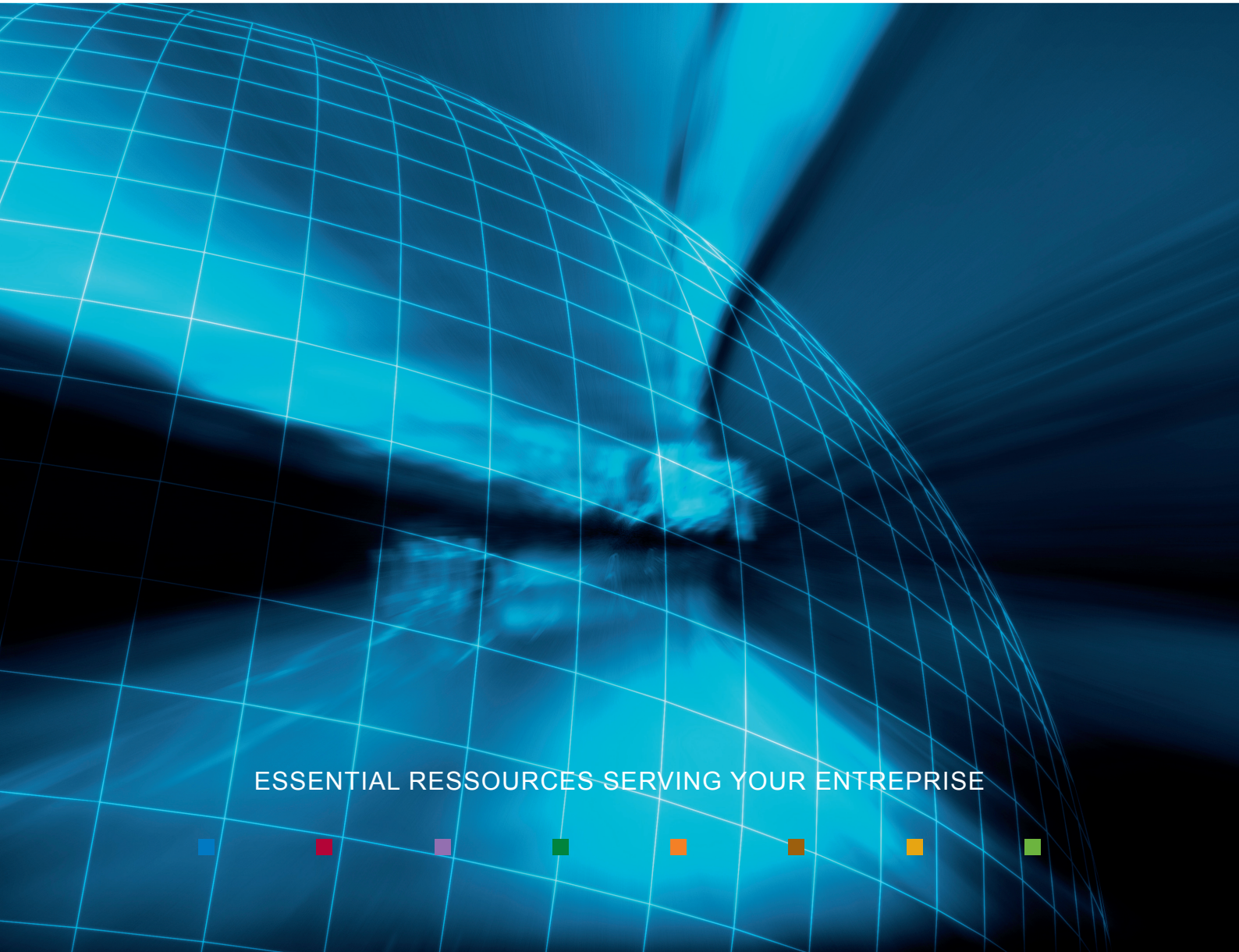
Dispute Resolution Services Worldwide

« DISPUTE-WISE BUSINESS MANAGEMENT »

VERS UN MANAGEMENT OPTIMISÉ DES LITIGES

IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS



About the American Arbitration Association

The world leader in conflict management since 1926, the American Arbitration Association (AAA) is a non-profit organization offering dispute resolution services, and in particular, arbitration, mediation, conciliation, negotiation and other voluntary processes.

www.adr.org

About FIDAL's "Direction Internationale"

With 1,300 legal and tax advisors and correspondents in 150 countries, FIDAL is the leading French business law firm. The "Direction Internationale" (or International Department) comprises 250 lawyers and consultants involved in the day-to-day handling of international legal and tax issues. The ADR, Arbitration and International Disputes department endeavors to offer its clients the most efficient, least costly and most appropriate means of resolution for each dispute.

www.fidal.fr

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Contents

FOR MORE THAN HALF A CENTURY, ALTERNATIVE DISPUTE RESOLUTION (ADR), WHICH INCLUDES MEDIATION AND ARBITRATION, HAS BEEN GAINING EVER-INCREASING RECOGNITION AND TRUST

"Dispute-Wise" Business Management – "Management Optimisé des Litiges"

Improving Economic and Non-Economic Outcomes in Managing Business Conflicts

Introduction

In November 2008, FIDAL's International Department, in cooperation with the American Arbitration Association (AAA), undertook a survey of a representative group of French companies in order to study their conflict management practices and their use of ADR (Alternative Dispute Resolution). This survey was modeled on a survey conducted by the AAA[1] in the United States in 2003.

The study resulting from this survey has established a view of the current use of ADR by French companies, and in particular, of arbitration and mediation, as well as a comparison with the customary practices of US companies in this area.

Beyond the simple statistics, this study reveals the French response to two crucially important questions that the AAA asked US companies:

- Is it possible to identify companies that have the most "Dispute-Wise" management practices, and if so, what are their characteristics?
- Is there a relationship between "dispute-wise" business management practices and favorable "outcomes" of both an economic and non-economic nature?

These original questions from the AAA's American survey revealed 8 characteristics common to the legal departments of US companies that the AAA designated as the most "Dispute-Wise" (in French, "*Management Optimisé des Litiges*").

Moreover, the results showed that the most "Dispute-Wise" companies derived specific advantages, as well as economic benefits, from setting up optimized dispute management practices.

The French study has confirmed this analysis with the same observation in France, and has carried the inquiry a step further by asking a complementary question:

- Do the most "Dispute-Wise" companies have common best practices in their conflict management policy, and if so, what are they?

This comparative French study has thus validated, beyond the borders of North America, the economic advantage that companies derive from using ADR.

ADR, WHICH OFFERS COMPARATIVELY INEXPENSIVE AND EASILY ACCESSIBLE ALTERNATIVES TO THE JUDICIAL SYSTEM, HAS BECOME AN ECONOMICAL CHOICE

[1] This AAA Survey, conducted in companies, is a follow-up to a survey conducted in 1998 by David B. Lipsky and Ronald, professors at Cornell University (*The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*). The AAA Survey confirmed the results of the Cornell survey and took them further by producing the "Dispute-Wise" concept.

It has also revealed some common best practices which the most "Dispute-Wise" companies have implemented within the framework of their dispute management policies, in particular, the organized use of ADR.

To arrive at these findings, the French comparative study:

- Examined the current usage of ADR within a sample group of companies, determined what forms of ADR are used, for what purpose, how often, with what effectiveness, and to what benefits;
- Determined whether the companies actually derive specific economic advantages from their ADR practices and their optimized approach to conflicts, and in particular whether they have better relationships with their business partners, their clients and their suppliers;
- Identified the common best practices of companies that practice "Dispute-wise" business management;
- Compared French practices with US practices in this area, to determine whether the results of the two studies are similar and whether general patterns and trends can be found in the use or view of ADR methods.

The first part of this study examines the main benefits that can be attributed to the use of ADR. The second part presents a comparative assessment of the use of ADR by French and American companies. The third part highlights the main conflict management trends in the most "Dispute-wise" companies.

Context of the survey

For more than 50 years, alternative dispute resolution—first arbitration and later mediation—has been gaining ever-increasing recognition and trust, as businesses become increasingly aware of the importance of preserving their commercial relationships and avoiding exposure to lengthy and costly litigation.

The development of ADR has been spurred, *inter alia*, by the rising burden of commercial litigation and the increasing complexities surrounding court proceedings, first and foremost in the Anglo-Saxon world (in the United States, annual legal costs are estimated at between USD 200 and USD 300 billion) and, ultimately, worldwide.

In such a context, ADR, which is comparatively less expensive and more easily accessible than court litigation, has become an economic choice. Moreover, the diversity of ADR methods has led companies that are most advanced in their use of ADR to adopt a "portfolio approach" to disputes and to implement organized and optimized dispute management practices.

Under a dispute-wise management approach, in-house legal departments are more integrated in the company's overall strategy, in a manner comparable to Risk Management departments. Dispute-Wise management is characterized by a willingness to consider the entire range of a company's disputes, to treat each of them in relation to the others and with the goal of minimizing the risks, costs, time and resources dedicated to them, while preserving important business relationships.

Pragmatic and effective, this type of dispute management, which the AAA has termed "Dispute-Wise Business Management," is at the forefront of the best practices in this area and has generated renewed interest in non-confrontational methods.

Even in situations where a favorable court decision is likely, "winning" is not necessarily the "Dispute-Wise" company's primary goal. The use of ADR, resulting in a settlement, not only reduces the risk and expense incurred by the company, but also saves legal departments valuable time and preserves good relationships (which are costly to reestablish) with the company's partners, whether they be clients, suppliers, shareholders or employees. Thus, the "Dispute-Wise" company tends to favor ADR and to avoid opting for a court-based resolution of disputes, which involves higher costs, delays, risks, constraints and stress.

The AAA, the world leader in conflict management at the origin of the development of ADR in US, and FIDAL's International Department, a law firm that seeks to enable its clients to benefit from the advantages of ADR, are both well positioned to measure the interest and enthusiasm generated by these alternative methods. Together they have sought to determine whether, outside America's borders, companies are deriving economic advantages from the use of ADR and the implementation of conflict management policies, and whether there are best practices that are transposable to all companies.

Method

Under the supervision of FIDAL and the AAA, the survey was conducted by a statistical and economic analysis firm,[2] which polled the managing directors and the heads of legal departments of 70 French companies of all sizes and from all sectors of business, and thus representative of the French economic and industrial environment. The sampling of companies surveyed was composed as follows:

- 40% from listed companies or members of a group listed on the main markets
- 40% from large unlisted companies
- 20% from SMEs (based on the EU definition: companies with fewer than 250 employees representing less than €50 million in annual revenue)

This survey, based on the American model, has, for the first time outside the US, made it possible to establish a scale for evaluating the way companies manage their disputes.

Table 1

ANNUAL REVENUE OF RESPONDENTS

	Total
Less than €50M	19%
€50M - €100M	3%
€100M - €300M	22%
€300M - €500M	8%
€500M - €1,000M	7%
€1,000M - €10,000M	27%
€10,000M & more	14%

[2] "Essec Solution Entreprise"

First, the respondents were asked to evaluate their company's behavior when confronted by a conflict, using a table of 8 types of behavior, and giving a score from 1 to 10 (10 corresponding to the description most fitting to the company's behavior).

Based on these scores, the companies were then, as in the American model, split into 3 categories reflecting their "Dispute-Wise" level or, in other words, their optimized dispute management level. Thus,

- 34% of French respondents are most "Dispute-Wise,"
- 34% of French respondents are moderately "Dispute-Wise,"
- 32% of French respondents are least "Dispute-Wise."

Next, the surveyed companies responded to a telephone questionnaire, composed of approximately fifty questions, divided into four parts. The first three parts concerned the company's practices, feedback and perspectives on ADR in general, and then on mediation and arbitration in particular. The fourth part dealt with the company's internal organization and, in particular, its legal department.

Next, the "Dispute-Wise" level was cross-tabulated against the answers to the questionnaire as a whole.

As will be shown in the analysis of the survey results, this cross-tabulation shows that the most "Dispute-Wise" companies have a larger and organized level of use of ADR and draw both economic and non-economic benefits from such use.

Moreover, this analysis has revealed traits common to the dispute management policies implemented by the most "Dispute-Wise" companies.

EACH RESPONDENT ASSESSED THE BEHAVIOR AND THE HABITS OF HIS COMPANY WHEN CONFRONTED WITH A CONFLICT

The characteristics of "Dispute-Wise" companies

The heads of legal departments in the most "Dispute-Wise" companies are more inclined to:

- Be integrated into the general corporate planning process
- Understand the broader business issues facing the company and the industry
- Spend a lot of time on highly technical and complex issues
- Be involved in cross-border disputes (the apparent goal being to avoid the risk arising from the uncertainty of judicial procedures outside the home country)
- Work in an environment where the senior management places emphasis on preserving the company's relationships and settling disputes rather than just on winning cases and, therefore, is less concerned about aggressively litigating every case.

Conversely, the legal departments of the least "Dispute-Wise" companies see their role as being more focused on drafting and following up on contracts, and they adopt a more confrontational posture when a dispute arises, favoring traditional judicial procedures rather than ADR.

"Dispute-Wise" behavior

Table 2

***DESCRIBES LEGAL DEPT VERY WELL** (8/10 minimum on a 1-10 scale)*
Base : Total

	All Respondents	Most	Moderate	Least
Our team has very good knowledge of the economic context of the company and of the industry in which it is active	75%	85%	73%	64%
Legal department is totally integrated upstream in the operational conduct of the business	69%	83%	65%	54%
Executive management wants primarily to preserve relationships and find amicable solutions rather than winning at all costs	77%	83%	76%	69%
A good deal of our time is dedicated to highly technical problems	65%	76%	66%	48%
A lot of our time is dedicated to international disputes	35%	48%	33%	19%
When a dispute arises, we usually adopt an aggressive stance	40%	33%	43%	47%
Our priority is to draft contracts	72%	71%	69%	77%
We often favour traditional litigation over ADR	55%	34%	67%	67%

Table 3

"Dispute-wise" categories by sector (Base: Total)

The most "Dispute-Wise" companies are spread accorss all sectors of business, thus preventing us from concluding that any one business sector is more advanced than the others in this area.

	All Respondents	Most	Moderate	Least
Banking/Finance/Insurance	17%	21%	17%	14%
Distribution/Consumer goods/Food	14%	13%	25%	5%
Energy/Natural Resources	13%	8%	13%	18%
Manufacturing	13%	17%	8%	14%
Pharmacy/Healthcare	10%	0%	13%	18%
Construction	6%	13%	0%	5%
Services/Local Authorities	6%	4%	4%	9%
Transport/Logistics	6%	0%	17%	0%
Automotive	4%	8%	0%	5%
Aeronautics/Space/Defense	3%	8%	0%	0%
Consulting & R&D	3%	4%	0%	5%
Tourism	3%	0%	0%	9%
Telecommunications/Media/Advertising	3%	4%	4%	0%

Indeed, listed companies or companies belonging to a listed group appear to be the most sensitive to the potential gains involved in effective dispute management, because they are more numerous in the "Most Dispute-Wise" category. Large companies are mostly found in the intermediate category, while small companies are generally found to be the least "Dispute-Wise."

Table 4

	All Respondents	Most	Moderate	Least
	Ensemble	Plus	Modérées	Moindre
Listed companies/subsidiary of a listed co.	40%	63%	29%	27%
Big companies	40%	29%	50%	41%
SME	20%	8%	21%	32%
	100%	100%	100%	100%

Table 5

Evaluation of the most important goals for the most "Dispute-Wise" companies when a dispute arises with clients or suppliers

	All respondents	Most	Moderate	Least
Evaluating the risks	66%	71%	74%	47%
Putting an end to the dispute	59%	71%	45%	60%
Performing the contract	55%	73%	54%	37%
Confidentiality	44%	45%	35%	53%
Expertise of mediators and arbitrators	34%	50%	25%	21%
Control over the ultimate solution	33%	41%	25%	33%
Costs	33%	33%	36%	28%
Winning	31%	30%	26%	37%
Being able to enforce the decision abroad	28%	42%	26%	13%
Speed	25%	36%	30%	6%
Maintaining business relationships	25%	30%	22%	22%
Fairness/Equity	15%	14%	18%	13%
Creating a precedent	13%	14%	9%	16%
Possibility of raising an appeal	7%	14%	0%	6%

The 8 main goals of the most "Dispute-Wise" companies surveyed are:

- Performing the contract
- Evaluating the risks
- Putting an end to the dispute
- Benefitting from the expertise of arbitrators and mediators
- Benefitting from confidentiality
- Enforcing decisions abroad
- Controlling the ultimate solution
- Controlling the time and cost of the proceedings.

The answers provided by the survey respondents, presented below, show that they consider that the use of ADR allows them to achieve these goals.

