

ADR: a new tool to solve corporate clashes through mediation

Akzo Nobel has recently adopted Alternative Dispute Resolution (ADR) as a preferred method for resolving corporate conflicts. ADR is a method of dispute resolution that avoids costly and time-consuming litigation. By putting the dispute resolution process into the hands of the managers rather than those of lawyers, mutually satisfactory business solutions can be reached. With this technique, both parties can walk away from the negotiating table feeling like winners. A report from Patricia Gosling.

Conflict is part and parcel of human interaction. Most of us, in our daily lives, are confronted with conflicts of one sort or another. But when disputes occur between corporations, essential cooperation and licensing agreements and patent rights—not to mention vast sums of money—can be at stake.

Traditionally, opposing parties in a dispute take their grievances to court or to arbitrators, resulting in long months—if not years—of costly litigation or arbitration. And the legal outcome of these suits often leaves both parties frustrated and dissatisfied, with only the lawyers richer for their pains.

But an alternative approach to resolving disputes, developed in the 1970s in the U.S. and only recently imported to Europe, promises to be a powerful tool in the world of corporate conflict. Called Alternative Dispute Resolution, or ADR for short, this technique allows disputing parties to avoid expensive court litigation and settle their differences through mediation. A neutral third party, the mediator, guides the disputing parties through the mediation process until they reach a mutually satisfactory resolution themselves. The mediator merely facilitates, he does not impose his judgement on the parties.

Developed by the General Counsels of major US corporations as an alternative to litigation, the concept of ADR inspired the creation of the CPR Institute for Dispute Resolution. Participating companies signed a pledge stating their commitment to solving disputes with other signatories by means of ADR. Not long after, nearly all major US companies became signatories (currently over 800 have signed the pledge, including 400 of the Fortune 500 companies). In addition many US subsidiaries of European multinationals signed the pledge. The success of ADR is overwhelming. In 85 to 90 per cent of cases resolved through ADR, a successful outcome is reached.

To show its commitment to ADR, Akzo Nobel Inc. has recently signed the CPR Corporate pledge. (See box for the text). Rather than being just a reflexive desire to 'jump on the bandwagon,' Akzo Nobel's commitment to ADR has deeper roots. On the basis of court orders the company has had several positive experiences with mediation, enough to convince the Board that this is the way of the future. What was initially an American response to the excessive litigation in that country is now also growing into a European-wide practice, now that more and more companies are convinced of the advantages of resolving disputes in this way.

The Pledge

"We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare businesses the high costs of litigation. In recognition of the foregoing, we subscribe to the following statements of principle on behalf of our company and its domestic subsidiaries: In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation of ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation."

(Text of the CPR Corporate Policy Statement on Alternatives to Litigation, as recently signed by Akzo Nobel Inc.)

Center: Akzo Nobel Inc. recently signed the CPR Corporate Pledge.

From left to right: Kenneth Frank, General Counsel Legal Department North America, Jan Eijbsbouts and Piet Provó Kluit,

President, Akzo Nobel Inc.

Akzo Nobel was first introduced to ADR by a court order during a dispute between Organon Teknika and Becton Dickinson over a proprietary, patented technology. Organon Teknika initiated court proceedings against Becton Dickinson for patent infringement. After the pre-trial stage, the judge referred the case to ADR, at the time an unpleasant surprise from the point of view of Organon Teknika's management. Despite Organon Teknika's initial resistance to ADR, the mediation resulted in a licensing agreement that was satisfactory to both parties.

To skeptics, ADR may seem like a soft option for resolving disputes, something that is out of place in the hard-hitting world of business. "Not true," says Jan Eijsbouts, General Counsel and Director of Akzo Nobel's Corporate Legal Affairs Department. "Is mediation a soft option compared to litigation? Absolutely not. In litigation, the disputing parties can hide behind their lawyers. In mediation, they are forced to sit face to face and hammer out an agreement. If you think that's easy, just try it. It involves lots of stamina and a willingness to put your cards on the table. Mediation can be emotionally and physically draining, because disputes, even in business, always have an emotional content."

During the negotiation several strategies are used to reach a successful settlement: defining the nature of the dispute, defining the objectives of both parties, assessing one's own position with respect to each issue and planning a strategy that moves both parties toward resolution. By following through with the logical steps of the negotiation process, the chance for success is high.

In addition to lower costs and time expenditure, ADR has several distinct advantages. By not handing a business dispute over to the lawyers, mediation makes it possible to make business solutions, rather than resort to legal remedies that may be unsatisfactory to both parties. In other words, mediation allows both parties to focus on their business interests, rather than their legal positions. The focus is on the future, not on the past!

"That's why the Board of Management wants to promote ADR as a management tool," stresses Eijsbouts. "By putting the power of negotiation into the hands of the managers, rather than giving resolution of the dispute away to the lawyers, mutually satisfactory outcomes can be reached. Judges look for legal solutions, but managers look for the best business solutions. The motto of ADR is that there's a new opportunity behind every conflict, a new chance to negotiate a better relationship with the person or entity with whom you have a conflict."

