DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Patrick Noonan

Secretary General, General Counsel,
Sr. Corporate Vice President, Nexans

THE SPEAKERS

Patrick Noonan
Secretary General, General Counsel,
Sr. Corporate Vice President, Nexans

James Blank
Partner, Arnold & Porter
Kaye Scholer LLP

Charles Kaplan
Partner, Orrick Herrington & Sutcliffe LLP

Mark Powell
Partner, White & Case LLP

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our Website, directorsroundtable.com.)

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of the achievements of our distinguished Guest of Honor and his colleagues, we are presenting Patrick Noonan and the Legal Department of Nexans with the leading global honor for General Counsel and Law Departments. Nexans is a global manufacturing and technology company providing cable and cable solutions serving the power transmission, resource, transportation, building industries and telecom industries.

His address will focus on key issues facing the General Counsel of an international corporation and particularly the evolution in governance, risks and compliance. The panelists' additional topics include mergers & acquisitions; corporate governance; international arbitration; competition law; and IP disputes. The transcript of this event will be made available worldwide in electronic copy. The program was moderated by Karen Todd, COO and Executive Director of the Directors Roundtable.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel. Join us on social media for the latest news for Directors on corporate governance and other important VIP issues.

Jack Friedman
Directors Roundtable Chairman

Patrick Noonan

Secretary General, General Counsel, Sr. Corporate Vice President

Patrick Noonan began his professional career in the United States at Patton Boggs in Washington D.C. and Wilson Sonsini Goodrich & Rosati in Palo Alto before joining Texas Instruments in France in 1985 as European Counsel.

In 1988, he joined Alcatel NV (Brussels and Paris) before going to Canada in 1992 to become General Counsel of the Americas Sector of Alcatel Cable. In 1996, he became General Counsel of the Cables & Components Sector of Alcatel and in 1998 was appointed Deputy General Counsel of Alcatel.

Since 2001, Patrick Noonan has been General Counsel and Assistant Secretary and Secretary of the Board of Directors of Nexans (NYSE Euronext Paris), and Secretary General since 2009.

He is a graduate of Stanford University in the United States (B.S. Engineering 1977, Juris Doctor 1981).

He is a member of FM Global Advisories Board, and Chairman of the Board of Nexans Hellas, a company listed on the Athens Stock Exchange.

Nexans

As a global leader in advanced cabling and connectivity solutions, Nexans brings energy to life through an extensive range of best-in-class products and innovative services. For over 120 years, innovation has been the company's hallmark, enabling Nexans to drive a safer, smarter and more efficient future together with its customers.

Today, the Nexans Group is committed to facilitating energy transition and supporting the exponential growth of data by empowering its customers in four main business areas: Building & Territories (including utilities, smart grids, emobility), High Voltage & Projects (covering offshore wind farms, submarine interconnections, land high voltage), Telecom & Data (covering data transmission, telecom networks, hyperscale data centers, LAN), and Industry & Solutions (including renewables, transportation, Oil & Gas, automation, and others).

Corporate Social Responsibility is a guiding principle of Nexans' business activities and internal practices. In 2013 Nexans became the first cable provider to create a Foundation supporting sustainable initiatives bringing access to energy to disadvantaged communities worldwide. The Group's commitment to developing ethical, sustainable and high-quality cables drives its active involvement within several leading industry associations, including Europacable, The National Electrical Manufacturers Association (NEMA), International Cablemakers Federation (ICF) or CIGRE to mention a few.

Nexans employs more than 26,000 people with an industrial footprint in 34 countries and commercial activities worldwide. In 2017, the Group generated 6.4 billion euros in sales. Nexans is listed on Euronext Paris, compartment A. For more information, please consult: www.nexans.com

KAREN TODD: Good morning and welcome! I am Karen Todd, the Executive Director and Chief Operating Officer of Directors Roundtable. I want to especially thank the people of Nexans, the outside law firms, the university law schools, and the other organizations who made a point to be here today. We're very appreciative that you're here.

The Directors Roundtable is a civic group whose mission is to organize the finest programming on a national and global basis for Boards of Directors and their advisors, including General Counsel.

Over the last 26 years, this has resulted in more than 800 programs on six continents. Our Chairman, Jack Friedman, started this series after speaking with corporate directors, who told him that it was rare for a large corporation to be validated for the good they do. He decided to provide a forum for executives and corporate counsel to talk about their companies, the accomplishments in which they take pride, and how they overcome the obstacles of running a business in today's changing world.

We honor General Counsel and their law departments, so they may share their successful actions and strategies with the Directors Roundtable community, not only through today's program, but also through a transcript of this program which will go out to 100,000 leaders globally.

Today, it is our pleasure to honor Patrick Noonan and the Legal Department of Nexans. Joining Patrick this morning are Distinguished Panelists: James Blank with Arnold & Porter Kaye Scholer; Charles Kaplan of Orrick Herrington & Sutcliffe; and Mark Powell from White & Case. In addition to Patrick's work as the Secretary General, General Counsel and Senior Corporate Vice President of Nexans, he is a member of FM Global Advisories Board, and Chairman of the Board of Nexans Hellas, a company listed on the Athens Stock Exchange.

Patrick has worked professionally at major international law firms in the U.S., Patton Boggs and Wilson Sonsini Goodrich & Rosati. On the corporate side, he has worked at Alcatel in Brussels and Paris, and was General Counsel of the Americas Sector of Alcatel Cable, and advanced to Deputy General Counsel. He has been at Nexans for 16 years as its General Counsel. He graduated from Stanford, first with a degree in engineering, and then with his law degree.

I have a letter from the dean of Stanford Law that I would like to share with you. This is from Elizabeth Magill, the Dean.

> Dear Pat:
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> I'm delighted to congratulate you on receiving the leading global honor for general counsel in law departments from the Directors Roundtable. Your steadfast dedication to the legal profession and to Nexans makes you a shining example of the remarkable achievements of which Stanford Law School alumni are capable. I often say that at SLS, we are training the brightest legal minds to be the leaders of tomorrow. The achievements for which you are being honored today prove this to be true. I am so proud of you and all that you have accomplished. On behalf of all of us at Stanford Law School, congratulations.

[APPLAUSE]

Now I'm going to turn it over to Patrick for his presentation.

PATRICK NOONAN: Thank you very much, Karen, and thank you for that surprise. I'll immediately go off-script and say that I remain humble and I still have a lot to learn.

This morning, I'm going to talk mainly about governance, risk and compliance; the evolution in the business world in these three domains in the last 35 to 40 years, and comment on how values have evolved in that time frame. These are subjects in which lawyers participate; lawyers accompany and sometimes encourage changes in these areas. They are subjects of ever-increasing importance for Boards of Directors. If I have some time, at the end, I want to talk briefly about how the legal profession is evolving.

I'm going to start with some comments about values. When I was a first-year student in university — not law school — I took a class in philosophy. One of the theses of the professor was that there are no absolute rights and wrong, from a moral point of view, that values are relative. He asked the class if everyone believed that murder is wrong. Virtually everyone said yes, except for those who suspected it was a trick question.

Then he asked, "Would it be wrong to kill an attacker to prevent him from killing your spouse and children?" Almost no one said it was wrong and probably no one thought it was wrong.

The point was that moral values are relative concepts; moral values can be relative to a situation, to a culture; and they can change over time. My perception is that changes in values have largely driven change in the last 35 or 40 years in these domains of governance, risk and compliance.

Let's start with compliance in competition law. What was the scene 35 to 40 years ago? As a young lawyer in Silicon Valley, one of my first missions related to the due diligence of a company about to go public. During the due diligence, it was discovered that this company had agreed with a competitor about prices and allocation of customers in export markets. The question put to me was, "Do we need to disclose this as a risk and potential liability?"

At the time, there was a law that had just been enacted, the Export Trading Company Act of 1982, which complemented a law which had existed well before that, the Webb-Pomerene Act of 1918, both of which *explicitly* authorized collusion, price-fixing, and allocation of markets in relation to export sales.