The survey findings

Economic and non-economic advantages of ADR

The results of the study quite clearly show that the most "Dispute-Wise" companies benefit from a better commercial and economic environment, are more satisified with the handling of their disputes, have a legal department that is better utilized and use ADR more than other companies.

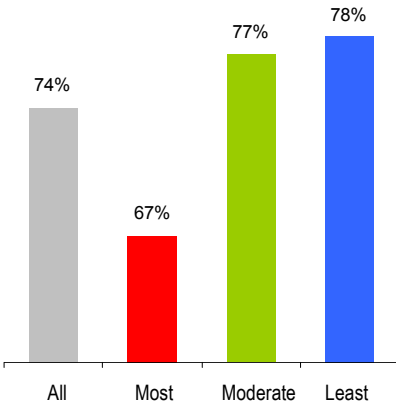
Among the key benefits of a "Dispute-Wise" management, the study shows that the most "Disputes-Wise" companies:

- Use their resources more effectively (in-house legal departments often consider themselves over-extended; those in the most "Dispute-Wise" companies are less likely to feel this way; see Figure 1)
- Use ADR more often than the least "Dispute-Wise" companies (see Figure 2)
- Derive economic advantages from using ADR, particularly mediation and arbitration, which result in:
  - Internal and external cost-savings with respect to conflict management;
  - Reduction of the time dedicated to dispute resolution, permitting better management of the company's resources and increased productivity;
  - Preservation of business relationships, especially with clients or suppliers (an important business objective);
  - Opening the way to new agreements, which create value for the company.

Figure 1

DESCRIBES LEGAL DEPARTMENT VERY WELL

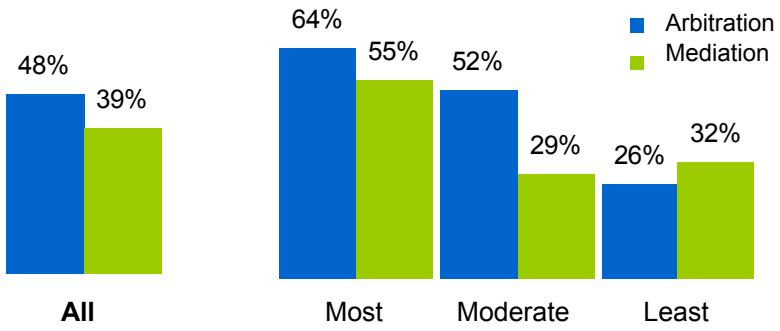
"The legal dept is quite lean, we often find ourselves stretched to the limit"



The most "Dispute-Wise" companies feel they enjoy more satisfactory working conditions

Figure 2

A GREATER USE OF ADR BY THE MOST "DISPUTE-WISE" COMPANIES



CHARACTERISTICS IN THE DISPUTE WISE MANAGEMENT INDEX

A Dispute-wise legal department:

- Is highly integrated into the corporate planning process
- Is in tune with broader business issues facing the company and the industry
- Spends a lot of time on highly complex, technical, or cross-border, international matters,
- Is encouraged by the management to seek to preserve valuable relationships and find solutions, and not just to focus on winning
- Is not as likely to take an aggressive approach to dispute resolution, favour ADR over litigation

Table 6

Advantages to the use of mediation and arbitration

(Base: use of mediation/arbitration)

	Mediation	Arbitration	*Mediation*	*Arbitration*
Saves time	70%	41%	*84%*	*73%*
Saves money	59%	30%	*91%*	*73%*
Preserves good relationships	44%	15%	*56%*	*38%*
Gives more satisfactory results	37%	22%	*61%*	*49%*
Is a more satisfactory process	33%	15%	*83%*	*66%*
Preserves confidentiality	26%	56%	*47%*	*54%*
Facilitates resolution of sensitive or technically complex solutions	19%	11%	*36%*	*37%*
Provides more durable solutions than courts	19%	7%	*31%*	*25%*
Uses expertise of the mediator/arbitrator(s)	19%	33%	*61%*	*49%*
Is required by contract	15%	30%	*54%*	*87%*
Is favored by management	15%	7%	*48%*	*37%*
Is necessary given the international nature of the dispute	11%	26%	*16%*	*25%*
Avoids creating legal precedents	7%	4%	*36%*	*32%*
Other	11%	4%		

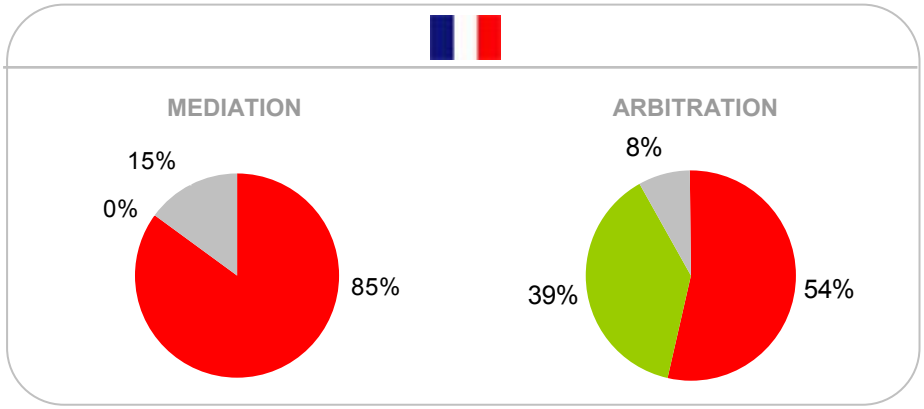
The main reason given by the respondents to explain their use of mediation and arbitration is the time-savings generated.

The respondents also stressed the importance of the cost-savings realized by using mediation, and the preservation of confidentiality resulting from the use of arbitration, which is confirmed by the answers to the questions relating to the effects of these processes on the time spent and the costs incurred in resolving disputes.

Figure 4

Effects on the time spent to resolve disputes using ADR vs. litigation

(Base: use of mediation/arbitration)

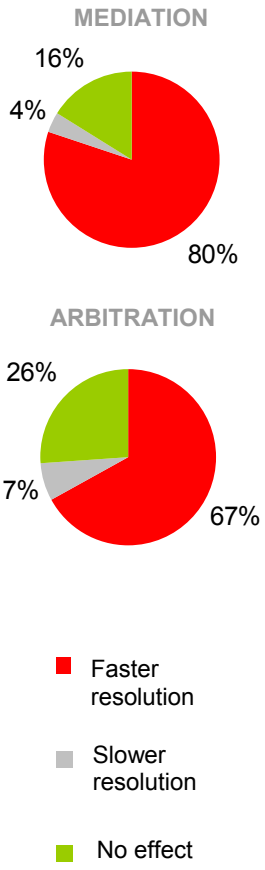


MEDIATION PERMITS A FASTER RESOLUTION OF CONFLICTS

Figure 3

US: EFFECTS ON TIME SPENT TO RESOLVE DISPUTES USING ADR vs. LITIGATION

(Base: use of médiation/l'arbitrage)



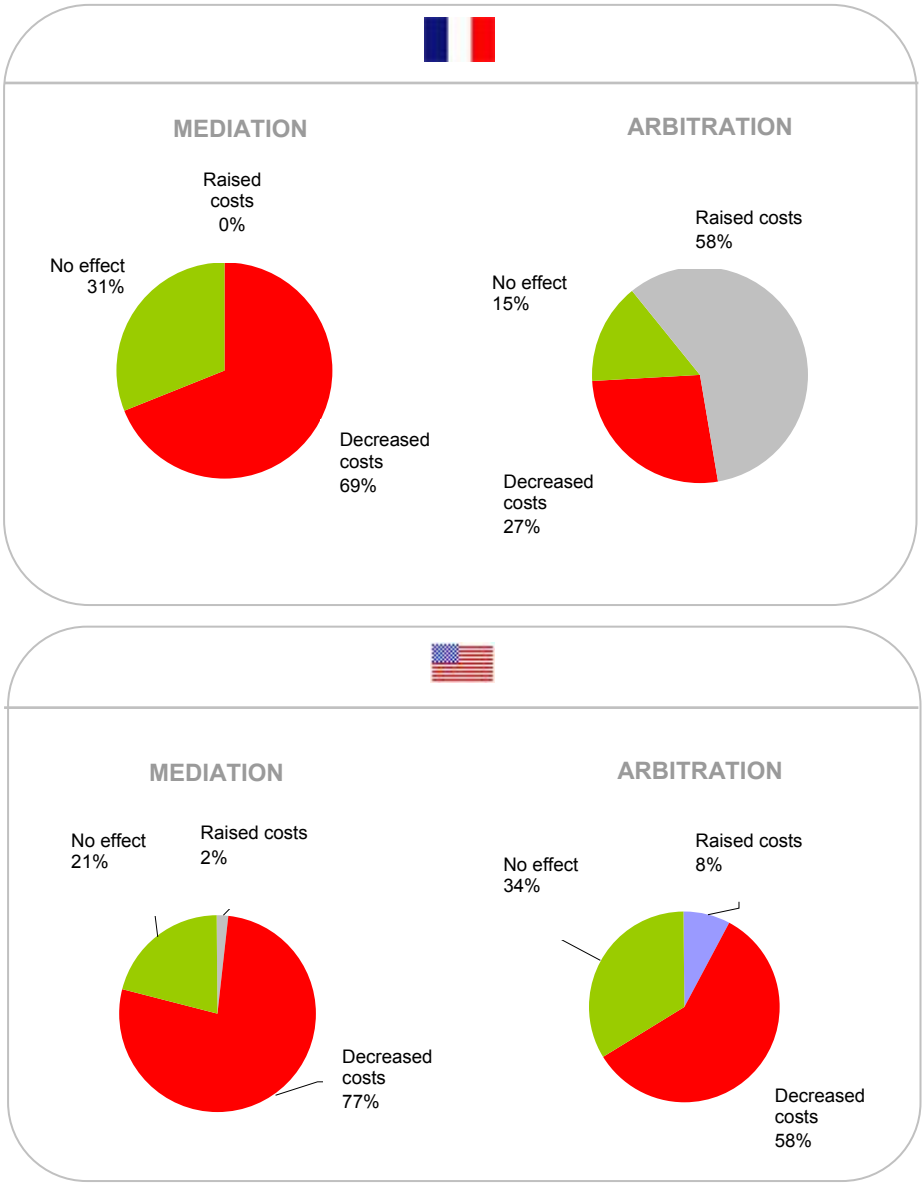
85% of respondents consider that mediation is a faster method of dispute resolution than court litigation.

54% percent of the French respondents, and 67% of American respondents, consider arbitration to be a faster method of dispute resolution than court litigation.

Figure 5

Effects on the cost of resolving disputes using ADR vs. litigation

(Base: use of mediation/arbitration)



The economical advantage of mediation is confirmed by 69% of French respondents and 77% of American respondents; however, a smaller percentage of French companies perceive cost-savings resulting from the use of arbitration (27% in France, 58% in US (Figure 5)).

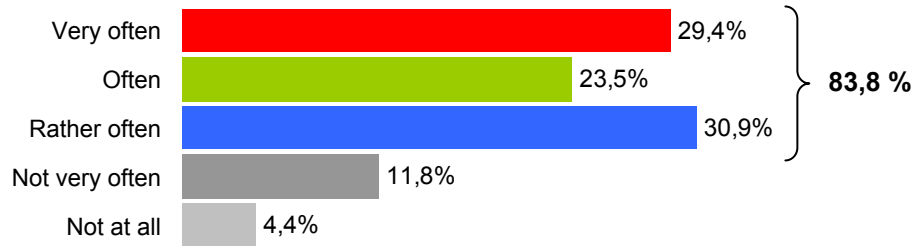
IN FRANCE, AS IN THE UNITED STATES, MEDIATION RESULTS IN A REDUCTION OF DISPUTE MANAGEMENT COSTS

Effects on the relationship between the parties using ADR vs. litigation

Figure 6

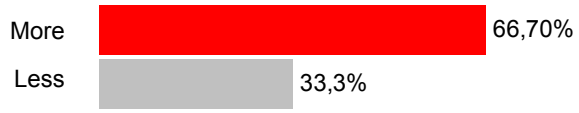
FRANCE: WHEN A DISPUTE ARISES WITH A CLIENT OR A SUPPLIER, IS IT OFTEN IMPORTANT TO MAINTAIN BUSINESS RELATIONS NONETHELESS?

Base: All



FRANCE: UNDER SUCH CIRCUMSTANCES, WOULD YOU SAY THAT YOU ARE MORE OR LESS INCLINED TO USE ADR?

Base: All

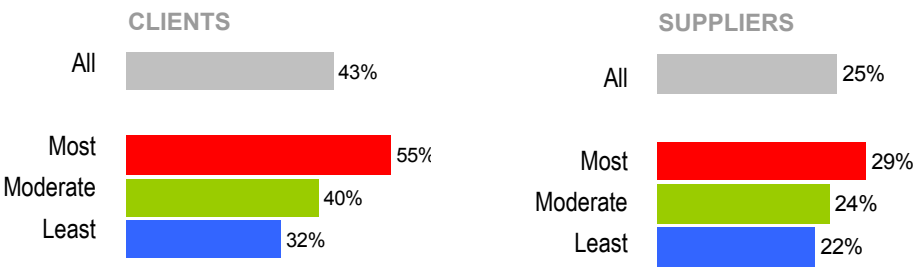


For more than 80% of respondents, when a dispute arises with a client or a supplier, it is important to preserve the relationship. For this reason, more than two-thirds of the French companies stated that they are inclined to use ADR.

In the United States, the most "Dispute-Wise" American companies, i.e., those that use ADR the most, are the ones that maintain the best business relationships with their clients and suppliers.

Figure 7

UNITED STATES: EVALUATION "EXCELLENT/ VERY GOOD" RELATIONS WITH CLIENTS AND SUPPLIERS

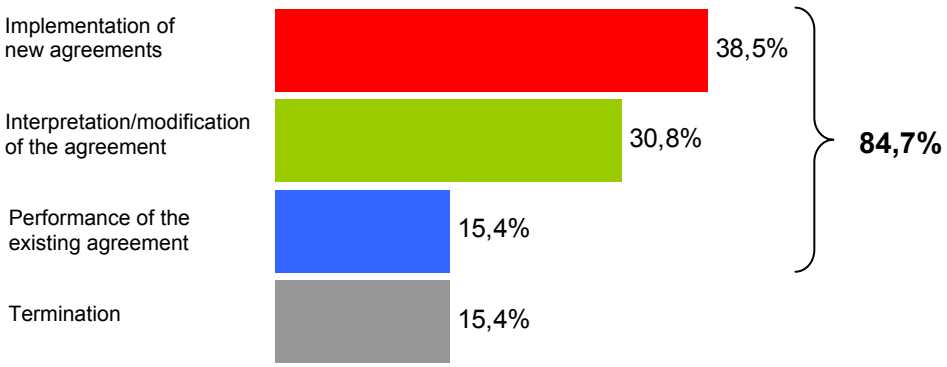


MEDIATION ENABLES COMPANIES TO ACHIEVE ONE OF THEIR ESSENTIAL OBJECTIVES: PRESERVING BUSINESS RELATIONSHIPS

Figure 8

FRANCE: WHAT CHANGES IN THE RELATIONSHIP WITH THE OTHER PARTY DOES A SUCCESSFUL MEDIATION PROCESS GENERALLY ENTAIL?

Base : Use of mediation

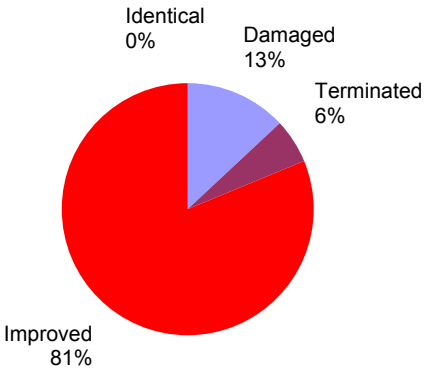


The majority of the companies surveyed stated that a successful mediation process avoids termination of the contractual relationship, by resulting either in the conclusion of new agreements, in a mutually accepted interpretation or modification of the disputed contract, or in simple performance of the existing contract.

Figure 9

FRANCE : WHAT EFFECTS DOES A SUCCESSFUL MEDIATION PROCESS HAVE ON THE QUALITY OF THE RELATIONSHIP WITH THE OTHER PARTY?

Base: Use of mediation



81% of the companies surveyed consider that the relationship with the other party is better following a successful mediation process.