And while traditional litigation is designed to pit two parties against each

other, mediation encourages the parties to work their problems together. By improving the negotiating skills of management, a sense of empowerment is created. And perhaps most importantly, after a mutually satisfying arrangement is reached through mediation, business relations are preserved.

Millennium bug

One of the reasons Akzo Nobel is paying close attention to ADR, particularly now, is the threat of potential disputes that may arise in connection with the millennium problem. Surveys by major US companies show that for every dollar spent on preventing Y2K mishaps, another two dollars will be spent on legal fees for sorting out claims. To avoid costly litigation that may result from the millennium bug problem, major companies in the US, the UK and other European countries, including Akzo Nobel, are signing millennium accords that obligate them to consider ADR as a first option for dispute settlement.

To assist companies in the Netherlands in resolving their disputes with ADR, Eijsbouts was instrumental in establishing a center for conflict management. Called ACB (for ADR Center for Business) the center is a not-for-profit institution whose goal is to promote ADR as an alternate means of solving disputes and to make this technique known to corporations in the Netherlands.

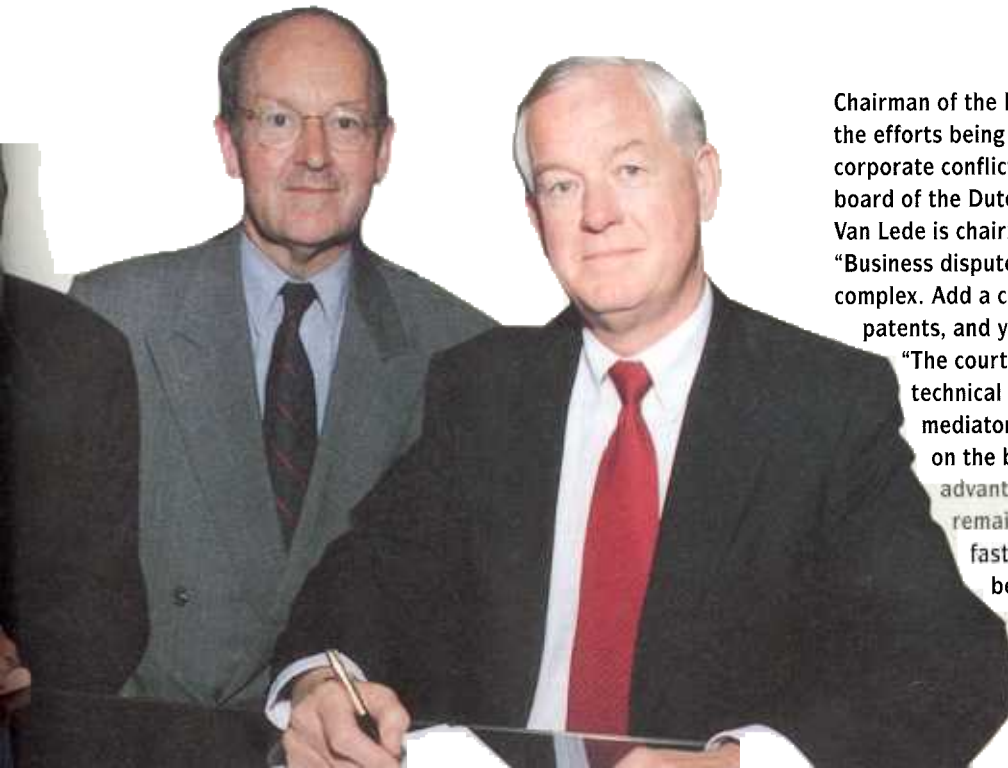
"The power of ADR is that it puts the negotiating process in the hands of the managers, where it belongs," says Eijsbouts. "Money and time is saved and businesses can go back to doing business. The numbers speak for themselves. Although there are still some skeptics, you can't argue with a success rate of 85 – 90 per cent."

ADR is clearly a trend for the future. "This is not just an American phenomenon," says Eijsbouts. "It fits very well into Dutch culture where there has always been an emphasis on solving conflicts by negotiation in a mutually satisfying way."

The English corporate environment has also adopted ADR. The English equivalent of ACB, CEDR in London, has expanded rapidly into a full service ADR provider for business.

Perhaps the only people who may lose in this process are the outside lawyers, but for corporations, when a dispute arises, extending the negotiation process and thereby keeping control on the outcome of the dispute will make for better business in the long term.

And, finally, keep in mind that increasingly courts will urge the parties to take resort to ADR first.■



Chairman of the Board of Management Cees van Lede fully supports the efforts being taken to increase the role of ADR in resolving corporate conflicts. That was one of the reasons why he joined the board of the Dutch ADR Center that was set up last year.

Van Lede is chairman of the body.

"Business disputes are almost always technical in nature and complex. Add a complicated legal structure, as in cases involving patents, and you have a real problem," says Van Lede.

"The courts do not have an in-depth understanding of technical aspects, but they still have to reach a decision. A mediator doesn't have that difficulty, because he is selected on the basis of his business know-how, which offers many advantages. It works much more efficiently, control remains in the companies' own hands, and it works much faster. In fact, the more complex the matter is, the better ADR works. Confidentiality also plays a big role. In court, everything's public. Everyone can listen to what is said and that just makes it all the more difficult to reach an agreement."