In the beginning of 1984, I started to work in France. At the time, price controls were in effect. The way price controls work, simply put, is that the government will ask the trade association to propose the prices that it wishes to have put in place by regulation. The trade association, of course, confers with its members, the manufacturers. They compare prices, costs, and capacity, and agree on the prices they think would be reasonable to charge. They submit their agreed desired prices to the regulator, and the regulator then issues a decree, and they become required prices. This is an example of government required price-fixing.

In Germany in the 1970s, and I believe through the '80s, you could register an export cartel, similar to the American scheme, and there was also the possibility to have approved and registered a so-called "crisis cartel" in the case where the domestic industry was suffering. One of the criteria for the Bundeskartellamt [Federal Cartel Office] to approve a crisis cartel was that the competitors had to agree to reduce capacity. Such an agreement would be illegal today.

In the '70s, and maybe through the '80s, there was something similar to the EU — some of you still remember — called the "European Steel and Coal Community." The treaty creating it was similar to the Treaty of Rome and contained prohibitions on anti-competitive agreements. At one point the Authority, equivalent to the European Commission, basically organized a cartel, according to some commentators. The Authority set production quotas and minimum prices.

In Belgium, which hosts the main European community organizations, and is basically the capital of Europe, the first competition law was only put in place in 1991. Up until then, Belgium was in a paradoxical situation where it would be illegal to collude in relation to trade with other member states of the European Union, but perfectly legal to have local collusion if you only affected regional or national markets.

In Italy, the situation was similar, there was no competition law until 1990.

So, when I look at the values underlying this hodgepodge situation, I cannot conclude that there was a societal judgment that it was morally bad to collude. One cannot say that it's morally unacceptable to collude in the United States but it's acceptable to collude in relation to another country, or that it's morally unacceptable to collude when you affect trade in member states but it's acceptable to collude in Belgium, or that the predecessor organization to the European Community could ban collusion as morally bad and yet, itself organize collusion when it felt that collusion was good for managing industrial policy.

This is one of the challenges for lawyers and general counsels, in particular, how to orient management behavior and gain adherence to norms and laws when the underlying values are unclear, or inconsistent. It can lead to what I would call "rules-based advice," but it doesn't lead to adhesion and I'll come back to this some more later.

What's happened today? We all know the current state of competition law, that there are billion-Euro fines in the European Union. There's a new directive which *presumes* that the so-called victims of cartels have been harmed, and that judges must estimate the amount of harm in the absence of proof. The U.S. Department of Justice, the DOJ, publicizes its fines. They have already been in the hundreds of millions for years, and the DOJ publishes every year statistics on how many people it sent to jail and the length of jail sentences. The last time I looked, there were about 50 persons a year sent to jail, and the length of jail sentences shown by the DOJ is increasing, about 22 months on average now. Countries around the world have adopted the same practices: Brazil, China, South Korea and India all have announced fines between half a billion and a billion dollars. We now see jail sentences in the United Kingdom and Ireland.

Have values changed in relation to competition law? Criminal punishment, jail time and the level of these fines suggest that the underlying values have changed. I do note, though, that there still seem to be some inconsistencies which, once again, can make it difficult to obtain adherence to new norms. One seeming inconsistency, indicating these are not moral issues, is the difference between structural combination and what I would call commercial cooperation. If two competitors in a given market each have a 15% market share, it would be illegal for them to coordinate their behavior. But they could merge, which would be approved at that level of market share. And so there's no problem in combining in one form but not in another.

While such types of seeming inconsistencies can be explained, they still can make it difficult to have management and Boards of Directors understand what is really behind the law.

Another pet concern of my own relating to competition law is the subject of innovation, which is generally considered a necessity for large companies in today's global world of fast technological change. I learned as a law student, that to encourage innovation, there is a legally protected monopoly: patents. So monopolies are not inherently bad. Now however, the respect for that monopoly has been eroded in law in the United States and Europe and I find that raises interesting policy questions.

Let's talk about a second compliance area and how things have changed: anti-corruption laws. When I was a young lawyer, the Foreign Corrupt Practices Act already existed, and the Foreign Corrupt Practices Act did prohibit corruption but it allowed so-called "facilitation payments," which were defined as paying money to a government official to do something he should do anyways. The standard at the time was $25; maybe today it's $50.

Then I came to Europe, and what did I discover? In France and in Germany, you could deduct payments made in cash to foreign government officials. Tax policy, to me, is used to encourage or discourage activities. When you allow a tax deduction for one activity, it's being subsidized by the activities which are paying taxes.

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>
> *– Patrick Noonan*

Once again, were societal values at the time reflecting a view that corruption was an act of moral turpitude? I find it difficult to conclude so. One cannot say it was morally incorrect to make corrupt payments to a government official in Germany or France, but that it does not constitute moral turpitude to corrupt people in other countries.

So, what changed? One of the things was the OECD Convention of 1997, where most developed countries agreed to prohibit corruption outside of their own country. Since then, there's been a lot of scandals and highly publicized events — the Siemens episode, the publicity of fines and jail time, particularly in the United States, new laws such as the U.K. Bribery Act, the French law SAPIN II. And there has been a trend in whistleblowing. In the United States, surprisingly to me, it's rewarded with cash payments. And whistleblowing can be obligatory for General Counsels under the Sarbanes-Oxley Act. If the General Counsel finds management is engaged in wrongdoing, he must escalate to the Board; if the Board doesn't act, the General Counsel at least, in the original version of the law, had an obligation equivalent to denouncing the company. The moral value underlying whistleblowing however, to me, is not clear.

Once again, I think there's been a general convergence and shift in values about corruption, yet still I question what to think about emerging economies' practice of requiring local content. Is this motivated by a desire to have know-how transfer and local employment, or can it be a disguised form of payments?

I'll switch now to governance and its evolution. I refer back again to my time as a student, once again still as an undergraduate, not as a law student. I took a class in political science, and we examined what was referred to as "interlocking directorships." Just so we're clear, an "interlocking directorship" is a type of situation where members of the Board of Directors or management of company "A" would be on the Board of Directors of company "B," and members of the Board of Directors of company "B" or its management would be on the Board of Directors of company "A," and there could be a network of several companies linked like this.

So, as I still recall today, the criticism that the professor directed at the practice of interlocking directorships, and which seemed to reflect a common concern in academia, was not about good governance; it was about what I would call a conspiracy theory. The so-called "Triad Commission" or "Trilateral Commission," for anybody in this room who may have heard of it, was seen to be using interlocking directorships to help the military industrial complex to dictate government policy and entrench the ruling elite. There was no criticism that this practice of interlocking directorships was poor governance which protected management from shareholder control. I do note, however, that in a U.S. law which dated from the early 1900s, there had already been a prohibition on interlocking directorships between competitors. There had long

been a recognition that if competitors sit at each other's Boards, that would facilitate collusion. So that "bad" aspect of the practice had been dealt with. But the pure governance aspect, as I think we all know it today, was not a concern, or at least not in my political science class.

Then I came to work in France. In France, there was a common practice which was referred to as a *noyau dur* of shareholdings in a listed company's capital. I looked up the translation in *Collins*, a reputable English dictionary, and I find the definition telling: a *noyau dur* is a group of shareholders that protect the company from hostile takeover bids. That, really, was the unabashed aim of these alliances. They would often not be between companies in complementary industries, at least not necessarily so, they were there to entrench management. The media at the time would report on the success that companies had in putting these arrangements in place, as opposed to criticizing them.

In Germany, there was a tradition for large banks to own a significant shareholding in the companies to whom they made lendings. I searched around on the Internet and found an *Economist* article from 2000, citing a study from Salomon Smith Barney from 1995, stating that 18% of the market capitalization of European companies was subject to cross-shareholdings. I see all that in a way as a continuation of the tradition of nineteenth century alliances amongst European powers.