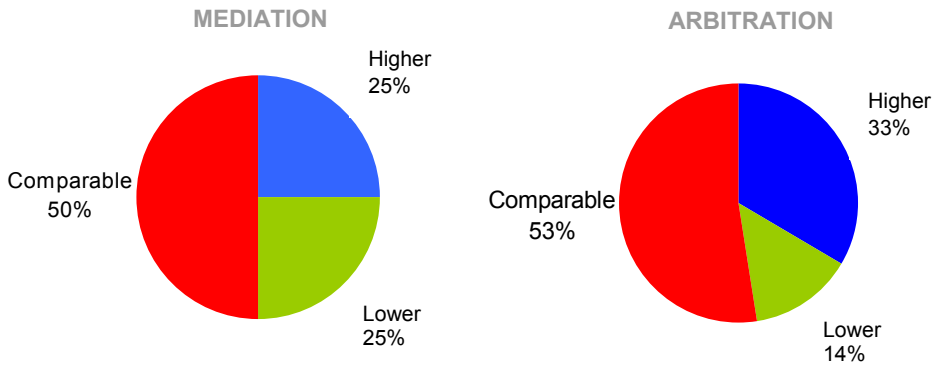
MEDIATION FACILITATES THE CONCLUSION OF NEW AGREEMENTS THAT CREATE VALUE FOR THE COMPANY AND PROVIDE "WIN-WIN" SOLUTIONS FOR THE PARTIES INVOLVED IN THE DISPUTE

Effects on the outcome using ADR vs. litigation

Figure 10

AS COMPARED WITH COURT PROCEEDINGS, WHAT EFFECT DOES MEDIATION HAVE ON THE ECONOMIC RESULTS OBTAINED?

Base: Use of mediation/arbitration



- One-half of the respondents consider that the final solutions resulting from mediation or arbitration are economically comparable to those that could have been obtained through court proceedings.

- Respectively one third and one fourth of the respondents consider that arbitration and mediation obtain higher results than court proceedings.

Assessment of ADR use

The results of the study clearly and consistently show that the surveyed companies that have used ADR are satisfied with such use, as well as with the quality of the arbitrators and the mediators.

A comparison of the French and US results demonstrates, however, that in spite of the 5 years that have elapsed between the two surveys, a difference still exists between the French and US companies, in terms of both the importance and the frequency of their recourse to ADR. The types of ADR used across the Atlantic are more varied than in France, where arbitration and mediation are still the most commonly used forms.

That being said, the study shows that French companies are already optimizing their use of ADR:

- By using mediation at the formation stage of the contract (Figure 15),
- By promoting the use of mediation in the majority of disputes (Figure 18),
- By using mediation from the beginning of a dispute (Figure 28),
- By using mediation and arbitration for all kinds of disputes (see Figure 16).

The third part of the study revealed that the most "Dispute-Wise" companies go even further, by integrating this optimized use of ADR in a formalized dispute-management policy.

Company Satisfaction with the use of ADR

84% of the French companies surveyed are satisfied with mediation and 76% with arbitration. These satisfaction rates are comparable to those found in the United States (respectively 87% and 76%). The exceptional rate of satisfaction with mediation can be explained, no doubt, by the fact that the parties themselves are the ones who determine the solution.

Figure 12

COMPANY SATISFACTION WITH THE USE OF MEDIATION

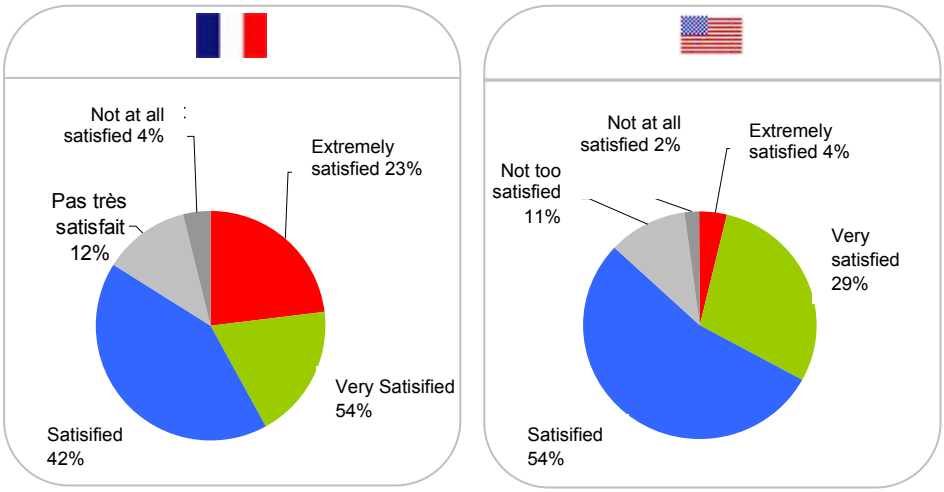
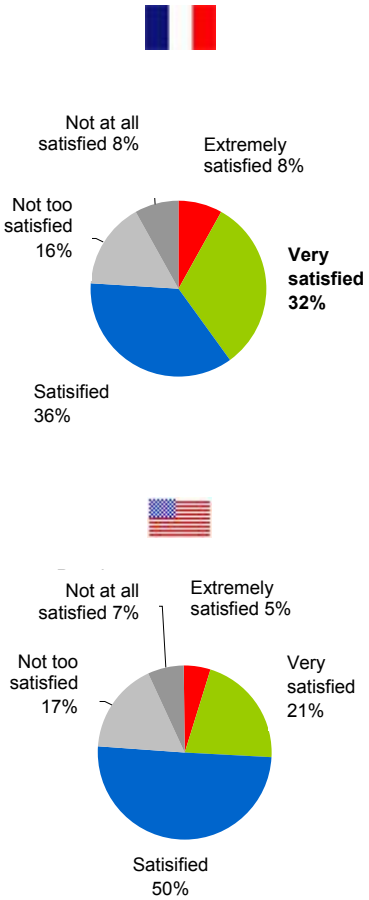


Figure 11

COMPANY SATISFACTION WITH THE USE OF ARBITRATION



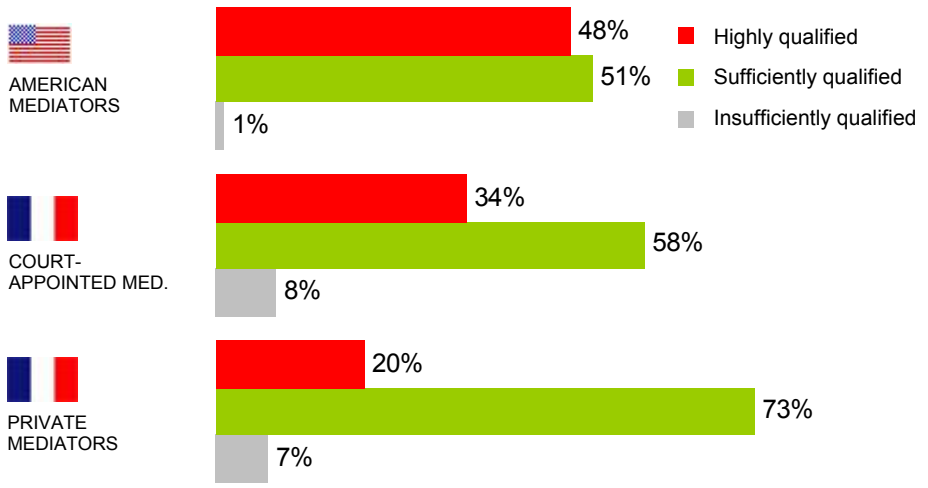
Between 92% and 93% of the French companies consider that the mediators are sufficiently and highly qualified, with no major difference being found between mutually agreed mediators and court-appointed mediators.

Very similar results are reflected by the American survey, which found that only 1% of the companies are dissatisfied with the quality of the mediators.

The companies' rate of satisfaction with the quality of the arbitrators is similar: only 7% of the French companies and 2% of the American companies consider that arbitratators are not sufficiently qualified.

Figure 14

EVALUATION OF THE QUALITY OF MEDIATORS IN FRANCE AND IN THE UNITED STATES



Wide use of ADR by the most "Dispute-Wise" French companies

The study demonstrates that the French companies that have recourse to ADR use it widely:

- By using mediation at the formation stage of the contract (Figure 15)
- By promoting the use of mediation in the majority of disputes (Figure 18)
- By using mediation and arbitration for all kinds of disputes (Figure 16).

Figure 15

USE OF MEDIATION AT THE FORMATION STAGE OF THE CONTRACT

(Base: use of mediation)

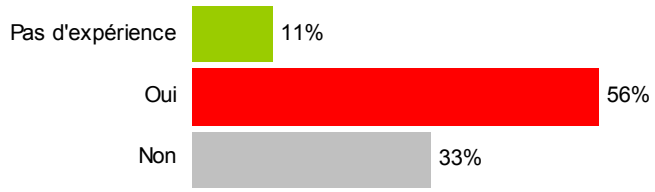


Figure 13

EVALUATION OF THE QUALITY OF ARBITRATORS IN FRANCE AND IN THE UNITED STATES

(Base : utilise l'arbitrage)

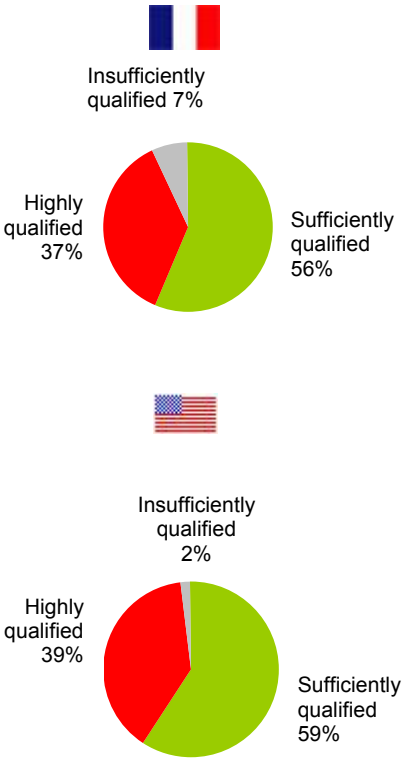
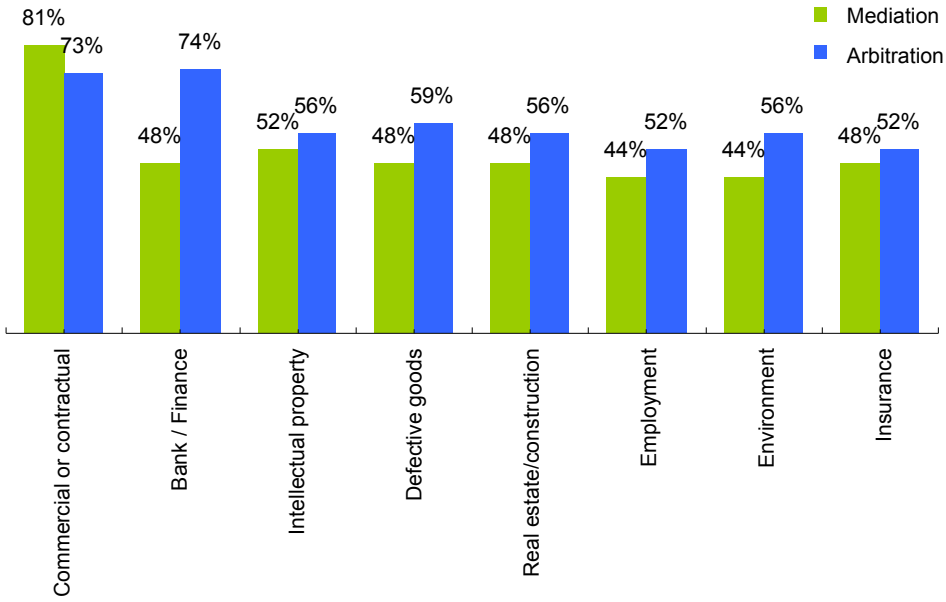


Figure 16

USE OF MEDIATION AND ARBITRATION FOR ALL KINDS OF DISPUTES

(Base: use of mediation/arbitration)

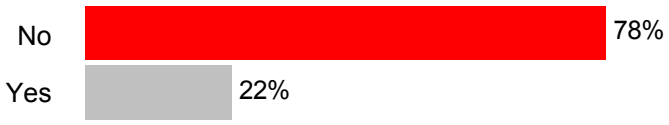


- Arbitration and mediation are used for all types of commercial and contractual disputes in all areas of law
- Priority is given to arbitration for international disputes
- Institutional arbitration is preferred to ad hoc arbitration for both international and domestic disputes

Figure 18

ARE THERE TYPES OF DISPUTES FOR WHICH YOUR COMPANY NEVER USES MEDIATION?

(Base: use of mediation)



Comparison of French and American practices in the use of ADR

In France, the most "Dispute-Wise" companies use ADR far more than the least "Dispute-Wise" companies. However, ADR is not yet used systematically in France as it is in the United States.

As in the United States, the forms of ADR most used in France are mediation and arbitration; but in both countries, the most "Dispute-Wise" companies also use other forms of ADR.

- The three types of ADR most frequently used by the French company respondents during the past three years are: arbitration, mediation and *expertise*

Figure 17

DOES YOUR COMPANY USE ARBITRATION MORE FOR INTERNATIONAL DISPUTES?

(Base: use of arbitration)

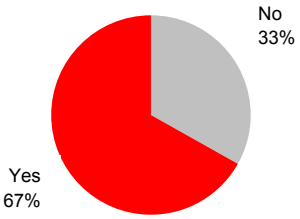
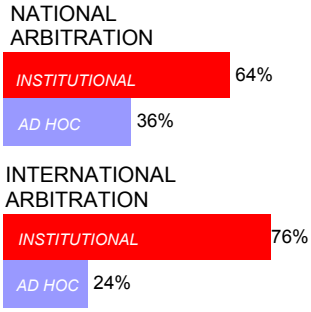


Figure 19

DOES YOUR COMPANY HAVE RECOURSE TO INSTITUTIONAL OR AD HOC ARBITRATION?

(Base: use of arbitration)

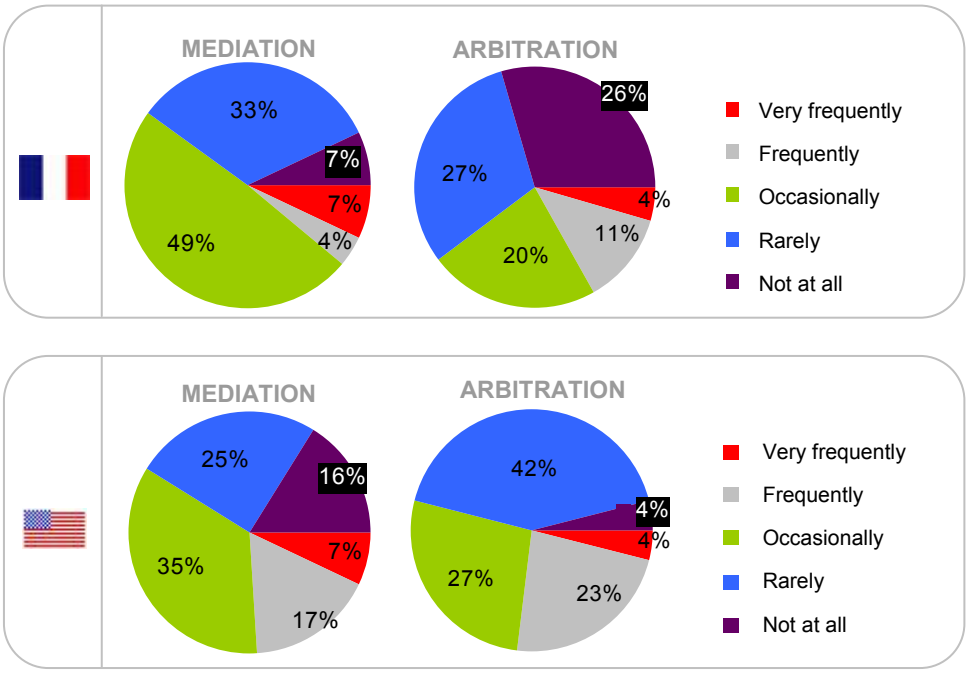


amiable (a form of amicable expert appraisal). The most "Dispute-Wise" also use Dispute Boards.

- The overall ADR usage rate is still much higher in the United States: 95% compared to 62% in France (Figure 20 and Table 7).
- However, 83% of the most "Dispute-Wise" French companies have used at least one form of ADR during the past three years (Table 7).
- Mediation is thus used twice as much in the United States as in France. Almost all the US companies (85%) have had recourse to mediation, as compared to only 39% in France (Figure 20 et Table 7).
- Arbitration is also more frequently used in the United States (72% of the companies) than in France (only 48% of the companies) (Figure 20 et Table 7).
- On the other hand, among the companies that use arbitration, the French companies (27%) use it twice as often as the US companies (15%) (Figure 21).