The value that seemed to be accepted at the time was that management stability is good. Not right and wrong, which I will stay away from, but that it was good. And management stability created management security. I do not recall reading in the media or hearing criticism of such practices as possibly resulting in management's lack of concern for shareholders' interests.

I cite also the example of a governance practice in the Netherlands, which existed until at least 2000, and maybe even until 2005 or

2006. In a typical listed company, the shareholders had no say on who the management would be. There was typically a management board, a group of three persons who could run the company, and they were subject to supervision by a supervisory board. But the supervisory boards were not appointed by shareholders; they self-appointed themselves and co-opted new members. At the time, once again, I don't recall hearing any outcry against the lack of concern for shareholder power or interest. Even the terminology that was used in the '80s and up through the '90s is telling: the terminology was to refer to "executive Directors" and "non-executive Directors" on Boards of Directors. The distinction was between people who were salaried and full-time at the company who were "executive" Directors, and people who were not, who were "non-executive." The terminology and therefore important distinction at the time was not "independent Directors" and "non-independent Directors," as it has become today.

There were many other practices which were considered acceptable at the time, such as auditors who were allowed to give paid advice on strategies to improve financial reporting or reduce taxes, and who then certified the accounts which reflected those strategies. Pay for performance was not a term that I recall hearing in the 1990s or even in the beginning of the early 2000s. Back in the '70s and '80s, corporate raiders were considered a bad thing – just the term, alone, "raider," was pejorative. Some people might remember Carl Icahn and his so-called "raid" on TWA.

Things have changed today; values have changed. In respect of governance, we're probably talking somewhat less about moral values than about societal or economic values. Today, the underlying value in governance is non tolerance of conflicts of interest. It is generally accepted that conflicts of interest are to be discouraged; that the Board is there to make sure that the stakeholders' interests, and perhaps firstly shareholders' interests, are protected. Boards, I think, now feel themselves responsible for implementing pay for performance as opposed to being externally held to that standard. Governance codes are virtually obligatory; in French law, you have to make reference to your applicable governance code or explain why you don't have one. The New York Stock Exchange requires adherence to its code.

What are the types of things that are important today in these codes? One of them, once again, is independence of Directors — that a board, generally speaking, should have a majority of Directors who have *no* ties to the company, not be beholden to it in any way, and that the committees which prepare the work on subjects such as the accounts and CEO remuneration should also have a majority of Directors who are independent. This was not the case in 2001, when Nexans first became a listed company.

Today, activists are considered a good thing, as opposed to the past negative view reflected in the terminology of "corporate raider." *The Economist* last year analyzed the very positive role of activists. Most institutional shareholders turn their holdings frequently, and are often very passive; they may simply sell their shares when they don't like the company's performance. Activists on the other hand are a vector for change and for management *in*stability. I said earlier that 30-40 years ago, the societal value seemed to be that management stability was a good thing; now it's considered that management instability and insecurity can be a good thing.

These are some of the changes I see in governance.

I turn now to risks. Risks are a little bit different. Risk-taking is inherent in any human activity, whether it be business or anything else, and no one is against risk-taking in itself. Risk management is a tool, in a way, for governance and for compliance, although there can be some normative or value aspects in risk management, as well.

I can't make the same comparison in the field of risks to practices 35 or 40 years ago as I did for compliance and governance, because risk management really didn't exist 35 or 40 years ago, except in banks and insurance companies who used mathematical techniques as part of their business model. Perhaps some of the big petroleum companies with billion-dollar platforms had to do some risk modeling in terms of avoiding incidents. But in a typical commercial or industrial company, risk management was not a term that anyone had even heard of.

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The standard for risk *management* today which is most well-known in the world comes from an organization called the COSO [Committee of Sponsoring Organizations of the Treadway Commission]. I looked up the history of COSO. COSO was formed in 1985 to study how to prevent fraud in financial reporting — nothing to do with risk management techniques. In 1992, COSO published some recommendations on internal controls. In 2004, they published the Enterprise Risk Management Framework, which is commonly cited today as a standard.

Some other observations about the evolution of risk management relate to the aftermath of some scandals in the late '90s and early 2000s. The Sarbanes-Oxley law in the United States mandated risk management practices. It required internal controls to be put in place and to be certified by auditors, internal controls being a risk management tool. That law also mandated that CEO and CFO bonuses be clawed back if the company had to restate its accounts. So for a bonus paid in relation to year one, if the year one accounts are restated two or three years later because of deficiencies in internal controls, the senior management would have to give back their bonuses. The law mandated escalation by General Counsels to the Board of Directors if management failed to act, and potentially a form of external whistleblowing.

In Europe, there was the European 8th Directive, which went into force in 2008, and which required European-listed companies, to have an audit committee or equivalent, which supervises not only internal controls but also risk management. Today, we see the recent French laws which actually require, render obligatory, some techniques of risk management, like risk mapping.

I asked myself the question in preparing for this, has there been a shift in values? While I said risk management may be less about values, there's been at least one change in societal norms related to risks and accountability for risk taking: it is acceptable to take risk provided those taking the risk bear the consequences for the risks that are taken. I'm going to pick on banks here, but if a banker's bonus results from taking risks in a great year, but the downside which results in the next year is not for him to bear, there's something wrong. I think there is a general consensus for this to change. After the crisis of 2008, many large finance institutions like banks were bailed out by the taxpayers, meaning their managers, Boards and shareholders transferred to others the negative consequences of their risk taking.

The change in norms, once again, seems to be this: those who benefit from the upside of taking risks must assume the downside of the consequences of the risk taking; it is not acceptable to take risks if somebody else, like the employees or the shareholders or the taxpayers, are going to pick up the bill for things gone wrong.

A few comments now on how and why things have changed. First an aside, about change management.

Our group has been focused on change in the last three years and will continue to do so in the future. Our markets and competitive landscape have changed, and so our ways of doing things need to change. Managers in this company have been trained in change management. One of the interesting things to keep in mind about change management is the time horizon for lasting change. When you change people's daily tasks, that change can be effected and become lasting in a matter of days or weeks. When you change people's skills, that takes a little longer, because you need to train them, and then they need to use the new skills for a while. When you change methods and processes, that might even take a couple of years, because you have to change people's way of acting on a daily basis. To change values, it can easily take 10 years. Company values often change when societal values change. As illustrated by my remarks at the beginning about competition law, when rules or policies are in a context of conflicting values or the lack of clear values, it's hard to get adherence to the policies.

Values can evolve, or converge, when people get hurt. In some of the scandals in the '90s and early 2000s, people were getting hurt, not just companies and institutions. Take the Enron scandal; you all probably remember what happened. When Enron went bankrupt, not only did the people lose their jobs; Enron had set up a retirement savings plan, in lieu of a pension plan, where the entire plan was invested in Enron stock. People lost their jobs, and they lost their retirement. And again, following the crisis of 2008, a lot of people lost jobs, and the question asked was who was responsible for this, and why did bankers keep their jobs when the banks were being bailed out by the taxpayer? There's a lot that could be said about that, but the perception was that governance processes were not appropriate and the people getting hurt were not the people who took the risks.

A lot of forces have contributed to the changes I am describing. Lasting change

results less from constraint and bludgeoning than it does from buy-in, and that's where I think value changes are very important. Other forces that have contributed to these changes in governance, compliance, and risk include the pressure of activists of two types. First, the institutional "activists," like the ones who used to be called "corporate raiders" and now are considered to be bringing good pressure to corporate governance. And there's what I would call the CSR activists — the same type of activists which pushed companies to basically boycott South Africa until Apartheid ended and who are active as a vector for change. Some of you may know one of the largest institutional investors in the United States, called CalPERS, that manages the retirement fund for the California Teachers Association. To remind everybody, California's got a population of 40 million people, so it's basically the size of a country. CalPERS has sent us questions about such things as the respect of embargoes to Iran and they will blacklist companies who engage in practices they don't support, or refuse to explain or answer their interrogations about those activities. As mentioned earlier, high fines and people going to jail are a deterrent force for change. Class actions, particularly in the United States, and about to come to Europe, also create financial disincentives and contribute to change.