Figure 21

FREQUENCY OF USE IN FRANCE AND IN THE UNITED STATES

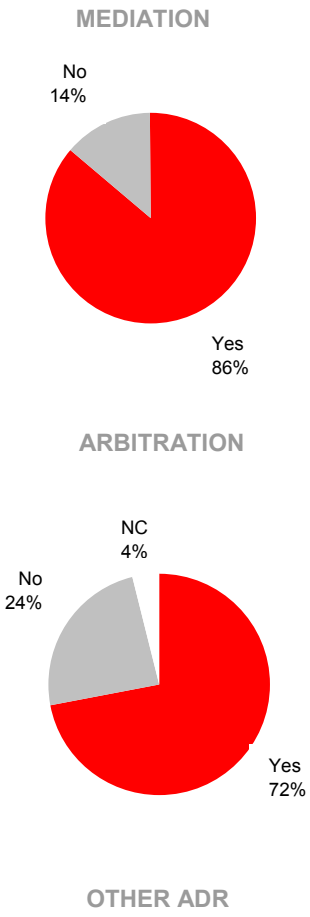


- The result for mediation is the opposite: among the companies that use this process, the French companies use it only half as often (11%) as the US companies (24%) (Figure 21).

Figure 20

USE OF ADR IN THE UNITED STATES

Mediation and arbitration are used more frequently across the Atlantic.



OTHER ADR

In House Grievance	**23%**
MEDARB	**20%**
Fact-Finding	**12%**
Mini trial	**11%**
Peer-Review	**10%**
Ombudsman	**5%**
None	**5%**
At least one	**95%**

Table 7

FORMS OF ADR USED DURING THE PAST 3 YEARS IN FRANCE

(Base: All)

	All	Most	Moderate	Least
Arbitration	**48%**	64%	52%	26%
Mediation	**39%**	55%	29%	32%
Amicable Expert appraisal	**16%**	23%	10%	16%
Early neutral evaluation	**6%**	5%	5%	11%
Dispute Boards	**6%**	18%	0%	0%
MED ARB	**3%**	0%	5%	5%
Ombudsman	**2%**	5%	0%	0%
Other	**5%**	5%	10%	0%
At least one of these	**62%**	83%	50%	41%

THE MOST "DISPUTE-WISE" COMPANIES TEND TO FAVOR NEGOTIATED MODES OF DISPUTE RESOLUTION AND COMBINE THEM WITH LITIGATION WITH A VIEW TO EFFICIENT DISPUTE MANAGEMENT

Best practices in the dispute-management policies of the most "Dispute-Wise" companies

Without question, among the most interesting data collected in this survey is that which allows us to analyze the typical behavior of the most "Dispute-Wise" companies when they deal with disputes.

The purpose of this analysis was to determine whether there were common tendencies among the various organizations of the most "Dispute-Wise" companies that could serve as a model.

The study specifically allowed us to identify 5 standard behaviors or best practices developed by the most "Dispute-Wise" companies in order to optimize the management of their disputes.

This research was particularly interesting insofar as the American survey had already demonstrated - and the comparative study has confirmed - that the most "Dispute-Wise" companies adopt an optimized management of their disputes, benefit from a better organization than the least "Dispute-Wise" companies, and attain results that better take into account their economic and non-economic interests.

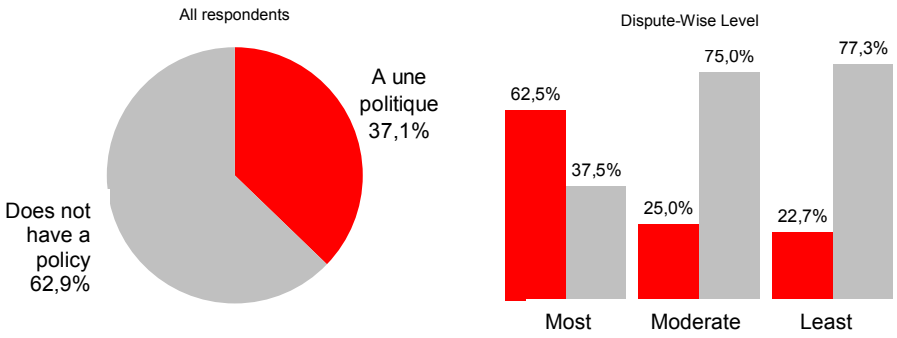
These best practices are:

- organizational:
  - formalizing a dispute-management policy,
  - training ADR teams;
- operational:
  - establishing a system for monitoring the performance of contracts,
  - adopting a strategic approach to using ADR,
  - pro-active anticipation of recourse to ADR, by introducing ADR clauses when drafting contracts.

The establishment of a dispute-management policy

Figure 22

FRANCE: DISPUTE-MANAGEMENT POLICY



- The majority of the most "Dispute-Wise" companies in France (62.5%), as in the United States (65.5%), have implemented a dispute-management policy.
- In France, only one-third of all the companies surveyed have implemented a dispute-management policy (37%). In the United States, the situation is the reverse: only one-third of the companies surveyed do not have a dispute-management policy.

- In France, three times more of the companies considered as the most "Dispute-Wise" have implemented a dispute-management policy than other companies.

Table 8

UNITED STATES: DISPUTE-MANAGEMENT POLICY

(Base: All)

	When claimant in a dispute				When defendant in a dispute			
	Total	Most	Moderate	Least	Most	Most	Moderate	Least
No policy	34%	26%	43%	35%	35%	29%	42%	35%
Always try to use ADR	10%	15%	7%	8%	13%	17%	12%	10%
Do not go to court except when it seems appropriate, otherwise always use ADR	28%	33%	27%	25%	27%	31%	24%	25%
Go to court first, then use ADR for certain cases	18%	18%	13%	22%	15%	17%	12%	17%
Always go to court	2%	-	5%	2%	2%	1%	4%	2%
Other	7%	9%	5%	6%	7%	5%	6%	10%
No response	-	-	-	1%	-	-	-	1%

- Half of the companies have adopted a dispute-management policy formalized by an internal document;
- 7.7% of the respondents consider that their dispute-management policy results from their signing of the Intercompany Mediation Charter (*Charte de la Médiation Inter-Entreprises*) established under the joint aegis of the Paris Chamber of Commerce and the Ministry of the Economy and Finance.

Training of teams on ADR

- The majority of the most "Dispute-Wise" companies (58%) state that they have provided their teams with training on mediation and arbitration;
- 86% of the people thus trained belong to the legal department, 4% to technical and/or commercial departments, and 4% to administrative departments;
- More than half of all the companies surveyed have not provided their teams with ADR training.

Figure 24

FRANCE: IN-HOUSE ADR TRAINING

(Base: All)

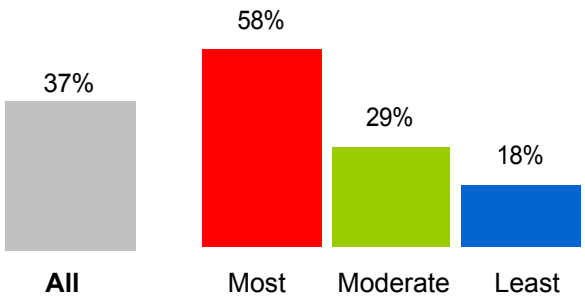


Figure 23

FRANCE: FORMALIZATION OF THE DISPUTE-MANAGEMENT POLICY

(Base: Has a dispute resolution policy)

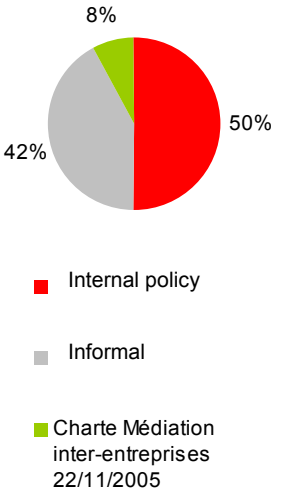
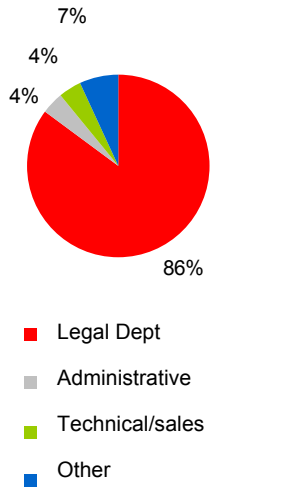


Figure 25

FRANCE: ADR-TRAINED STAFF PER DEPARTMENT

(Base : Trained to ADR)



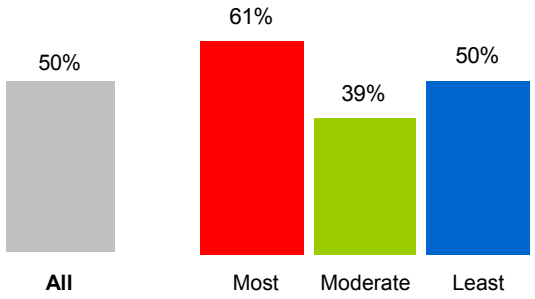
A system for monitoring relations and contracts

- Almost two-thirds of the most "Dispute-Wise" companies state that they have set up a system for monitoring contracts.

Figure 26

FRANCE: EXISTENCE OF AN INTERNAL MONITORING SYSTEM

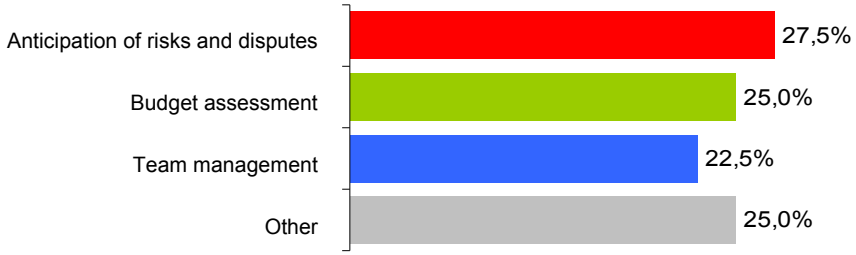
(Base: All)



- These companies have specified that this system allows them to:
  - anticipate risks,
  - better control the budget,
  - better control their teams,
  - use a planning chart to manage disputes,
  - determine responsibilities.

Figure 27

FRANCE: EXISTENCE OF AN INTERNAL MONITORING SYSTEM
(Base: All)



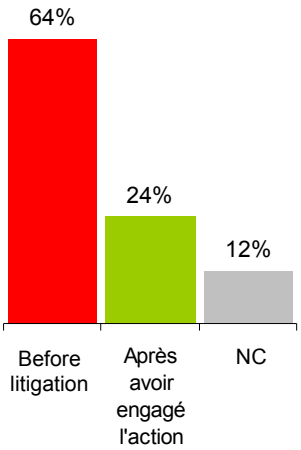
A strategic recourse to ADR

- The most "Dispute-Wise" companies do not give priority to litigation, except when it seems appropriate.
- When a negotiation fails, the most "Dispute-Wise" companies give priority to mediation before initiating litigation.
- One-third of the most "Dispute-Wise" companies have recourse to mediation before undertaking an arbitration process; however, the majority of the companies surveyed never undertake mediation when they use arbitration.

Figure 28

DOES YOUR COMPANY UNDERTAKE A MEDIATION PROCESS AFTER DIRECT NEGOTIATIONS HAVE FAILED?

(Base: Use of mediation)



- 88% of respondents state that their attitude toward ADR is the same whether they are claimants or defendants (Figure 29).
- Hybrid processes that combine mediation and arbitration exist and can be used to manage certain disputes. The use of Med-Arb in France remains completely marginal (3%), while in the United States this form of ADR is one of the four most frequently used (20%) (see Table 7 p.18 and Figure 20 p.17)

Table 9

FRANCE: HOW WOULD YOU DESCRIBE YOUR COMPANY'S DISPUTE-MANAGEMENT POLICY WHEN IT IS THE DEFENDANT?

(Base: All)

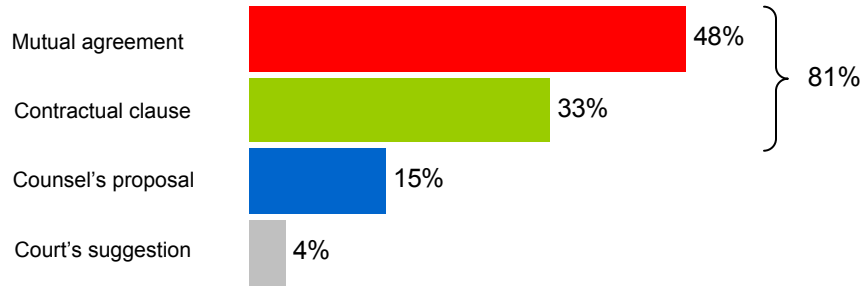
	All	Most	Moderate	Least
Always try to use ADR	**34,9%**	43,5%	30,0%	30,0%
Refer to a court only when it seems appropriate, ADR for all other cases	**28,6%**	30,4%	35,0%	20,0%
Give priority to the courts	**19,0%**	8,7%	20,0%	30,0%
Go to court first, then recourse to ADR	**6,3%**	13,0%	0,0%	5,0%
Other	11,1%	4,3%	15,0%	15,0%

The anticipation of recourse to ADR

Figure 30

FRANCE: IN THE MAJORITY OF CASES, THE MEDIATION PROCESS WAS INITIATED DUE TO …

(Base : utilise la médiation)



- The study confirms the voluntary nature of ADR, and especially of mediation, since the parties' willingness (48%) and the inclusion of a clause in their contract (33%) are the two main reasons for their recourse to mediation (i.e., a total of 81%).
- Moreover, for 15% of the respondents, lawyers have played a key role in undertaking a mediation process. The role of the courts remains minor, since only 4% of the respondents stated that the court to which a dispute was referred encouraged them to undertake a mediation process.

Furthermore, the study demonstrates that more than one-third of the companies that have had recourse to mediation insert clauses providing for such processes in their contracts. It is interesting to note that this practice is already widespread, even among companies that do not practice "Dispute-wise" business management.

Figure 29

IS YOUR DISPUTE-MANAGEMENT POLICY DIFFERENT DEPENDING ON WHETHER YOUR COMPANY IS CLAIMANT OR DEFENDANT?

(Base : All)

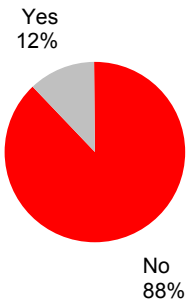


Figure 31

DOES YOUR COMPANY UNDERTAKE MEDIATION AT THE SAME TIME AS AN ARBITRATION?

(Base: Use of mediation)

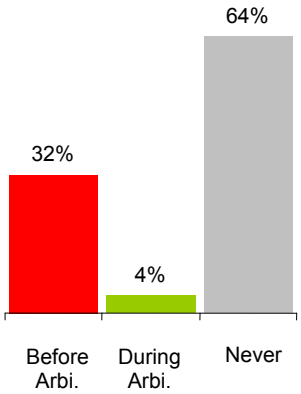
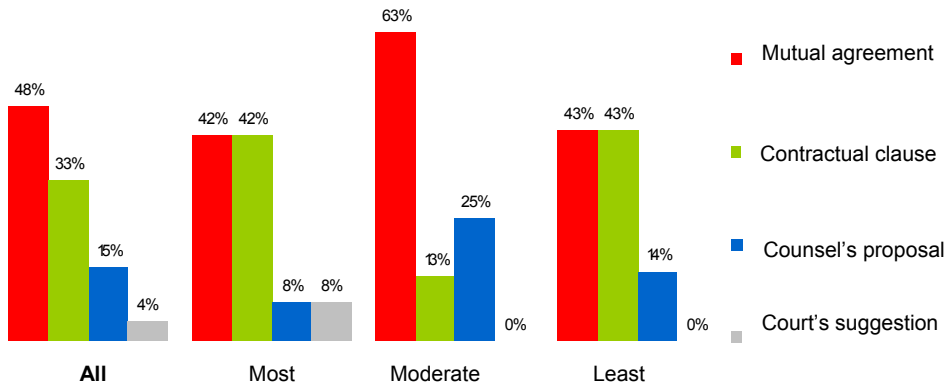


Figure 32

FRANCE: IN MOST CASES, THE MEDIATION PROCESS WAS INITIATED DUE TO …



Future & Prospects

The French study, which is based on the feedback given by companies themselves, has confirmed the findings of the American study, i.e., that using ADR, and particularly mediation, in the framework of a dispute-management policy is advantageous to the companies.

However, the majority of French companies surveyed say they do not think they will have more frequent recourse to ADR in the future (Figure 33).

- Those who do not currently use mediation state that this is mainly due to their ignorance of the process and the unwillingness of senior management (Table 10);
- Those who do not use arbitration state that this is due to the complexity and cost of this process, as well as the unwillingness of senior management (Table 11).