On the slightly more positive side, there is also the real concern about the reputation of a company. The management of Boards of Directors are more motivated today, I would like to think, by a concern for the image they project than their fear of fines or jail, and so they align with and adopt changed societal values.

Personally, I think there has been convergence around the world, in all these realms. But as mentioned already, there are probably still some inconsistencies left. At the end of the day, though, my perception is that there is very positive change. I'm going to overstate the case with an example. It used to be, 20 years ago, that General Counsel had to insist with management and Boards of Directors, "Don't do this, because there's a law against it." Now, I think a lot of Board members, themselves, ask questions about, "Should we be doing this," or "What are we doing to make sure this doesn't happen." That's very positive when the changes in norms are adopted and taken on by management and members of Boards of Directors.

To talk for a minute about my group Nexans. I think it has done well in these areas. When Nexans became listed on the stock exchange in 2001, we immediately adopted a Code of Ethics and we engaged in compliance training. In the end of 2003, we appointed our first director of risk management. In 2007, we created a corporate social responsibility program. In 2008, when the current French Governance Code was published, we were at least 95% compliant. I remember the first Board meeting we held immediately after its entry into force, and we only needed to change three or four things. The Board immediately took on the obligation for the audit committee to supervise risk management, and decided, on its own, to also directly supervise compliance,

and we appointed a compliance program officer. I'm proud of our performance. Last year Ernst & Young rated us in the top quartile of our peers for governance. The French finance journal, called the AGEFI, awarded us third place, or the bronze medal, for governance dynamic. We had our compliance program certified before the new French law SAPIN II required a program. To obtain the certification, we undertook a worldwide risk-mapping of compliance risk, and not only of corruption, but of competition law, embargoes, money laundering, fraud, etc. We interviewed approximately 80 managers around the world. The risk mapping was their own assessment of the risk. An organization called "Ethics Intelligence," which is represented here today, organized the certification by external auditors, and finally by a panel of experts: lawyers including a former DOJ official. So, I'm proud of my company's performance in CSR; I'm proud of having, myself, supervised the creation of risk management and corporate social responsibility in the 2000s. I'm proud of my department's contribution to the honors and recognition that we achieved last year, since risk, compliance and governance are all functions under my responsibility.

I will take up five more minutes of your time with some observations or comments on the evolution of the legal profession and the functioning of lawyers in legal departments. First, I'm going to tell a joke. The joke is about a lawyer and an engineer and a doctor that were debating what is the oldest profession. The doctor said, "Medicine is the oldest profession, because when God created Eve from the rib of Adam, that was an act of medicine — it was a medical act of surgery." The engineer said "No, I disagree. When God created the universe out of the chaos, that was an act of engineering." The lawyer said, "No, no, no, no. Who do you think created the chaos in the first place?" [LAUGHTER]

I tell this joke as a preface to my remarks about the evolution of the legal profession, because I think the legal profession will

become a little less different in the future than other functions and other professions, and become, hopefully, demystified. I'll give you three examples.

The first is the use of artificial intelligence. It's happening. A lot more will happen, and what will happen may not be exactly what's foreseen today; perhaps some of the panel members will comment on that. As an example, as a method for document identification and retrieval, it's far better to use machine learning to identify relevant documents than it is to have human beings read several million documents.

Another area is the plain language initiatives, which have been talked about for a long time, but which actually have to happen, so that contracts and laws can become comprehensible to lay persons and you don't need a lawyer to demystify them, acting as a high priest.

Finally, lawyers will be using techniques that other functions use. I want to comment, once again, on something our department has done and I'm very proud of. We did an exercise in lean manufacturing applied to a legal function. Lean manufacturing techniques, in an over-simplified version, have as an objective to eliminate waste — waste being something which doesn't add value, something a customer won't pay for — and to standardize, to the extent possible, so that management's main role is to deal with deviations from the standard. We looked at the things that the legal department does, and at least in my company, I identify four or five recurring tasks which cover probably 95%, if not 100%, of our time. The number one is contract negotiation; number two is claims management; number three is compliance; number four is corporate law; number five is consulting. That's my 5 C's.

We identified contract negotiation as generating the most recurring activity and having the most potential for standardization. The exercise was not just to make the legal function more efficient. In the jargon of lean manufacturing; the goal was to make the end-to-end process within the group more efficient, meaning from the day the customer first asks for a quote to the day of signing the contract, all actors involved do so in a more efficient way.

We came up with a tool which works like this: when a customer asks us to respond to a tender, we tell the customer we won't take the time to mark up the contract. We don't take the time to have internal debates about what to mark up, etc. We submit to the customer a five-sentence addendum to its contract. We state that we will sign the customer contract if it will sign our addendum. The addendum is a risk management tool to limit our liability, exclude consequential damages, things of that nature.

At first, I was a bit skeptical, because I thought customers would reject the approach, but that hasn't happened. The efficiency gain for our group works like this: suppose our hit rate is to win one in five tenders that we submit. If we go through the full process for every tender of reviewing the contract terms, of proposing changes, of discussing those changes with the salesperson, of submitting them to

the customer, and of having yet another discussion based on the customer reaction, then for our four bids which are not selected, that time has been wasted — it's scrap, in terms of lean manufacturing principles. It's scrap for us, and it's scrap for our salespeople, and it's even scrap for the customer.

If we submit instead our tool, our five-sentence addendum, then in the case where we are selected, even if the customer rejects our approach, we don't mind; we have eliminated non-value-added work on the rejected bids, and we have deferred the work of contract negotiation for only the bids we win.

An added benefit, to my surprise, is that a lot of customers actually accept our addendum eliminating negotiation altogether.

We developed this tool using some risk management techniques, as well. We examined our different customer segments, because we have many, and with some customers, the risk is higher than with others. I'll take an example of the oil and gas industry. We often request and obtain from our customers an indemnity against pollution liability. Some of you may have even noticed in the big oil spill in Texas, the subcontractor has been in a fight with BP, because BP didn't want to honor its contractual indemnity against pollution risks. The same practice exists in the nuclear industry, to give another example.

For market segments where we identified the risk as high, we won't use our tool; we think it's still better to have a lawyer review the whole contract and make sure the safeguards we want are in it and take the time to negotiate. But for contracts we evaluate as being of low risk and acceptable risk — there's still some risk — we decided to not have a lawyer review it; we tell the salespeople to send to the customer this five-sentence addendum, in order to gain time for more offers or other activities.

We've been measuring that for the last 18 months, and I'm happy with the results so far. There's good progress, good acceptance by our salespeople, and even a fair amount of customers have accepted to sign our addendum, which is a benefit in addition to the reduction of contract review resources.

> "Today, the underlying value in governance is non-tolerance of conflicts of interest. It is generally accepted that conflicts of interest are to be discouraged; that the Board is there to make sure that the stakeholders' interests, and perhaps firstly shareholders' interests, are protected." — *Patrick Noonan*

I've shared with you my thoughts on evolution in governance, risk and compliance. I've told you about my company and shared a few ideas about the future of the legal profession. Thank you for listening. Please don't hesitate to challenge me during or after this on any of the ideas that you don't agree with — that's how we all learn. Thank you very much. [APPLAUSE]

KAREN TODD: Patrick, you mentioned the U.S. government's policy of basically rewarding whistleblowers. That policy, obviously, is to get whistleblowers to come forward. Do you have a similar policy within Nexans, and can you say anything about what the EU's government policy is on whistleblowing?

PATRICK NOONAN: I'll comment on Nexans' policy, because we publish it. We did put in place a whistleblowing policy around 2010, and two years ago, we opened it up to even external whistleblowers. We think it is an appropriate method for identifying and detecting anomalies. I didn't mean to criticize the existence of whistleblowing; I even think it's a positive thing for employers who are in an uncomfortable situation. Where I hesitate is when it's rewarded with monetary rewards, and this is encouraging an activity that some people would feel is inappropriate. There's a bias in French culture against what they call "delation," a denunciation to obtain a personal advantage. Whistleblowing processes are now basically required, anyways. For example, by the SAPIN II law, and I think Europe is going in that direction. But I do not believe Europe is going in the direction of *rewarding* whistleblowing. That was even debated in the French legislative history of the SAPIN II law. But if anybody else knows about any developments in Europe to reward whistleblowing, I'd be happy to hear about it.