Table 10

WHAT ARE THE REASONS WHY YOUR COMPANY DOES NOT HAVE RECOURSE TO MEDIATION?

(Base: no use of mediation)

Company has no experience	34%
Senior management unwilling	24%
Too expensive	13%
Not familiar with mediation	8%
Too complicated	8%
Process not clearly defined	5%
No right of appeal	5%
Refusal by the other party	5%
Lack of confidence in the mediators	3%
Difficulty in having the outcome enforced	3%
Difficulty in initiating the process	5%
Insufficient expertise of the mediators in the field	3%
Risk of unsatisfactory results	3%

Table 11

WHAT ARE THE REASONS WHY YOUR COMPANY DOES NOT USE ARBITRATION?

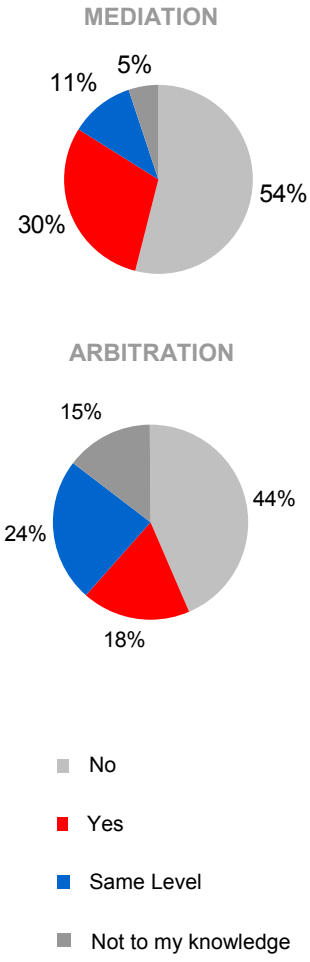
(Base: no use of arbitration)

Too complicated	33%
Too expensive	33%
Senior management unwilling	33%
Company has no experience	31%
Difficulty in initiating the process	17%
Risk of unsatisfactory results	11%
Process not clearly defined	11%
Difficulty in having outcome enforced	8%
Difficulty in raising an appeal	8%
Refusal by other party	8%
Lack of confidence in the arbitrators	8%
Insufficient expertise of the arbitrators in the field	6%
Can harm relationship	6%
In the event of "amiable composition," not subject to the rule of law	3%
Other	8%

Figure 33

DO YOU PLAN TO HAVE RECOURSE TO MEDIATION AND ARBITRATION IN THE FUTURE?

(Base : All)



Prospects

The promotion of mediation by companies themselves and by the public authorities should rapidly reverse this tendency and reduce the difference that still exists between its level of use in France and in the United States, as has already been observed in Canada, Australia and certain Latin American countries.

Indeed, since the adoption of Directive 2008/52/CE of May 21, 2008 "*on certain aspects of mediation regarding civil and commercial issues,*" an unprecedented move towards developing ADR has emerged in Europe

This directive emphasizes that "*mediation can result in an economical and rapid extrajudicial solution to the dispute through a process adapted to the parties' requirements*" and that "*the agreements that result from mediation are likely to be complied with voluntarily and to preserve an amicable and durable relationship between the parties*." Introduced to foster cross-border investment, this directive in particular encourages the Member States to promote the use of mediation in a predictable legal context, to inform the public, and to regulate and develop the mediation profession.

AN UNPRECEDENTED DEVELOPMENT OF ADR IS UNDER WAY IN EUROPE

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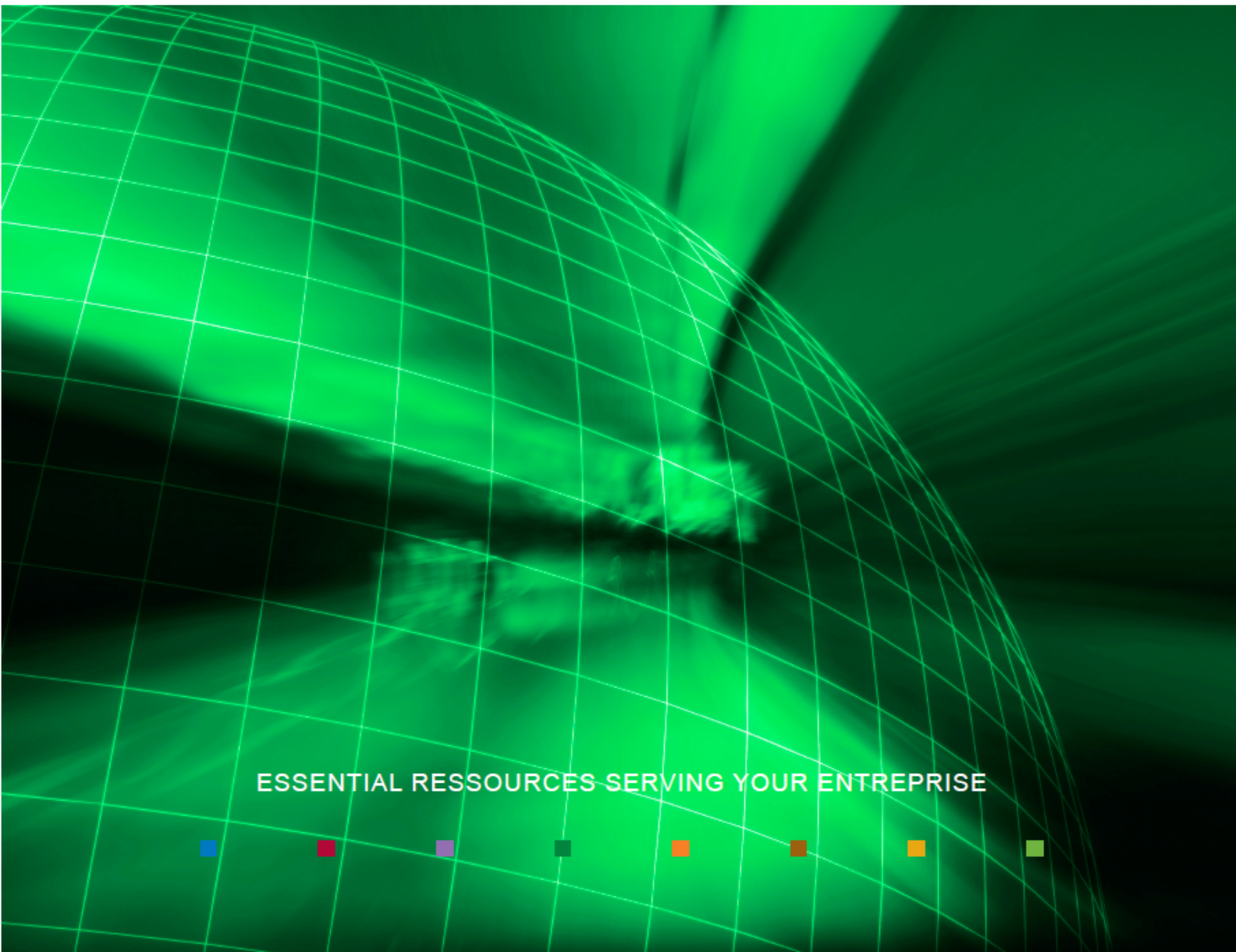
LE MANAGEMENT OPTIMISE DES LITIGES©

BEST CORPORATE PRACTICES IN CONFLICT MANAGEMENT FROM FRANCE



About the American Arbitration Association

The world leader in conflict management since 1926, the American Arbitration Association (AAA) is a non-profit organization offering dispute resolution services, and in particular, arbitration, mediation, conciliation, negotiation and other voluntary processes.

www.adr.org

About FIDAL's "Direction Internationale"

With 1,350 legal and tax advisors FIDAL is the leading French business law firm. It has 90 offices in France and a network of 150 best friends worldwide. Its Dispute Resolution practice, composed of 150 *avocats*, endeavors to offer its clients the most efficient, least costly and most appropriate means of resolution for each dispute. FIDAL attorneys have been trained to mediation for more than 15 years and FIDAL is ranked #1 for mediation expertise among French law firms (*Decideurs* magazine).

www.fidal.fr

About International Centre For Dispute Resolution

The International Centre for Dispute Resolution (ICDR) was established in 1996 as a separate division of the American Arbitration Association, to further enhance the delivery of arbitration, mediation and other conflict management services around the globe. The ICDR maintains specialized administrative facilities in New York, where a staff of multicultural, multilingual attorneys supervises the administration of international cases. The ICDR has established offices in Mexico City, Singapore, Bahrain and a Senior Executive domiciled in Europe serving Europe, the Middle East and Africa (EMEA).

www.icdr.org

Authors of the survey: Richard Naimark, Senior Vice President, ICDR – AAA
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FOUR YEARS AFTER OUR FIRST SURVEY, COMPANIES THAT ADOPTED A DISPUTE-WISE© MANAGEMENT APPROACH TOLD US MORE ABOUT THEIR PRACTICES AND ORGANIZATIONS

"Dispute-Wise" Business Management – "Management Optimisé des Litiges"

LAST TRENDS AND BEST PRACTICES OF LAW DEPARTMENTS

Introduction

In 2009, Fidal and the AAA conducted a survey on a set of companies that were representative of the French market (of all sizes and sectors). By comparison with a similar survey performed in 2003 by the American Arbitration Association in the United States, the 2009 study basically revealed:

- French companies have the same economic interest in using Alternative Dispute Resolution methods as North American companies, notwithstanding the difference in the two countries' judicial systems. The French companies that were already practicing mediation affirmed that this dispute resolution method allowed them to save time and money as well as to protect the value of the company by preserving its business partnerships.

- Also, like American companies, French companies favor arbitration in international disputes, and prefer institutional to ad hoc arbitration.

The 2009 French survey also revealed five best organizational practices of the legal departments of the most "Dispute Wise" companies:

- Setting up formal or informal dispute management policies
- Providing ADR training to in-house legal teams
- Establishing a system for monitoring business relationships and contracts
- Adopting a strategic approach to using ADR
- Proactively anticipating the use of ADR

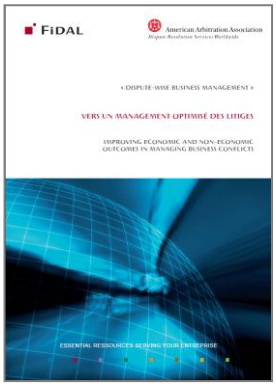
On the strength of this initial inquiry, which revealed a significant trend by the law departments of large French companies to structure their activity around the principal of anticipating and managing disputes wisely, the authors conducted this second in-depth survey of the companies most committed to this line of thinking.

This new study essentially shows that:

- French companies increasingly view the effect of disputes as a strategic consideration, with potential impacts on corporate policy, financial results and brand image.

Figure 1

2009 AAA-FIDAL SURVEY



The 2009 AAA-FIDAL Survey is available upon request or in the "publications" section of FIDAL's website.

In an area that has traditionally been reactive, these corporations are moving to anticipate future or potential sources of discord in their business transactions

Commercial relationships and the disputes attendant to those relationships are increasingly complex, involving multiple ramifications that require more finely-tuned responses to the problems encountered.

Moreover, companies that are concerned about minimizing the damage to business relationships are increasingly trying to favor amicable solutions and, at the very least, avoid litigation in cases where conflict cannot be avoided.

To do so, most of the companies interviewed have experimented with arbitration, mediation and other ADR methods appropriate to their industry.

Some companies go further, by drafting model dispute clauses and designing mechanisms for a combined use of ADR methods.

One can say 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 opportunities.

- Law departments are endeavoring to work more closely with business units and to take the business dimension into account when crafting solutions.

Law departments have also undergone a change in status and role, as their leaders are now increasingly involved in the company's strategic decisions.

Their organization as well as their reliance on outside counsel has also changed.

- The law departments' dispute-wise, organizational and functional practices described below vary greatly from one company to another. None of the companies interviewed engage in all of these leading practices. Each company has its own unique set of practices and policies. Many of the practices and policies have developed over time and been shaped by experience. Most of them developed thanks in part to the sustained determination of a "champion," i.e. the chief legal officer, acting alone or with the support of outside counsel.

- Throughout, the need to be agile in cross-border transactions, disputes and relationships has driven these developments and the emergence of these best practices.

- These evolving trends in French legal practices can thus offer valuable lessons and food for thought even beyond the French territory.

CHARACTERISTICS OF DISPUTE WISE LEGAL DEPARTMENTS

(Source: 2009 AAA-Fidal Survey)

- Highly integrated into the corporate planning process
- In tune with broader business issues facing the company and the industry
- Spend a lot of time on highly complex, technical or cross-border matters
- Encouraged by management to seek to preserve valuable relationships and find solutions, and not just to focus on winning
- Not as likely to take an aggressive approach to dispute resolution, favoring ADR over litigation

Methodology / Interviewees

The Survey consisted in arranging in-depth interviews with representatives of Law Departments of large French companies or French subsidiaries of large international groups, all Dispute Wise, that is to say committed in a process of evolution and thoughts on the best manners to implement a "Dispute Wise Business Management", and more generally, to give the Law Department the place that it deserves with the business people in order to best maintain and manage the risks and improve the company's performance.

In some cases, these interviews were conducted with several persons of the Law Department who were meeting especially for this interview.

The interviewees had between 10 and 30 years' experience in the legal function; some of them had been lawyers before becoming an in-house counsel; all of them had an international profile (a few years spent overseas, double nationality, foreign diploma, etc.)

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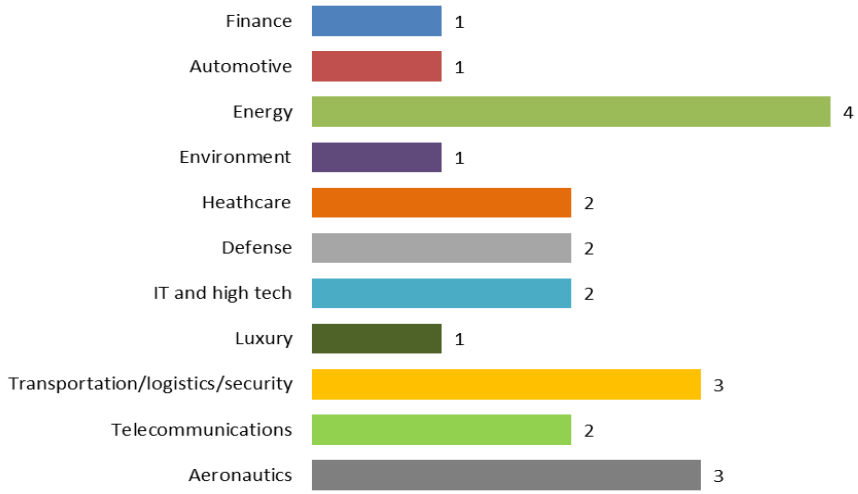
The interviewees represent the French large companies since they represent all market sectors.

Table X

Activities of the interviewes

NB. Some of the interviewees are active in more than 1 field listed below



VERY LARGE INTERNATIONAL COMPANIES, REPRESENTING A FULL RANGE OF BUSINESS SECTORS, AGREED TO GIVE DETAILS REGARDING THE ORGANIZATION OF THEIR LEGAL DEPARTMENTS AND THEIR APPROACH TO DISPUTES

Foreword
Latest trends at a glance

➢ The most Dispute-wise™ companies consider that dispute management is of strategic importance in reducing the negative impact of conflict on their brand reputation, corporate policy and financial results.

➢ They anticipate disputes before they arise by improving the organization of their legal department, e.g.:

- By encouraging in-house counsel to work more closely with business staff, and vice versa;
- By encouraging more business-oriented legal services;
- By fostering early dispute-detection and communication within the company;
- By favoring the use of ADR methods when a dispute cannot be avoided and by viewing litigation as a very last resort.

➢ They train both their legal and business staff on ADR techniques, so that they have the right reflexes at the right time.

➢ They draw lessons from past errors so as to avoid repeating them and seek to anticipate and control risks.

➢ They no longer simply outsource cases to outside counsel, but instead team up with law firms to constantly seek the best tailored solution to the dispute and issues at hand.

➢ They try to integrate the legal department into top management, so that it is involved in all of the company's strategic choices, and to put in place internal rules that foster better risk management.

By contrast with US companies, in which the legal function has long been a core part of the corporate organization, there is still a glass ceiling in France between the legal department and top management.

However, large French companies are increasingly regarding their legal departments as agents of change, fostering a better business environment.

THE SURVEY SHEDS LIGHT ON A MAJOR SHIFT IN THE ROLE OF LEGAL DEPARTMENTS IN LARGE COMPANIES

1. New trends and best practices in the organization of Law Departments

From a historical perspective, one could characterize the law department organization of large multinational companies as falling into two distinct models:

– **Decentralized law departments** with local generalist counsel working within each of the group's subsidiaries.