KAREN TODD: Thanks very much. Our next speaker is going to be Jim Blank. He's with Arnold & Porter Kaye Scholer. He's going to discuss some issues in patent law.

JAMES BLANK: Thank you, Karen, and thank you, Patrick and the entire Nexans legal team for hosting this event and inviting me to participate. I'm quite privileged to be here.

I am a patent litigator in the United States. I've been practicing patent litigation for a bit over 20 years now, and I'm going to continue on Patrick's "evolution" theme. I'm going to talk today about the patent litigation landscape and how it's changed in the United States over the past five years or so — I'm going to limit myself to that time period — how it's continuing to change today, and how those changes are having an impact on patent litigation in Europe, particularly with respect to litigation brought by non-practicing entities — NPEs, or sometimes referred to as "patent trolls" — and potentially also with respect to future litigation in the Unified Patent Court — UPC — if and when that court comes into fruition.

I was thinking this morning a little bit more about this, and the patent litigation landscape globally, now, is similar to major

global stock markets and economies which seem to move, at least as of late, in synchronicity. We're seeing more and more of that in patent litigation across the United States, Europe, and also Asia, including Japan and China. The Chinese government has become much more diligent in terms of creating courts now to protect the intellectual property rights of its patents and its patent holders.

To give you some perspective, when I started working on patent litigations for Nexans in the mid-2000s, the world was a very, very different place. The first case I handled — and I'm just going to go through this quickly to give you a sense of the evolution or chronology. It was in the mid-2000s, I handled a patent litigation matter (that was actually an arbitration). Nexans was the patent holder, and a competitor, we believe, was infringing the patent. Notice was provided to the alleged infringer, and then rather quickly, a negotiation ensued, and it was successfully concluded with a license agreement.

It's fair to say, in that type of case, a competitor vs. a competitor case, where the monetary stakes were not insignificant, that that result would not happen in today's environment. It certainly wouldn't happen that quickly. I'll talk about what's changed in the course of those 10 years or so.

The second case was an actual litigation. It was the same competitor. It was brought in federal court, and in that case, Nexans was the defendant and also the counterclaim plaintiff. We had patent claims going both ways. That case was litigated over a couple of years and it ultimately ended up in a settlement through a cross-license. That case was in the late-2000s time period, maybe 2009, 2010. That case would have looked very different in this day and age.

Now, the latest case that we handled was initiated in 2012 and concluded in 2015, and that was a case in which Nexans was alleged to infringe four patents, 81 claims by a different competitor. In that case, that was filed after the enactment of the America Invents Act in the United States, which was signed by President Obama and went into law in the fall of 2012. In that case, we availed ourselves of the very significant IPR procedure, and over the course of 18 months, invalidated 79 of the 81 patent claims that were asserted against Nexans. The remaining two claims were invalidated on appeal at the Federal Circuit level.

Had that case been brought a year earlier, before the enactment of the America Invents Act, that would have been a very different case, and I think it's fair to say we would not have litigated it in the same way at all. The risk profile of that case was very high.

What has changed over the last five years in the United States? I would say, in my estimation, there are three major events, and each has made it more difficult for patent owners to successfully assert their claims in the United States. Each was done in response to the proliferation of patent litigation in the United States brought by so-called "patent trolls" over the last 10 to 15 years.

The first thing was in 2012, as I mentioned, the America Invents Act, which provided a much faster mechanism to invalidate patents, going directly through the United States Patent Office and appearing before their Patent Trial and Appeal Board. Without any jury, it's a fast-track; it's required to be resolved within 18 months. What that court created there, were panels of judges who had worked in the Patent Office over years, who had technical experience; they were typically patent examiners and/or administrative law judges. So for the first time, you had a situation where the invalidity of patents, other than when they were initially examined, was being opined on by these experts, as opposed to a lay jury or a district court judge. You also have a situation before the PTAB where to prove invalidity, you have to only do so by a preponderance of the evidence, not by clear and convincing evidence.

That was very radical. That was in 2012, and there have been tens of thousands of IPRs — *inter parte* reviews — or covered business method filings in that body over the last five years, and huge numbers of patents, particularly in the Internet and software space, and also in the financial services space, have been invalidated during that time period. It remains, and it's improved over time, but it remains the best forum, in my view, to try to invalidate a patent in the United States.

The second thing that's happened over the last five years is the Supreme Court's decision in *Alice v. CLS Bank* in 2014. That case established a two-step process for

determining whether a software patent was eligible subject matter under our Section 101 of the Patent Act. That case, itself, has also resulted in hundreds of cases finding software patents invalid because their subject matter is ineligible.

The last thing — it's not as important as the first two things, but I do want to mention it — was in 2014, the Supreme Court, in a case called *Octane Fitness v. Icon Health & Fitness*, made it much easier for a case to be found "exceptional" — that's under our patent statute, which such a finding may trigger the award of attorneys' fees to the prevailing party. In Europe, the majority view is that the prevailing party is typically awarded its attorneys' fees; that has not been the situation in the United States. It's not automatic now, but it's much easier for that finding to happen. And what we're also seeing is that there have been a lot more cases in the United States Supreme Court over the last four or five years, patent cases, much greater interest there. It's resulting in these very important cases that's the law of our land, and it has to be applied by our lower courts.

Change continues in the United States on the judicial landscape, including in this past year, 2017, where the United States Supreme Court again, in another case called *TC Heartland* — and this was done in response to the majority of patent cases over the last 10 years or so had been filed in the United States District Court for the Eastern District of Texas, which had been known as a very plaintiffs-friendly jurisdiction. The judges there had, over the course of 10 or 15 years, put in place very specific rules. It was a very predictable place; you knew what the timeline looks like; you knew what your discovery obligations would be. This went both ways, for the plaintiff and the defendant. Our venue statute had to be looked at, and that was done in this case, *TC Heartland*, which found that corporations can only be sued in the United States in the states in which they're incorporated, or where they have a physical place of business. We're continuing to see,

of course, cases filed in the Eastern District of Texas, because some corporations are incorporated there, and others actually have a physical presence there. But in the last six to nine months, we're seeing cases filed all over the country — Delaware, where many companies are incorporated, has really picked up; California has really picked up — the Northern District of California, where a lot of the tech companies are, has picked up. Also Rust Belt companies, industrial companies that are located in, for example, Ohio, in Indiana. We're seeing those courts certainly with an uptick of filings, as well.

The trend is further continuing, as the Supreme Court has decided to hear three patent cases this term — I'll just go through these quickly — the most important of which is a case called *Oil States*, in which the Supreme Court will decide on the constitutionality of the America Invents Act, specifically the IPR procedure that I described before for invalidating a patent. The issue there is whether the patent issuance, the grant of a patent, is a private property right or a public property right. If it's determined to be a private right, there is an argument that only a district court judge and a jury can invalidate that patent; it cannot be done by the Executive Branch or an administrative agency such as the United States Patent Office.

I think it's going to come out that the Court is going to find that the procedure is constitutional; I think it's highly unlikely it will come out the other way. But we'll have a decision by June.

The second case is called *SAS Institute v. Matal*, and for that the Supreme Court is looking at whether the Patent Trial & Appeal Board, when they're doing an *inter partes* review, is required to render a decision on each and every single claim of the patent that has been put up for review, or whether they can exercise their discretion and pick and choose.

The third case that I'll just mention quickly is a case involving Schlumberger. This case, the Supreme Court just decided to hear on Friday, three or four days ago. At a high level, the issue there is whether a corporation's foreign profits, meaning outside the United States, if there is a nexus with the infringement in the United States to those foreign profits, whether those

foreign profits can be part of the damages award in the United States. That's something that's very interesting.

What have all these changes in the United States, have they had an impact elsewhere? I would submit, absolutely, that they have had an impact. I'll just go through a couple things before I conclude. Here in Europe, since 2013 — that's one year after the enactment of the America Invents Act — there's been a dramatic rise in patent troll cases. Specifically, outside the United States, the cases are accelerating, with over 250 cases from 2012 to 2016, and that's just for cases in which there's been a decision rendered. In Europe, you can't tell exactly the ones that have been filed and that have been settled. There are 250 cases over the last three or four years, and three-quarters of those have been in the last two years. Most of them are in Germany or in France, and a number of them have been in other jurisdictions, including Japan.

In terms of the industries, historically, the patent trolls in the United States were known for being aggressive in the technology and telecom spaces, and increasingly more so in pharmaceuticals and biotechnology. We're seeing the same trends or patterns followed in Europe with respect to the industries that are being targeted here, with telecom being at the very top.

The success rates, also, are increasing for the patent trolls in Europe over the last five years or so. In 2013, they had a success rate of 71%, which is very high; in other years, the success rate was hovering around 55 to 60% — and that's a higher rate than in the United States, where the success rate is somewhere in the 40 to 50% range, depending on how you count it.

In my view, there's certainly a nexus, a correlation between what has changed and evolved in the United States in the last four or five years, and the acceleration of patent litigation activity in Europe and in Asia. I think that is absolutely going to continue,

irrespective of whether the Unified Patent Court comes online, and if that does come online, whether it's 12 months or 24 months or 36 months — who knows — that court will be a hotbed for patent litigation by non-practicing entities, because you're going to have a court in Europe that's going to provide for pan-European damages and a pan-European injunction, and that's very powerful.

Thank you. [APPLAUSE]

KAREN TODD: You mentioned the Chinese government and the changes they've made in terms of patents. Have you found that that's increased or decreased their infringements on corporate patents?

JAMES BLANK: It's relatively new, but the Chinese government has set up specialized patent courts fairly recently. I don't think, at this point, it's been a deterrent in terms of infringement, but it was clearly set up — China had historically been looked at as a rampant infringer, and there is at least a recognition by the Chinese government, as their economy has been evolving, to look at it from the perspective of the patent *owner*. We'll have to see what happens.

KAREN TODD: Thanks very much. Our next speaker is Mark Powell with White & Case. He's going to talk about European competition.

MARK POWELL: Thank you. And thank you, Nexans, for giving me the opportunity to speak to you today.

You've already heard that modern legal departments and General Counsels face multiple challenges, and I'm just going to pick on two themes over the next 10 minutes, because I can see that the coffee is beginning to wear off, so let's keep it nice and tight!

My two themes are, first of all, the importance of managing information flows, particularly in this digital age, and that's particularly in relation to internal documents; and the second theme, the importance for a legal department to be creative and to think a little bit off the orthodox path, particularly when it comes to processes. For the second theme, I'm going to focus on due process in my field, which is antitrust investigations.

First, there is the importance of internal documents. I'm also going to pick up on this evolutionary theme. When I was a baby competition lawyer in Brussels — and I'm

going to start with antitrust — things were very civilized. The European Commission found that there was potentially an infringement of the competition rules, and they would call up the General Counsel and say, "We're going to come and visit your premises on Thursday afternoon; does that work for you?" "I'm sorry — I'm on the golf course — how about the following Tuesday at 10?" "Yes, that seems right." The European Commission officials would show up, and one of three things would happen. First of all, to their surprise, they would see a large quantity of shredded material [LAUGHTER] outside, waiting to be transported to the waste disposal unit. Secondly, as occurred in one case, they would arrive, and they would be ushered into the elevator — or the lift, as we would say — and the receptionist would pull the plug and they'd be trapped in the lift for several hours whilst the shredding party continued upstairs. Or they would finally make it up to the CEO's office, and there, in the right-hand drawer, they would find the pristine cartel agreement. "Aha! We've found the evidence that we are looking for." It was a relatively straightforward process.

Today, however, things have changed quite dramatically. The European Commission has become extremely rude, and they arrive, unannounced, on the premises. They're referred to as "dawn raids." Of course, they never actually occur at dawn, because for the European Commission, they like to arrive a little bit later, after coffee, so it tends to be around 10:00 rather than at dawn. They no longer — because it's all unannounced — see the shredded material outside, and they no longer go to the CEO's office; they go *immediately* to the IT department, and they stick a nozzle in the side of the server, and they vacuum out all of the electronic materials.

The Commission has found, obviously, emails generate some really interesting exchanges. But, of course, it's not confined to emails; we now have multiple ways of communicating — we have Messenger, we have WhatsApp. There was a recent

Spanish case regarding Spanish turron, a very popular cake before Christmas, and much of the evidence was found on an employee's WhatsApp application.

That's the situation today. I think it's probably familiar to everyone here. There's a risk associated with document creation.

What's probably *less* well-known is what's happening in the field of merger control. Now, again, when I started as a baby lawyer in Brussels, we didn't have merger control in Brussels; we had Hart-Scott-Rodino in the United States, we had voluntary notification in the U.K., and there was mandatory notification in Germany, but nothing in Brussels. But then, in 1989, they adopted the Merger Regulation, and it all became very clear. There was a form that needed to be filled out, the "Form CO," as it's called, and you filed, and then within 25 working days, you would get your response. It looked very simple.

However, it's a little bit more complicated and over time it has evolved. What we thought was a small novella which had to be produced — a little bit fatter than a Hart-Scott-Rodino filing — has now morphed into a novel. Today, to make a notification in Brussels, you really need to produce several versions of *War and Peace*; you provide 24 chapters to the Commission; they say, "No, we want 17 more chapters. You have forgotten that, potentially, there is the relevant market of blue-eyed people in the north of Denmark who like to consume these products on a Tuesday." So, you divide and produce more paper. But we thought, "Never mind, this is our system; we're familiar with it; we prefer this to the U.S.'s horrible system of filing and then second requests."

But, of course, we've now evolved, and we've combined the two systems. We've created a monster, a Frankenstein, where we have the horrible *War and Peace* document *plus* the U.S. system of second requests, because it's now very common — and this is really over the last few years — for the European Commission to ask for all of the internal documents going back over the last three years for 20 custodians, perhaps more, and, of course, the reason is that the Commission believes that — and I don't know why — perhaps the internal communications within the company are more interesting than the polished documents produced by the lawyers and the economists. Many transactions run into huge difficulties because of this.

There was a case last year, a merger on the Italian telecom sector, where the parties were saying to the Commission, "Don't worry — we're going from four to three players, but customers will not suffer as a result of this; there will be greater innovation, and a better deal for customers." Unfortunately, the internal documents told a slightly different story. They indicated that the prices would go up, and the market was *so* good that the merging parties considered seeking "compensation" from their competitors.

The Commission devoted 30 pages in its decision just to the internal documents.

This is clearly a feature of antitrust and also merger control, which leads me, now to due process. You don't really raise due process

obligations in merger control proceedings, because you *desperately* want to get the piece of paper — the approval decision — from the Commission, which allows you to proceed with your merger.

However, I think it is extremely important for lawyers to focus on the procedural issues — because, in fact, antitrust is no longer for the lawyers; that's for the economists. Economists decide all the substantive issues. We focus more on process, and I think legal departments, accordingly, should be focusing on the process. Let me describe an antitrust investigation, very briefly, in the old days.

The European Commission has traditionally been following a French administrative system, and it had Robespierrean powers of investigation. In fact, that's probably being unfair to Robespierre, who was a very good lawyer. The European Commission had extremely broad powers of investigation. They could go to a company and they could say, "We want *all* of your documents." They may as well have left a sign on their door in the office saying, "Gone fishing," because they would go off and they would hoover up all of the documents. There were no limits on what they could take.