– **Centralized law departments** which function as "internal law firms" with legal specialists generally based at the group's head office and to whom all of the group's subsidiaries turn when faced with specific legal issues relating, for example, to intellectual property, competition, international contracts, litigation, etc.

In each of these two models, the law department's teams are based on the same site, usually at the company's head office. The business teams know where to contact them if necessary.

Often, companies adopt a combination of these two models, having a centralized legal department as well as a small number of legal professionals within the various divisions, who are generally autonomous and report directly to the CEO of their division.

However, the interviews conducted for this study revealed that these models each have their own disadvantages which need to be addressed.

For example, where law departments are decentralized and do not communicate with each other, it may be difficult for the company to identify potential conflict-of-interest risks between several subsidiaries in the same group. Such conflicts of interest may arise frequently in some business sectors and stem, for example, from the negative impact suffered by one subsidiary in a business relationship with a business partner as a result of legal action initiated by another subsidiary against that same partner.

A centralized organization can nevertheless be a barrier to the interaction that is needed between the legal professionals and the business teams, so as to ensure that legal risks are properly dealt with at all stages of the company's operations.

This is why we are now seeing a stronger trend towards organizing law departments in a "hybrid" fashion, where the company draws upon each of these two models but does not replicate them entirely.

A TREND TOWARD MORE AND MORE INNOVATIVE METHODS OF ORGANIZING LEGAL DEPARTMENTS, DRIVEN BY A SINGLE CONCERN: TEAMING UP WITH THE BUSINESS PEOPLE

The first trend is to assign some of the company's legal professionals not to a centralized or decentralized law department but actually to business teams within a division

Assigned to a specific division, the legal specialist is actually based with the business teams of that division rather than with other legal staff.

The main objective of this organization is to facilitate formal and informal exchanges, increase daily interaction between the legal professionals and the business teams, so that the latter more naturally take into consideration the legal aspects of their activity by spontaneously seeking the advice of the team's in-house counsel.

Such counsel is mostly a generalist capable of answering all legal questions raised during the course of business on a daily basis. He is also selected based on his personal aspirations and interest in the business of the division to which he is assigned.

Such an organization can have noticeable effects. The legal professional, who is involved in the business teams' activity on a daily basis, gains excellent insight into the business of his division, particularly its specific issues, products, brands and competitors, and is thus able to provide advice and assistance that is perfectly tailored to its needs.

- ***The advantages of this new practice are significant according to the chief legal officers interviewed for this study.***

Since the legal professionals are considered to be members of the team, the internal clients are more likely to share concerns with them before they become problems. The legal dimension of the relationship is taken into account right from the beginning of the contractual relationship, which makes it easier to better anticipate and control risks.

Clearly, the legal professionals perfectly integrated into these divisions see themselves as part of the operations and part of the business team. As one interviewee pointed out, the success of her role is linked to the fact that the business teams are used to seeing her around the table and systematically include her in their strategic and commercial considerations.

This new trend is perceived as highly beneficial and fully meets the need – expressed by all of the interviewees – to integrate a legal professional into the business teams both naturally and well upstream, so that legal reflexes are incorporated into all stages of the activity. The legal counsel is thus no longer perceived as an obstacle to business progress but identified as a member of the business team "so much so that they forget you are a lawyer."

FULLY INTEGRATED INTO THEIR BUSINESS DIVISION, IN-HOUSE COUNSEL SEE THEMSELVES AS PART OF THE TEAM

➢ ***However, this type of organization can have two disadvantages which need to be anticipated:***

First, legal professionals integrated into the business units may become "too close" to the business considerations and eventually lose their reflexes of legal prudence and, more particularly, be unable to see things from a distanced, more neutral perspective.

Also, it seems to be a shame for the experience, specific skills sets and best practices developed by these legal professionals during the course of their work for one specific division not to be shared and pooled so that all of the group's divisions may benefit from them.

Lastly, if their work is not coordinated, there is a greater likelihood of not identifying conflict-of-interest risks across the group's different divisions (as mentioned earlier).

➢ ***The companies interviewed indicated having set up several good practices to deal with these risks:***

- The first consists in setting up regular reporting between the integrated counsel and the general law department. Such reporting forces the legal professional to conduct an objective analysis for the preparation of his report and also enables the general law department to identify best practices and disseminate them.

- The second practice aims primarily at avoiding any lack of objectivity should a conflict of interests arise between the company's business teams and its partners. It consists in setting up a centralized litigation department to which all matters must be referred by the division's in-house counsels as soon as a pre-litigation or litigation situation is identified.

- Another solution to promote the dissemination of best practices consists in offering the legal staff assigned to a business division the possibility of internal mobility across the different divisions, thereby facilitating the circulation of new ideas and best practices within the group.

- Such mobility is also seen as a way of preventing legal professionals assigned to a particular division from getting trapped in habits which may affect their efficiency.

- Another practice aimed at preventing the risk of isolation and helping to circulate best practices is to keep the legal staff assigned to the different divisions in contact with each other by creating cross-divisional working groups led by team managers known for their expertise. Regular meetings are organized to improve knowledge and exchange on the different issues and solutions experienced.

EFFECTIVE PERFORMANCE ENSURED BY THE ADOPTION OF BEST PRACTICES FOCUSED ON COMMUNICATION AND MOBILITY

A second trend in "hybrid" forms of law department organization is to assign the legal professionals to business units but to keep them physically based inside the law department – whether centralized or decentralized

This practice makes it easier to establish a link between the generalist counsel and the business unit to which he is assigned, all while facilitating communications and coordination with the legal activity within the law department.

According to the chief legal officers interviewed and who implement this type of organization, thanks to the formal or informal communication between the members of the law department who work alongside each other every day, this mode of organization gives the generalist counsel assigned to an activity a better understanding of the full range of legal issues common to the division or the group.

At the same time, this type of organization allows the counsels assigned to the specific divisions to maintain close relationships with the business teams within those divisions.

Such relationships are important insofar as all the interviewees considered that each division operates and thinks differently and that it is important to adapt to the division's way of working while simultaneously trying to foster a common practice when addressing legal issues.

This is also the reason why law departments try to adopt a "proactive" approach with the business units, so that they are involved in their considerations as far upstream as possible.

It is thus common for these law departments and centralized law departments to set up cross-disciplinary "working groups" to dialogue with and understand the needs of the business units, educate the law department on those needs and make the tailoring of appropriate law department solutions quicker and easier.

As one interviewee pointed out, the aim is for the business teams to perceive the law department as "another business department, totally matched to the business organization of the group."

A third trend: specific attention to developing a "litigation" department

Although many companies still do leave the legal professionals in the subsidiaries or centralized legal department to handle any disputes that arise, a trend is emerging that consists in setting up departments or a single, point person specifically for litigation matters.

ANOTHER WAY: LAWYERS ASSIGNED TO SEPARATE BUSINESS UNITS BUT WORKING TOGETHER WITHIN THE LEGAL DEPARTMENT

THE CREATION OF DISPUTE-MANAGEMENT UNITS HELPS PREVENT CONFLICTS OF INTEREST BETWEEN DIVISIONS, BRANCHES OR SUBSIDIARIES

In this case, the legal professionals in the subsidiaries or centralized department refer matters as soon as they become pre-contentious or contentious to this special legal department which is usually based at the company's head office and which then acts as an internal law firm.

The referral of disputes to this team is not necessarily systematic. Some interviewees indicated that this team is assigned only to cases that are complex or involve high amounts. Other interviewees answered that no distinction was applied.

The aim of this organization is to prevent the risk of any conflict between subsidiaries of the same group and to entrust the company's strategic disputes to a legal professional who will be able to manage them quickly and effectively with the required objectivity and attention.

Main law department hiring trends

Three main criteria for the recruitment of legal professionals were identified during the interviews.

Language skills and multi-cultural experience have become key hiring criteria because of the globalization of business.

Specialization is also a criterion for many large centralized law departments with sub-departments structured according to area of specialization.

Lastly, for some counsel assigned to business units, additional technical training is also preferred. In some cases, trained legal professionals who also have an engineering background are considered as better qualified to hold certain positions than persons who do not have training in two fields.

Some common problems

- ***Time, availability and service***

Lastly, the same problem arises regardless of how the law department is structured: being able to give the internal client the time needed to maintain a viable and effective working relationship. "I have to prioritize and treat everyone equally; they expect that. I have to give them early and full attention as if it is the only thing I am doing."

- ***Difficulty of determining cost control measures***

An obvious concern of centralized legal departments is controlling its operating costs.

One of the interviewees was entertaining the notion of outsourcing non-essential legal services, as part of an internal examination into possible ways of achieving costs savings.

The complex question addressed in that examination was basically whether external cost savings could be realized without sacrificing the quality of work, bearing in mind that the legal department is more exposed to major structural or market-related costs than other departments (such as the IT or financial department).

The response to these two last issues has necessary implications on the question of when and how to use outside counsel, which is addressed in the fifth part of this study.

2. An increasingly business-oriented approach and a shift in the identity of the legal function

In-house legal professionals are historically regarded as being in charge of the strictly legal aspects of business, intervening from time to time at the request of business managers to draft contracts or settlements when a deal is concluded or to handle litigation when a problem arises.

According to the interviewees, it would appear that, based on this historic vision of the legal function, many in-house legal professionals still view their role as being limited to pointing out obstacles or rendering opinions and then leaving it up to the business people to decide on what action to take.

According to the chief legal officers and in-house advisors interviewed, this historical vision of the legal function, consisting of spotting issues and then letting the business people "deal with it," is now, however, out of date and goes against the desired goal of integrating the legal function into every step of the business relationship, in order to secure that relationship.

The more modern vision of the legal function, which they broadly share, is to consider that in-house counsel, after having raised the potential legal obstacles, should also propose possible options to enable the business people to achieve their objectives in the company's interest, which, after all, is in the in-house counsel's interest as well.

According to one of the chief legal officers interviewed, "the in-house legal professional must serve the company's business, meaning that his role is to help secure business opportunities, and not simply to state the law or forbid things from being done."

In light of the interviews conducted in this survey, as well as the preceding comments in section 1 of this report, this restriction of the in-house counsel's role to a reactive treatment of the strictly legal aspects of a business is no longer the norm in the most "Dispute Wise" French companies.

As we saw in the first part of this study, in-house counsel are increasingly involved at the early stages of business decisions and, depending on how the legal department is organized, are very often at the negotiation table during the initial discussions with the company's business partners, or are called

BUSINESS-ORIENTED LEGAL SOLUTIONS AIMED AT SECURING OPPORTUNITIES, WITHOUT EXCESSIVE THEORETICAL TALK OR BLANKET OPPOSITION

upon by the business people as soon as relations begin to heat up, in order to avoid litigation.

The interviewees unanimously indicated that their vision of their role has considerably shifted toward a much more "business-oriented" approach to resolving the issues submitted to them at every stage of the business process.

Their involvement in business decisions and recognition of the business constraints when providing advice has even led them to see themselves more and more as business people, to a point that they feel that their professional identity has changed, vis-à-vis both themselves and the business managers.

In fact, a number of interviewees said that a major portion of their in-house identity, i.e., of how they were perceived by the company's other departments, was as a business person. One of the interviewees felt that he was 100% perceived as a business person, while another said at least 50%.

While very happy to have thus succeeded in shedding the image of a "pure advisor" (which was key to getting the business people to involve them more readily in their thought processes), all of these interviewees said that they took care to maintain their legal reflexes so that business constraints would not dominate legal considerations, recognizing that this could be a risk if one is not careful.

INCREASINGLY REGARDED AS BUSINESS PEOPLE, IN-HOUSE COUNSEL ARE UNDERGOING AN IDENTITY SHIFT THAT FAVORS MORE FLUID EXCHANGES

There are several reasons for this evolution of the in-house legal function:

- ***An increasing pressure from business people***

First, the increasing pressure from business people and management, concerned about pursuing the company's strategy and goals, to solve problems rather than to get embroiled in extended legal activity, was cited repeatedly.

- ***Globalization of economy***

Another reason given for the shift in their role and identity is the growth of cross border activity and the globalization of business.

Given the variations in environment and international contexts faced by business units, they require advice that is tailored to these environments in order to be able to effectively conduct their operations. One of the interviewees said that the in-house legal professional "must give them the tools necessary to navigate effectively in these non-native settings."

These tools must take into account, in addition to the applicable law, the intercultural customs and approaches that allow one to understand every dimension of the business relationship.

➢ *Concentration of markets*

The globalization and concentration of markets resulting from the waves of mergers and acquisitions over the last decades has had an influence on the type of advice expected from in-house counsel in the event of conflicts.

Indeed, it is difficult to get angry without incurring repercussions in a close-knit industry.
It can also be risky to sue a business partner in a given country, since it might also be a business partner of one of the company's subsidiaries in another country, or even in the same country.

Moreover, in a close-knit industry, news of a lawsuit may tarnish the company's reputation and be an impediment to winning new business.

In light of these changes in the economic context, in-house legal professionals must propose other alternatives to conflicts than mere traditional litigation, and must favor the use of other tools aimed at balanced, negotiated outcomes that preserve the business relationship.

On this point, several interviewees said that, ironically, it is often the business unit involved in a conflict that is less inclined to take business considerations into account, and that their input in that regard is essential.

Indeed, the business units or management bodies directly involved in a conflict are often too focused on "winning the battle." It then falls on the lawyer to urge them to take a step back and bring broader considerations (costs, the business consequences, consumption of time, uncertainty, etc.) into the discussion.

➢ *The in-house lawyer, an agent of change benefiting the company*

In conclusion, the interviews of the chief legal officers and in-house legal professions of the most "Dispute Wise" French companies suggest that companies can look forward to beneficial changes in the future role and responsibilities of in-house counsel.

Indeed, many, if not most, of the interviewees see themselves as "agents of change," 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.

In support of this culture of change, and in order both to spread and strengthen it, these same chief legal officers have set up modes of regular communication with the company's business units, whether via informal meetings, newsletters, internal training, model documents that take into account past experience, claims management processes.

During these interactive communications, in which they provide practical advice, in-house counsel also receive information about the business

THE INCREASING GLOBALIZATION AND COMPLEXITY OF BUSINESS PLACES INCREASED PRESSURE ON COMPANIES' LEGAL DEPARTMENTS, DRIVING THEM TO FIND FASTER & MORE FLEXIBLE SOLUTIONS THAN BEFORE

operations, thus further enabling them to fine-tune their own analysis of situations.

These communications tools are, in themselves, another key factor of change.

As one of the chief legal officers promoting a change policy said, "*In-house counsel need to earn the right to know information – and you earn the right through consistency, interactive analysis and educational activities*."

GENERAL COUNSEL: AN AGENT OF CHANGE TO STEER THE LEGAL DEPARTMENT IN LINE WITH THE COMPANY'S INTERESTS AND TO DEVELOP BUSINESS WITH A BETTER MANAGEMENT OF RISKS

3. Dispute wise business management

The trends observed in the 2009 study are confirmed and reinforced: avoiding litigation and preserving the business relationship are key objectives for all of the chief legal officers and in-house counsel interviewed

The study published in June 2009 revealed that the most dispute-wise French companies had, like US companies, set up a strategy under which court litigation was to be considered as the last resort in the event of a dispute, or as one to be used only where there was no other alternative.

Table 2

EVALUATION OF THE MOST IMPORTANT GOALS FOR THE MOST « DISPUTE-WISE » COMPANIES WHEN A DISPUTE ARISES WITH CLIENTS OR SUPPLIERS

Source : 2009 AAA-Fidal Survey

	All respondents	Most	Moderate	Least
Evaluating the risks	66%	71%	74%	47%
Putting an end to the dispute	59%	71%	45%	60%
Performing the contract	55%	73%	54%	37%
Confidentiality	44%	45%	35%	53%
Expertise of mediators and arbitrators	34%	50%	25%	21%
Control over the ultimate solution	33%	41%	25%	33%
Costs	33%	33%	36%	28%
Winning	31%	30%	26%	37%
Being able to enforce the decision abroad	28%	42%	26%	13%
Speed	25%	36%	30%	6%
Maintaining business relationships	25%	30%	22%	22%
Fairness/Equity	15%	14%	18%	13%
Creating a precedent	13%	14%	9%	16%
Possibility of raising an appeal	7%	14%	0%	6%

That study also demonstrated that, in order to pave the way to settlement agreements, those companies were starting to have recourse to mediation,

where they found the same benefits as US companies, as well as to other modes of alternative dispute resolution, albeit to a lesser extent.