That was until along came Nexans. Today, the situation is very different. Because of Nexans, the European Commission can't say, "We want fish — we're desperate for fish." They have to specify, "We would like perch" or "gudgeon" or "bream." They have to explain, eventually, to a court, *why* they're looking for perch, gudgeon or bream. The background to this was that the European Commission, about nine years ago, conducted a dawn raid, not on this premises, but on the previous premises, and they said, basically, "We want *all* of your documents in relation to cables." [LAUGHTER]

Patrick said, "Well, that's what we do. You're effectively asking for *everything*." And steeped in his U.S. legal background, and the concept of probable cause, which is a

kind of inflated version of the English law concept of reasonable grounds to suspect, Patrick thought this merited a challenge. So the question was, "Where can we challenge? Can we go before a court?" We said, "Yes, you can go before the court." "Okay — when do we get our decision?" "This is Europe; it takes a bit longer." About three years later, we finally got the decision from the court, specifying the Commission *has* to have reasonable grounds to suspect before conducting an investigation.

Nexans is obviously a very famous cable company, now in this beautiful, new building, but for law students across Europe, "Nexans" stands for something very different, which is that there is the possibility to harness the powers of the administration through judicial review.

I would just leave you with two thoughts based on that. The first is going back to document creation. It's extremely important in terms of compliance to make very clear to the business people that *anything* that they write, that they produce — and, of course, these days it's not helped by the fact that we're generating evidence all the time — that they need to be very measured in their communications, because it could come back to haunt them, and it could be very expensive to turn some of these messages around.

Secondly, with respect to process for legal departments, be bold. Be creative and think about the process issues, because they're very important.

We're delighted to have accompanied Patrick and his team along this journey, and that the message is that good lawyering really can make a difference to the company and to the bottom line.

Thank you. [APPLAUSE]

KAREN TODD: Can you comment on whether artificial intelligence can be used to generate any of these documents?

MARK POWELL: [LAUGHS] Well, I think artificial intelligence can do *anything* these days! It's not a question of whether it would be *creating* the documents; it's a question of whether the artificial intelligence could be used to *review* the documents that are sucked up in the vacuum cleaner. There are, increasingly, methods to be able to review the documents to try to determine not only what are the bad documents, because we know that the authorities will not trouble themselves looking for *good* evidence; rather they're going — in a merger case, for example — to look for documents on market repair. That will be one of the terms that they will search for, and they'll find the three documents which are very unhelpful.

Obviously, what *we* want is to find the other 7,000 documents which are telling the positive story. That's where artificial intelligence *can* help, in terms of sifting or carrying out the first level of review that would traditionally be done by an army of paralegals or first-year associates. There, artificial intelligence *can* help in achieving efficiencies on some of these investigations.

KAREN TODD: Thanks very much.

Our next speaker is Charles Kaplan of Orrick Herrington & Sutcliffe, and he will be talking about international arbitration.

CHARLES KAPLAN: Thank you very much. Patrick — thanks to you, and thanks to Nexans, and congratulations. A very specific thanks, because international arbitration lawyers, when they're not arguing cases, tend to spend their time discussing international arbitration issues with other international arbitration lawyers. This is a *rare* opportunity for me to talk to you about what is not entirely a positive picture, I have to say, to speak with an audience of knowledgeable but non-specialist lawyers and non-lawyers. The person I have most to fear here, in terms of not putting a foot wrong, is probably Patrick himself, insofar as he's been through all the wars in international arbitration and would probably be more familiar with what I'm going to talk about than many of you are.

I said "not an entirely positive picture." I'll start with something a little bit dramatic. I'll say, at the moment, compared to the situation 10 years ago international arbitration was a panacea; it solved *all* your problems. It was probably quite a reliable cure for acne. It certainly solved issues arising from international trade, international investment. It was reliable, neutral, efficient, cheap, beautiful — you name it — it had all the qualities. Today, it's fair to say that it's an institution under attack. And under attack from public opinion, politicians and, indeed, a number of lawyers who, of course, see it as an opportunity to advance whatever somber designs *they* have which *they* think will advantage *them* personally, at the expense of international arbitration — rarely a good calculation, but one that lawyers, unfortunately, often make.

Why is international arbitration under attack? Well, there are two problems, and I'll sum them up very quickly. The first is the attack on investment arbitration. Now, as some of you may be aware, the starting point was this: some of you may remember that a few years ago, Chancellor Merkel decided that Germany would no longer rely on nuclear power. A perfectly legitimate decision taken in a democratic context by a democratically elected politician. Nonetheless, it had the effect of considerably damaging operators in the industry who, in reliance on the continuing use of nuclear power, had invested in the nuclear industry in Germany. The most famous case is a Swedish operator called Vattenfall. And all of a sudden, public opinion in Germany and elsewhere was made aware that *even* if you are a democracy, and *even* if a decision is taken by a democratically elected politician, it is not without consequence — it *can* give rise to claims for compensation. Then if you add to that something that people were absolutely not aware of, that such claims might possibly, in a European context — under a multilateral agreement called the "Energy Charter Treaty" — such claims might actually be adjudicated behind closed doors by private, unelected, unappointed persons called "arbitrators." You see how the whole thing can be dramatized and made into a story.

I'm not about to go into the rights and wrongs of the underlying argument; I'm just identifying the crisis and where it came from. And just to finish with, on the investment topic, it has resulted in the European Union taking an institutionally hostile attitude towards investment arbitration, to the point that the European Union will not include arbitration as a dispute resolution mechanism in any of its investment treaties for the foreseeable future going forward. This is already the case in the treaty it has recently negotiated and signed with Canada. Instead, it wants to set up something which is, in effect, much more state-controlled, I would say. "He would say that, wouldn't he? More state-friendly." Which, in effect, destroys the fundamental equilibrium of arbitration, which is that both sides of the procedure basically weigh the same, are treated equally, each appoints its own member of the tribunal; you then have a chair or president; and, in effect, you have a process which is structurally neutral from the start.

That is no longer acceptable politically in an investment context, it seems, at least as far as the European Union and a number of other States are concerned.

On the commercial arbitration side, there has been perhaps a slightly more local storm, but a very significant one all the same, which has affected the climate, and not in a positive manner. I am, of course, referring to the *Tapie* affair. Now, I will immediately say I'm not free to speak as freely as others. As a firm, Orrick, we were representing the bad bank entity of Credit Lyonnaise, the CDR, which, in effect, was Mr. Tapie's opponent in that particular case. What is, again, unfortunate, unfair — but, you know, life's unfair — about this particular occurrence is that this was an exceptional case, which I would call a "pathological case," in which a party to an arbitration in effect made a corrupt bargain with one of the arbitrators, who was then found to have exercised undue influence on the entire process. However, because this involved public funds and a high visibility person, Bernard Tapie, and an agreement he had made with high-visibility politicians, such as Christine Lagarde, it is now the case today — and maybe, Patrick, you'll confirm whether you've heard this — that in a

number of French corporate circles, at least, there is an inbuilt fear, mistrust, suspicion of an institution that as recently as 10 years ago was thought of as a solution to practically every single problem you could have in international trade — and I barely exaggerate the, in effect, excessive claims — that were being made for arbitration in those days. How far we have come since then.

> "The change in norms, once again, seems to be this: those who benefit from the upside of taking risks must assume the downside of the consequences of the risk taking; it is not acceptable to take risks if somebody else, like the employees or the shareholders or the taxpayers, are going to pick up the bill for things gone wrong." – *Patrick Noonan*

What I really want to do very briefly in the rest of my 10 minutes, is to say, "Let's get back to basics. Let's have a look today at what international arbitration is for, what it's about," and why, I would say in a word, *if* applied in the proper place — i.e., *not* as a cure to acne — it remains an indispensable tool of risk management.

It's sometimes very difficult, when we are speaking to people who negotiate deals all day long, to say to them, "You *must* think in terms of the worst happening." I say that *all* litigators have this problem and international arbitrators are no exception. You must think of "what if your worst nightmare comes about?" That is called the *risk* of litigation, the *risk* of disputes.