FORMS OF ADR USED DURING THE PAST 3 YEARS IN FRANCE

(Base: All)

	All	Most	Moderate	Least
Arbitration	**48%**	64%	52%	26%
Mediation	**39%**	55%	29%	32%
Amicable Expert appraisal	**16%**	23%	10%	16%
Early neutral evaluation	**6%**	5%	5%	11%
Dispute Boards	**6%**	18%	0%	0%
MED ARB	**3%**	0%	5%	5%
Ombudsman	**2%**	5%	0%	0%
Other	**5%**	5%	10%	0%
At least one of these	**62%**	83%	50%	41%

It also demonstrated that arbitration was the favored method in international disputes, and that institutional arbitration was preferred over *ad hoc* arbitration.

On the strength of those initial results, the present study, conducted on the basis of in-depth interviews with the chief legal officers of the most "Dispute Wise" companies, delves further into the details of the best practices used by such companies to avoid litigation, whether before or after a conflict arises.

Early detection makes it easier to settle disputes before they become litigious:

As we saw in the previous chapter, in their effort to change the culture and identity of legal departments and bring them closer to business units in order to better prevent and manage risks, the most "Dispute Wise" companies have, to this end, set up multiple modes of communication between the legal department and the business units.

➢ The interviews revealed, however, that one of the most effective ways through which legal departments identify and address brewing disputes within the company is by holding **regular informal meetings** with business managers.

Often, the information surfaces during a discussion on another topic. For example, many of the interviewees said that the first detection of a dispute often began with the familiar phrase "oh, by the way, if you have a couple minutes, I'd like to talk to you about…"

The interviewees also all confirmed that conflicts are more naturally and easily revealed orally, rather than by email. Similarly, it is easier to identify the heart of a dispute by addressing it orally, rather than in writing.

By coming down from their ivory tower, in-house counsel multiply their occasions to exchange with business managers. When this is combined with unwavering responsiveness to the information thus conveyed, it appears to be the best practice that companies have found, to date, to detect the sources of conflict early on.

➢ Some companies also use other **more formal practices** to enable the business people themselves to spot potentially litigious situations and avoid them from the outset, e.g., upon entering into the contact.

One company, for instance, has developed a **software program** that helps identify the litigious situations encountered by the company and the remedies needed to avoid their recurrence, particularly upstream at the contract-drafting stage.

Lastly, when the legal department becomes aware of a dispute, its first priority is to work with the business manager to secure the company's position and control the risk as soon as it materializes, so as to avoid having the conflict deteriorate into a litigious situation that is harmful to the company.

Several in-house counsel said that, as soon as a dispute arises, they conduct an early case evaluation of all the legal and non-legal impacts of the dispute on the company or group.

Through this work method, in which they call upon all of the people directly or indirectly concerned by the dispute, they manage to avoid intragroup conflicts of interest and, in many cases, get the business manager directly affected by the problem to take a more reasonable approach. Indeed, in conflictual situations the business manager who is closely involved and emotionally invested in the matter, is often more bent on "winning the battle" than the in-house counsel.

Operating in this manner, in-house legal advisors are involved in managing an impressive diversity of risks on a day-to-day basis. The main risks identified relate to commercial relations, intellectual property, human resources, product liability, engineering and regulatory issues.

Clauses providing for ADR methods are becoming increasingly widespread

Within the companies interviewed, so-called "issue escalation" clauses, which provide for the implementation of amicable or alternative methods of dispute resolution prior to any court litigation, are now commonplace.

When such a clause has not yet been inserted into a contract, companies at least insert a clause in which they agree to negotiate in good faith for a certain length of time, before bringing any court action.

Figure 2

DOES YOUR COMPANY USE ARBITRATION MORE FOR INTERNATIONAL DISPUTES?

(Source: 2009 AAA-Fidal Survey)

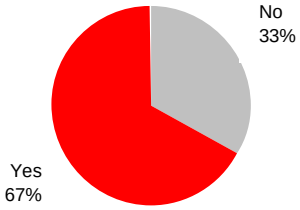
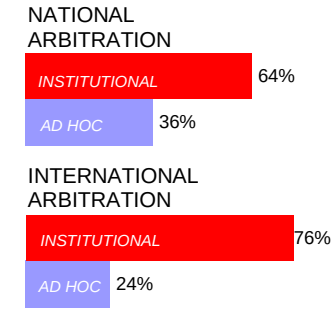


Figure 3

DOES YOUR COMPANY HAVE RECOURSE TO INSTITUTIONAL OR AD HOC ARBITRATION?

(Source: 2009 AAA-Fidal 2009)



These clauses typically provide for a gradual escalation of the conflict, from the project manager to the division manager and sometimes all the way up to the CEO.

According to the chief legal officers who use them, such clauses provide good leverage for a successful negotiation, to the extent that no one wants the conflict to end up being submitted to the CEO.

Mediation: an ADR process that is starting to "take hold"

The interviews revealed that most companies have an increased acceptance and understanding of mediation as a means of trying to amicably settle their disputes.

Certain companies, however, are still resistant to it.

- ***The arguments for or against using mediation remain quite typical, such as:***

"Mediation serves to preserve business relationships and to avoid damaging them as much as possible."

"Our feeling is that mediation is a good thing not only for the company but also for the suppliers, who can use this process both to mitigate risks and to build better relations with the manufacturer."

"Mediators can help people appreciate the reasonable or unreasonable aspects of a situation."

"The business units see the positive effects of mediation. We focus on what we want and on the benefits of a negotiated agreement. We usually incorporate mediation into our contracts.

"Some say that a mandatory mediation clause can undermine the effects of mediation, since the parties are thus compelled to participate. But without that clause, they wouldn't use mediation at all. A forced approach is the best we can do for now."

"We first negotiate with the opposing party. If we fail, I don't think another type of ADR tool is useful."

"If I mention mediation in a contract, not many people are familiar with this process."

"The worst thing is to have made mediation mandatory."

- ***According to the interviewees, the positive results encountered in a first mediation can definitely favor the development and acceptance of mediation within the company.***

Figure 4

IN THE MAJORITY OF CASES, THE MEDIATION PROCESS WAS INITIATED DUE TO…

(Source: 2009 AAA-Fidal Survey)

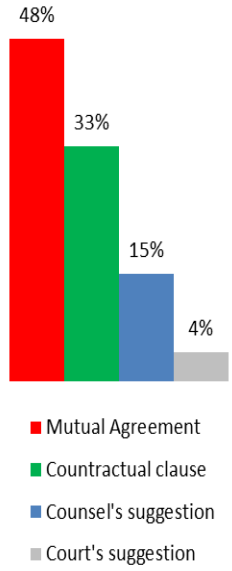
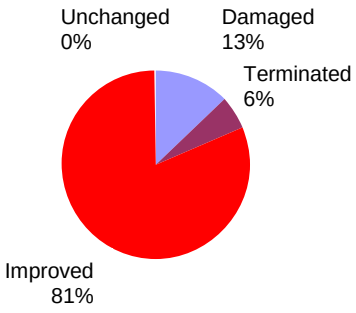


Figure 5

QUALITY OF THE RELATIONSHIP AFTER MEDIATION

(Source: 2009 Fidal-AAA Survey)



In this connection, one of the interviewees recalled a significant experience that illustrates this phenomenon:

A business unit manager came to the legal department with a brewing dispute about which the manager was quite certain of the viability of his position and the great potential for a litigation win.

After broad consultation based on her knowledge of many different subsidiaries in many different countries, the litigation director determined that even with a litigation win there were likely destructive business effects on other subsidiaries in other jurisdictions and that, for the overall health of the group, it would be best to seek a negotiated settlement agreement by engaging in mediation.

The business unit manager grudgingly agreed to participate in the mediation process, even though he was convinced it would be a waste of time. After a few mediation sessions, a settlement agreement was reached that not only put an end to the dispute but allowed the group, including the business unit involved in the dispute, to continue its relationship with its strategic business partner and thereby consolidate its profits.

Sometime later, the same business manager, facing a litigious situation, turned directly to the company's chief litigation counsel to initiate a mediation procedure immediately. Even better, he wanted to have mediation clauses inserted in his contracts, to facilitate recourse to this process."

➢ *From the handling of the litigation to the dispute resolution thanks to mediation*

Another chief litigation counsel who regularly practices mediation summed up the advantages she had experienced in this process in three key points:

"We have registered clear progress in resolving disputes through negotiated solutions prior to any litigation; generally speaking, we can say that, thanks to this process, our activity has shifted from one of litigation management to one of dispute resolution; lastly, we have seen a drastic drop in attorney fees."

That being said, it should be noted that several interviewees expressed concerns about having access to competent mediators, reporting that they have come across some inadequate mediators.

Some of the companies reported cases in which the mediation process was not competently managed even by lawyers who claimed to be specialized in the area.

All agreed that this new way of addressing conflicts requires specific training, both for the mediator and for the lawyers assisting in the mediation process.

Several of them were of the opinion that certification standards should be established to ensure the quality of the services provided in this area.

Litigation: the last resort

Most of the interviewees considered arbitration or court litigation as the undesirable last resort in many conflict situations.

In support of this view, one of the interviewed legal advisors who works in a company that does business mainly with governments said that *"Our industry does not allow us to be a litigation-oriented company. We don't want to be perceived as a company that sues its business partners. We don't want to enter into litigation against our government clients."*

Other interviewees, in support of this same standpoint, stressed how difficult it is to establish a constructive and efficient relationship with their strategic suppliers and, therefore, how equally difficult it is to put an end to such longstanding relationships.

"They are specialized. Once you are in an established relationship with one supplier, it takes too long to find another one (training, education). We can't replace them just like that. We have no interest in engaging in litigation with them, but rather in finding an amicable outcome that allows us to preserve the relationship."

➢ *Domestic disputes : commercial courts*

The interviews reflected the fact that, when it cannot be avoided, litigation over French domestic conflicts is traditionally brought before the French commercial courts, often pursuant to contract clauses that provide for it. These courts are quite well regarded by businesses, most (though not all) of which consider them to be fast, cost-efficient and competent.

However, the commercial courts are sometimes criticized for not being entirely impartial toward multinational firms, which are often seen, in their eyes, as systematically in the wrong vis-à-vis their smaller sized business partners.

➢ *International disputes: institutional arbitration*

With respect to international disputes, all of the interviewees indicated that, when an amicable solution cannot be reached, they turn to institutional arbitration, often pursuant, once again, to contractual clauses providing for such arbitration.

This preference for arbitration in international disputes does not mean that it is used without concern as to both the cost and the complexity of the procedure.

As one interviewee who is disinclined to arbitration put it, "*It's too complicated and time-consuming. If this process was simpler and less costly, we might use it.*"

LITIGATION: VIEWED BY COMPANIES AS A LAST RESORT WHEN NO OTHER MEANS OF RESOLUTION IS POSSIBLE

At the same time, there seems to be no denial of the results achievable through arbitration. For instance, one of the interviewees told us that, in her opinion, "*what scares midsize companies about arbitration are the costs, not the results.*"

To overcome the resistance to arbitration that comes from concerns about complexity, one of the interviewees who often uses this procedure suggests that, based on his own positive experience, in-house legal advisors should be involved in the procedure from the very outset, alongside the outside counsel, to help define the strategy and thereby fully understand the "ins and outs" from the start.

Lastly, most of the in-house counsel interviewed affirm that they resort to court litigation or arbitration only for "eminently winnable" cases and that, in all other cases, they systematically make negotiation offers.

Specialization and the creation of multidisciplinary teams for better conflict management

The current trend seems to be toward the creation of highly specialized and "occasionally interdisciplinary" litigation teams.

Several companies have adopted the approach of creating specialized teams that take the form of an "internal law firm" dedicated to disputes, which seems to contribute to a better understanding of conflict management.

Due to the growing complexity of the subjects of dispute, companies also often add other skill sets to the teams in charge of conflict management, in addition to those of the legal advisors.

For example, one of the interviewed companies whose business is highly technical decided to bring engineers into the in-house legal team in charge of dispute resolution.

When making dispute-resolution decisions on important subjects, the interviewees also stated that they will naturally call in the financial department, the project manager, or even the CEO or a member of the management committee.

In-house counsel's much greater involvement in litigation management

The interviews also revealed that legal departments are seeking to play an increasingly active role vis-à-vis their outside counsel in charge of litigation matters, both at the outset of the case, by being involved in defining the strategy, and throughout the entire proceedings, by setting requirements as to the format of the pleadings to be produced in support of their claims.

A SIGNIFICANT INCREASE IN THE INVOLVEMENT AND INVESTMENT OF BOTH LEGAL AND BUSINESS STAFF (TECHNICIANS AND MANAGERS) IN THE CONDUCT OF LITIGATION

For example, the interviews revealed the emergence of a new innovative practice applied by certain companies, indicative of the change in the relationship between in-house and outside counsel, which consists of systematically requiring the latter to include, as an introduction to every set of pleadings or brief, a short case summary of no more than 3 or 4 pages. This practice allows both in-house and outside counsel to focus on the main points, to clearly communicate their position and to make the file highly accessible to judges and arbitrators. According to the various testimonies, this practice has proven very successful.

In sum, as one of the in-house counsel attested, "*We supervise the work of our lawyers. We need to know precisely what they do and expect them to communicate the important draft pleadings at least one week before the hearing or deadline.*"

Certain legal departments go even further in taking ownership of litigation. Indeed, several of the interviewed companies appear to be experimenting with the approach of not hiring outside counsel for litigation in which the company is not required to be represented by a lawyer. Certain companies thus apply an exclusively internal approach to managing proceedings before the French commercial courts, criminal courts or labor courts.

In any event, the companies interviewed always prefer a settlement outcome to the alternative of litigation or arbitration, and expect outside counsel to seize any settlement opportunities that may arise at any stage of the proceedings.

An innovative practice: dispute audits

One of the companies interviewed described a practice it initiated several years ago that has proven to be successful, allowing the company to considerably reduce its litigation portfolio and, accordingly, realize substantial savings and better manage its risks.

On the premise that its traditional practice of referring all disputes to its customary outside counsel could lead to a certain routine devoid of creativity, the company decided to subject all of its ongoing litigious matters to a detailed examination, conducted by a new outside counsel well-versed in negotiation and ADR techniques, whose mission, under the supervision of the company's chief legal officer, was to try, by all possible means, to propose or even provoke a settlement outcome, which in fact he succeeded in doing in many cases.

In cases where no such outcome was possible or reached, the new outside counsel was then tasked with the job of reworking the existing pleadings, to make them more concise and forceful. In most cases, this modification of the pleadings led the opposing party to reconsider its position and, in the end, to accept the settlement approach it had initially refused.

DISPUTE AUDITS: A SIMPLE AND LOW-COST MEANS OF REGAINING CONTROL OVER THE MANAGEMENT OF PENDING DISPUTES AND THE EVALUATION OF CONTINGENCY PROVISIONS

4. Law Departments' increasing involvement in risk prevention and management

All of the companies interviewed indicated that the law department should play an educational role in transmitting the best legal practices for preventing and controlling risks and in steering the company toward progress.

This educational role takes different forms in different companies. We have identified the following in particular: regular interactive communications with business colleagues, newsletters, model documents or standard letters, awareness-raising or training programs, as well as other more innovative methods that we will examine below.

Training programs

➢ *For Business Staff*

In most cases, it appears to be the law department staff itself that trains the business staff, with the aim of sensitizing them to the legal reflexes to be adopted in their day-to-day activities.

Sometimes, however, the law department will call on outside professionals, university professors, practicing lawyers or specialists on a given subject to enhance their presentation or replace them.

In all cases, these programs serve not only to convey the basic legal reflexes needed to properly manage the company's risks but also to create ties between the law department and the business units that make it easier for the latter to call upon in-house counsel when the need arises, and to better identify this need at the right time.

Such training can come in different forms including informal breakfasts, seminars, or full-fledged programs delivered over one or several days.

➢ *For Legal Staff*

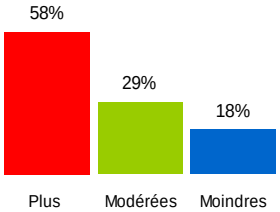
In light of the interviews, the most frequent subjects of the structured seminars provided by law departments are:

- Arbitration and Mediation: It is interesting to note that arbitration training is now often combined with mediation training. These two subjects can also be handled separately. Moreover, such seminars, which aim to help key persons who might be involved in such procedures get acquainted with the basic steps involved, are often provided to a mixed group of legal and business staff;
- Negotiation, Contract law and Claims Management: these seminars are also sometimes intended for groups composed of both legal and business staff;
- Competition law;

Figure 6

ADR TRAINING: A GROWING PRACTICE IN THE MOST DISPUTE-WISE© COMPANIES

(Source : 2009 AAA-Fidal Survey)



- Compliance;
- Data Privacy;
- IP issues;
- Liability Issues and Risk Avoidance/Management Strategies: this type of training, often considered as essential, consists of helping the participants identify, prevent and mitigate risks;
- Pre-Termination Notice Requirements;
- Public Speaking;
- Crisis Management;
- Social Media Issues;
- Regulatory Frameworks.

Risk prevention through informal communication

At the end of such training sessions, the participants are typically provided with materials carefully designed to guide them in their day-to-day work so that, to the extent possible, they do not have to turn to the law department on simple matters, in keeping with the "self-lawyering" concept, i.e. "what business people can do without asking the law department."

In certain companies, there is no formal educational initiative by the law department, but instead a reliance on communication by "walking around," a management style established by Andy Grove, the CEO who built INTEL into a dominant force in the microchip industry.

Under the "wandering around" policy institutionalized in that company, which simply consisted of lowering the barriers and increasing spontaneous communication between all departments, large numbers of engineers and physicists were encouraged to visit other departments, including the legal department, and to share their experiences and ideas, which proved highly conducive to problem-solving and innovation.

One of the companies interviewed said that this practice or philosophy was a mainstay in the daily function of the legal department, virtually doing away with the need for additional training of staff.

In any case, according to the various legal departments that engage in them, these regular informal exchanges, like the more formal training programs, serve to remind their business colleagues what situations are ripe for legal department involvement.

Generally speaking, the subtext in all of these publications, educational and training programs is communication of the team concept. As one of the interviewees put it: "*We are a team, including commercial people, engineers, procurement people, project people, legal and finance, all with a role to get the business secured*."

That said, while legal departments are concerned about engaging in dialogue, education and training to provide business units with basic legal reflexes they are also concerned about setting up ongoing training programs for their own legal staff, to allow them to keep their knowledge up to date and hone their skills.

Knowledge Management

The interviews showed that several companies have set up an intranet portal dedicated to the legal functions of the entire group.

These portals include various sections containing practical information such as model contracts or clauses, as well as links to other types of documents and relevant websites.

Certain sections of these intranet portals are also accessible to business staff.

These portals often contain practical information such as model letters to use in particular situations or model conflict management clauses.

The legal departments that promulgate model contract clauses and contracting advice for transactional staff viewed this as one of the most important educational risk-prevention efforts.

Interestingly, only a few of the companies interviewed use and promote "approved" clause models. This is basically due to the large culture gap that can still be found between the subsidiaries of a single group.

According to the interviewees, this culture gap can be attributed either to the fact that the subsidiaries in question are in different jurisdictions with different legal systems or to the fact that certain purchased subsidiaries sometimes still have a great deal of autonomy in choosing their contract clauses, even though they must generally report to the central corporate legal department.

In-house counsel's involvement in drafting and monitoring contracts

Companies use a variety of approaches to control risk as early as the contract-drafting stage.

Two radically different trends can be seen:

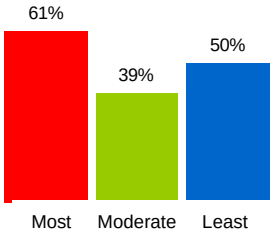
In certain companies, the business managers are completely autonomous and draft the contracts themselves, with the help of a list of model clauses suggested by the legal department. In these cases, the business managers are generally instructed to call upon the legal department if none of the suggested models is appropriate to the situation.

In other companies, the legal department's control over contract drafting is systematic, and the business units must submit every contract to the legal department's review prior to signing.

Figure 7

EXISTENCE OF AN INTERNAL SYSTEM FOR MONITORING RELATIONSHIPS AND CONTRACTS

(Source: 2009 AAA-Fidal Survey)



According to the interviewees, this system allows them to:

- *Foresee risks*
- *Better control the budget*
- *Better manage their teams*
- *Better manage their disputes*

In all cases, an increase can be seen in the efforts deployed to train business staff on contract drafting techniques.

The techniques used to manage the litigation risk when difficulties arise in the performance of contacts are also quite diverse.

Everyone acknowledges that, given early problem identification, a well-timed letter can generally resolve disputes before the "march to the courtroom" begins.

Similarly, everyone agrees that the informal discussions that legal departments engage in with business units are, most often, the best way to identify emerging problems. This is also one of the key messages conveyed during the legal seminars provided to business staff.

A new Risk Management practice emerging under several forms: post mortem evaluations

It is said that those who cannot remember the past are doomed to repeat it.

Ideally, no matter what the outcome of any dispute, there will always be lessons to learn in terms of practices to either avoid or copy.

These lessons can lead, for example, to a change in the wording, language or law applicable to future contracts, or in the choice of jurisdiction in the event of a dispute, and, more generally, to recommendations on what strategic approaches should be taken upstream to ensure proper tracking of projects and, downstream, to adopt the best reflexes in the event of a dispute so that the situation does not worsen.

While all of the interviewees consider that it is very important to take into account the "lessons learned" from past situations, particularly contentious ones, they admit that companies still have some ways to go in this area.

Several of them told us of some new practices they have adopted to this end.

One company, for instance, is working on a guideline that will incorporate the lessons learned into training programs, founded on case studies, prepared on the basis of the company's past experience with disputes.

Another company conducts an internal systemic "post mortem" evaluation for each major case, in view of producing a memo on the errors to avoid or, failing that, of stimulating a conversation about "how we can do this differently next time."

Lastly, other interviewees told us that they find it useful to discuss the matter with outside counsel (who may or may not have been engaged to handle the case). The goal is to better understand those areas of the case where the judge or arbitrator saw the matter differently than the company, once again in order to avoid committing the same errors of assessment in the future.

"POST MORTEM" EVALUATION OF RESOLVED DISPUTES: A NEW IDEA DEVELOPED BY COMPANIES CONCERNED ABOUT LEARNING FROM THEIR PAST SUCCESSES AND MISTAKES

5. New trends in the use of outside counsel

Large companies tend to rely less on outside counsel

Based on the various interviews conducted, large companies clearly tend to rely less on outside counsel for handling their legal issues, particularly for transactional and adversarial legal matters which are often systematically handled by internal law departments.

This trend, which appears to be more modest in France than in the US, is nevertheless growing and is driven by the need to address the company's major concerns, which in-house law departments are in a better position to handle.

The interviews revealed that the three main reasons for reducing use of outside counsel are:

- Reduced costs and better cost control;
- Knowing and understanding the company's business and its law department better;
- The perception that in-house counsel would be more likely to take "ownership" of a matter than outside counsel.

With respect to these last points, it is also important to highlight that all the legal expertise needed to conduct business; corporate, IP, M&A, purchasing and sourcing, finance, competition, regulation, litigation/dispute resolution, can usually be found in the in-house law departments of most large companies

However, small and medium-sized companies which do not have such extensive law departments have not reduced their utilization of outside counsel for their legal issues.

The name: a key criterion in some circumstances

Generally, the interviews held with the chief legal officers regarding the selection of outside counsel revealed that this issue raises many questions and concerns such as:

- How to develop methods for determining the hiring and qualifying criteria for the law firms we need to use?
- How to ensure the selected law firm's alignment with the company's interests?
- How to manage the relationship with the selected law firm?

However there was one area of general agreement among the persons interviewed: the choice of law firm is a strategic choice which will "send a message" to the counter-party regarding your evaluation of the matter at hand.

BY STRENGTHENING THE LEGAL FUNCTION, COMPANIES CAN REDUCE THE NEED FOR OUTSIDE COUNSEL

It goes without saying that. So, for example, well-renowned law firms are selected when the company considers the matter to be of "high importance".

The panel approach: a growing trend

The "captive" law firm approach, with one substantial law firm receiving all or most of the work for the company is almost, but not entirely, gone.

Companies tend to have a list of firms, "preferred providers", that is reviewed frequently (as one interviewee put it, "our panel is not a panel forever").

Although each company works differently, the companies we interviewed indicated that they often use the listed firms for many years because those firms "know the company's business" and are trusted.

In all cases, price is an issue, as is the level of attention given to the client by the outside firm. Responsiveness is expected for all matters.

Hiring of outside counsel almost always falls to the law department which will be directly using their services, but sometimes counsel are selected from a panel by the in-country central legal department in a group which has several subsidiaries or by the central corporate legal department of the group's holding company for all subsidiaries worldwide.

In some cases the outside counsel is selected in cooperation with the company's purchasing department, to encourage competition among firms and obtain the best offer at the best price. This trend is growing. In particular, it is more and more common for large companies to implement a competitive bidding process when selecting law firms for specific matters.

It would nevertheless seem that the law department, and not the company's purchasing department, is eventually responsible for making the final choice of firm.

The personal factor: a key consideration

Outside counsel are frequently selected because they are known and trusted: "We've been using them for years." "They know our business."

One interviewee even confessed that his choice of firm is very personal. "I know every one of them, I hire the individual, not the law firm."

Selecting foreign outside counsel in certain jurisdictions still raises difficulties

The interviewed companies expressed real difficulties concerning the hiring of new outside counsel in jurisdictions where the company did not have a history of doing business and so possessed little knowledge of the local legal marketplace.

SELECTING A LAW FIRM: A MULTI-FACETED QUESTION

3 COMMON CRITERIA FOR HIRING A LAW FIRM: COST OF SERVICES, KNOWLEDGE OF THE COMPANY'S LINE OF BUSINESS, TEAM SPIRIT

They look to have choice and to find the best specialist who knows the company's business sector well. Those criteria are often difficult to satisfy.

Various approaches have been tried but clearly with mixed results.

"When you don't have an existing relationship it's tough". "It's difficult in some countries. We ask friends, other companies, other lawyers and consult books and other rankings." One interviewee even told us "I'm embarrassed to admit that we've used the phone directory".

Choosing between small or large firms

Companies use a mix of small, medium and large firms.

Small "boutique" law firms are often hired for their high level of specialization in complex legal areas and are valued for their attention and responsiveness to the client.

Large firms often have extensive "best friend" networks of correspondent law firms and may be selected for this reason and for their significant legal resources they can offer where necessary.

However, the chief legal officers interviewed were not always satisfied with the services of these large firms which, in certain jurisdictions, do not always have the required expertise or sufficient resources to handle some legal matters.

One interviewee indicated having been disappointed by the foreign office of one large firm which did not offer the expertise or quality of work expected, to such an extent that he had to look for another more competent law firm in that jurisdiction.

Another corporate counsel told a story of inheriting a huge litigation matter that had been handled by a large, famous litigation firm. Nonetheless, the case showed little to no progress over time. Corporate counsel called a meeting with her litigation firm, summoning the partner in charge of the litigation. Inexplicably the partner showed scant interest in the case, leaving the room from time to time to make phone calls and allowing the junior associate to continue the meeting. After some time there still seemed to be little forward progress so corporate counsel summoned the litigation firm to another meeting. In that instance, the senior partner did not attend at all, instead sending the junior associate, who was clearly "out of his league" if not incompetent on the complex legal issues.

The in-house counsel fired this large law firm and engaged a smaller "boutique" firm who handled the case successfully and now continues to be the company's main outside counsel for its other litigation work.

In any case, the outside counsel's spirit of collaboration and his consideration for the company's interests are key criteria

➢ ***One criterion for hiring law firms that appeared to be essential for all of the interviewees was the issue of aligning the law firm's and the company's interests.***

In other words, a company's main concern is to ensure that the outside counsel's personal interests do not benefit to the detriment of the company's interests, but also that the law firm adapts to the company's culture, needs and priorities and agrees to "form a team" with the client.

It is also essential for a company's outside counsel to know and understand the company's business sector and environment well.

Some of the in-house counsels interviewed shared their concerns about these issues.

"At the beginning we discuss with outside counsel the spirit of the organization, and that our policy is to be very fair. Integrity is very important to us, even in litigation."

"I try to be really clear with new counsel that we're hiring for a deal or litigation and we share our view with them. It is the company which decides on the strategy to adopt. This is not popular with most of the firms. They would like more control."

"We don't work with firms that are too aggressive and inappropriate for this culture."

"An outside lawyer has a different role than those on the inside. Outside counsel should know our business, but inside counsel should be much more involved in the day-to-day business. The collaboration is important. "

"I am the translator for outside counsel. I explain the activity of the company, like the composer of a soundtrack for a film who conveys the atmosphere and course of action through that soundtrack."

➢ ***Companies use several ways of ensuring proper alignment with law firms, so that the outside counsel understands the company's culture and needs.***

- Giving the outside counsel access to the company's intranet or exchanging newsletters on company-related information or topical areas were some of the easiest and most common practices implemented by the persons interviewed.

- Others go further and set up regular meetings, "we meet with outside counsel from time to time to review and discuss our business trends."

- One company customarily invited its outside counsel to its law department's annual seminars.

At these seminars, and to ensure their alignment with the company's needs, the legal teams looked at the company's identity, its priorities and main

"WE DON'T WORK WITH FIRMS THAT ARE TOO AGGRESSIVE AND INAPPOPRIATE FOR OUR CULTURE OR THAT ARE NOT TRAINED IN ADR."

strategic policies: “What type of company are we?” “What is our approach to / philosophy of conflict management?” “How are litigation and settlement decisions made within the company?” “How frequently do we expect progress reports?” “What kind of budget is anticipated?”

Clearly, the answers to these questions will give the outside counsel better insight into the company’s culture so that the company’s needs and the law firm’s services are appropriately aligned.

Some of the interviewees further pointed out that it is reassuring for a company to use the same law firm over time, so that the outside counsel knows the company in the long term and understands its culture and needs.

An innovative practice: a lawyer as a “personal and external advisor”

Another particularly interesting approach was reported by a chief legal officer who keeps “someone (external) just to talk to me” informally, for advice, perspective and counter point of view. This is an outside lawyer who has no other function than to provide senior, professional advice, feedback and counsel.

“We’re looking for someone who is inventive. Outside counsel are helpful in finding solutions because they have a different perspective. ”

IN-HOUSE LAWYERS ARE MUCH MORE INVOLVED IN THE WORK OF OUTSIDE COUNSEL AND, IN RETURN, EXPECT OUTSIDE COUNSEL TO TAKE ATTENTION IN THEIR COMPANY

6. Toward a greater involvement of the Law Department in the company's top management

As we have seen in the previous sections of this study, legal departments have a very broad and precise vision of the risks incurred by the company, which makes them well-positioned to participate in managing those risks via an appropriate communication with the business units on how to avoid repeating past errors and to adopt good practices at every stage of the business relationship.

According to the testimonials gathered, legal departments are also able to provide the broader perspective needed to manage disputes in ways that do not necessarily involve litigation but that focus instead on amicable resolution methods, resulting in an overall savings for the company.

By making an early analysis of conflictual situations, they can prevent potential conflicts of interest between the group's various subsidiaries and facilitate the adoption of solutions that protect the group's overall interest.

By so doing, legal departments can inspire behavioral changes that are beneficial to the company.

It is for these reasons that, as reflected in the wide variety of best practices identified by this survey, legal departments have undertaken a cultural shift aimed at getting closer and closer to business people who, in their day-to-day work, are more and more willing to consult them in order to develop the right reflexes at the right time.

But to what extent do legal departments get involved in and contribute to upstream strategic decision-making at the top management level of the company?

There is no doubt that, thanks to their comprehensive view of the business – and of the associated risks, stakes and opportunities – as well as their understanding of the legal practices of international markets, legal departments are able to foresee the potential pitfalls associated with the implementation of new strategic directions for the company.

It is also clear, according to most of the chief legal officers interviewed, that the changes they are trying to bring about in order to enhance the company's understanding of the risks associated with its decisions cannot be truly effective unless they are supported by top management.

Indeed, access to the company's policy-makers can allow chief legal officers to promote the establishment of internal rules or guidelines that foster effective implementation of the necessary changes.

It is for all these reasons that North American companies have given their general counsel a special role in their executive bodies, where no important strategic decision is taken without their advice and recommendations, and

where they are able to suggest what measures should be taken to ensure that risks are properly dealt with in the conduct of business.

However, while the interviews show that French companies' executive committees increasingly turn to their chief legal officers when important decisions must be made, this trend still tends to be on an ad hoc and occasional basis. It is exceptional to find general counsel in the top management of French companies.

According to the interviewees, the main reason for this "French exception" to the standard practice of North American companies seems to reside in a significant cultural difference relating to the educational background of the members of corporate governance bodies. Whereas top management positions in the US are attributed to graduates of both "ivy league" schools and other well-known universities, in France they only go to the graduates of the officially recognized "grandes écoles."

As one of the interviewees said, there is still a "glass ceiling" in France between the law department and top management that "we cannot cross, regardless of how big a contribution we make to improving the company's performance".

All of them deplore this situation and hope for a shift in mentalities that will allow them to follow through with the changes they have begun by implementing the various best practices we have reported in this study.

FRENCH GENERALS COUNSEL WISH TO BE MORE INVOLVED, LIKE THEIR US COUNTERPARTS, IN THEIR COMPANY'S TOP MANAGEMENT…

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