Then you need to think beyond that. Assuming the worst happens, then what kind of a scenario would you find yourself in? Would you find yourself in what I could call a relatively *low-risk* dispute resolution environment? Or would you find yourself in a *high-risk* dispute resolution environment? A company such as Nexans will find itself in both quite commonly.

What are the factors driving whether you are in a high risk dispute resolution environment? They are geographical; they are industrial; they are political. If your customer is a company in the building next door, then probably you are in a relatively low risk dispute resolution situation. First of all, you'll actually be in a low dispute risk situation. But the actual dispute resolution, itself, if it occurs, will also probably be relatively low risk, because there will be shared assumptions as to how the dispute should be resolved. There will be shared assumptions about which is the appropriate forum, the appropriate law, the appropriate language.

There is a high likelihood that if a dispute occurs, and one of the parties is found to be in debt to the other for whatever, be it money or some other form of obligation, that debt will be honored. The judgment, the decision, will not even *need* to be enforced, let alone involve considering an enforceability problem.

If, on the other hand, your customer is in a country — and I must be very careful, now, because there have been some very powerful chief executives who have gotten into a lot of trouble recently for saying, rather rudely, what they thought about the relative merits of different countries. But this is an assessment that we have to make all the time, in judicial terms. In certain countries, the dispute resolution risk is extremely high. The courts are not reliable; they are not neutral. Or they are simply inefficient! They are unbelievably slow. They are legally unsophisticated. Therefore, in *those* situations — and *that* is where I'm saying international arbitration comes into its own — we are dealing with an indispensable risk management tool.

What are the required qualities of a manageable dispute resolution risk? The first is that there should be a neutral process, and a neutral process means several things. It means an impartial decision maker; it means a process which is predictable, efficient, and something in which both sides can operate without too much difficulty. It means a set of legal rules that are accessible, that can be readily understood and easily applied and that are, to the extent possible, predictable. Language is a factor — not a decisive one, but in terms of the ease with which the process can take place. The end result of the process, of course, is does it actually bring about a solution? And on the most basic level, assuming compensation is due, is it a process that will actually enable such compensation to be paid?

I may have left out some other factors here, and people say, "What about this or that," but I think those are the main ones. If you look at matters very coldly and very practically, the *only* system which will allow you to achieve all of those things — again, not to a perfect extent, my goodness, no, let's not repeat the mistakes of the past; let's not make overblown claims — but the *only* system that will allow you to tick those boxes at least to a significant extent is international arbitration. There is simply no getting away from it.

Let me deal with the last point first. Just to remind those of you who've forgotten, and there are maybe one or two people in the room who haven't heard of the New York Convention, but I doubt it — the New York Convention is the most successful international treaty ever concluded. Practically every country in the world is a signatory to it, and although it is applied in different ways in different places, it fundamentally sets out two principles: one, thou shalt recognize and apply an arbitration agreement that has been concluded between citizens of signatory countries, and even in some cases, non-signatory countries. What that means is thy courts shall not assume

jurisdiction where the parties have agreed to go to arbitration. That is, it's applied more or less well, but it is a principle that is respected throughout the countries, at least paid lip service to throughout the countries that have signed the New York Convention. The second principle is, thou shalt *enforce* a decision made by arbitrators acting pursuant to a valid agreement to arbitrate. If you think about that for a second, and you make the parallel with a judgment issued by the court of any country, you immediately understand that there is no equivalent convention dealing with the enforceability of judgments, and therefore, again, this is not a perfect instrument, but *only* arbitration awards are, in principle, even *in principle*, enforceable in most of the world.

Really, I can conclude right there. This is a message to you; I don't even need to tell Patrick. Patrick has far too much experience and will not be put off by public rumor as to the supposed ills of international arbitration from giving the proper advice to his management in terms of what is the appropriate risk management tool in a high dispute resolution risk environment. My message is more addressed to *you* than it is to *him*, but I really thank him very much for giving me the opportunity to send it. [APPLAUSE]

KAREN TODD: Thank you. Can you tell us a bit about the cost and duration of arbitration in the EU?

CHARLES KAPLAN: I don't think there's any specificity to arbitration in the EU, is the first point. *But* arbitration may, to some extent, be influenced by those taking part in it, because, in effect, the answer to "how expensive," "how long does it last?" How long is a piece of string, of course, is the answer to that. I'll just make two points, and as briefly as I can.

To those who claimed, once upon a time, that arbitration was both cheaper and faster than court proceedings, I think we can say no sensible person would make that sort

of a claim any more. What we are talking about is a comparative analysis — what are your options? What are your alternatives? It is in *those* terms that you have to think. If your acceptable alternative is the Commercial Court of Paris, then, very likely, going for a process which may take a couple of years, which may cost — in the more complex cases — hundreds of thousands and possibly millions of dollars, is not an attractive option. If your alternative is possibly litigating in certain jurisdictions in the United States or even in England, where not only is it going to be every bit as expensive, but there is going to be an appeal, and the duration of the whole saga is likely to be three or four years, then it may be a much more attractive option.

Again, how expensive is it? How long does it last? There is no general answer. Does it remain a cost-effective risk management tool? Yes, very much. But you need to think, obviously, situation by situation.

KAREN TODD: Thank you. Now I'm going to ask some questions of our panel. I'm going to start with Patrick. How do you organize your legal department to deal with the variety of jurisdictions you have in different countries?

PATRICK NOONAN: That's a very good question, and there's a certain judgment involved. I do believe for a lot of the recurring themes that we deal with, there is some general convergence throughout the world. As Jim said earlier, for example, China has evolved from not respecting patents to protecting patent owners. I would like to think that in most of the world, there is a respect for contracts; there is a respect for the terms of the contract; and that reasonable dispute resolution processes are, in principle, on the same path.

The judgment is when to involve an external lawyer or not, because there is a cost. If you are managing a department, you are managing the cost center for a company, and perhaps there is a point of difference between an internal department and a law firm. A law firm holds itself to a standard of near perfection and cannot take any risk on getting it wrong, and an internal department has to do that, because you can't afford to make sure everything's 100% right. So, to the extent that there's convergence in the recurring things that we deal with, in claims, in governance and in contracts, you may or may not consult an external lawyer, depending on the sensitivity and the risk of the activity and context.

We do find, sometimes, that we need to order full-fledged involvement of an external lawyer, and sometimes we manage it with just some target questions. It depends; it's a very boring answer, but you get the flavor of it, at least!

KAREN TODD: Thank you. I was wondering if Jim and Patrick could talk about the difference between handling processes within a company as trade secrets versus having patents.

JAMES BLANK: Along the lines of what I was telling you about earlier, we are seeing, in the United States, an increase in trade secret litigation. I tried a trade secret case, for the first time in quite a while, in June. We have a new law in the United States, the

Federal Trade Secrets Act, which is pretty recent. Previously, trade secret was governed on a state-by-state basis. There is an increasing awareness and a sensitivity in the United States as to the distinction between trade secrets and patents and given that what we've been seeing over the last few years in terms of the difficulty of their enforcement, their recent finding of invalidity, and the costs of both defending a patent and asserting a patent, that companies are looking more closely at trade secret protection.

KAREN TODD: Patrick, would you say that the majority of your corporation's intellectual property is held in patents, or do you have some areas that are trade secrets?

PATRICK NOONAN: I should say that, as a personal opinion, the majority of our intellectual property is in the form of trade secrets as opposed to patents. There are two or three reasons for that. One is that to get a patent, you have to reveal the process. Second, while this has possibly changed, and Jim would know better than I, a very high percentage, maybe 80 or 90% of patents challenged in court have been invalidated or some aspect of them is invalidated, so you're taking a risk when you apply for a patent that you will both publish your know-how and the patent may ultimately be invalidated. To go back to your original question from a different angle, I think it's very difficult in Europe to get significant damage awards and injunctions about trade secrets, and so the emphasis is more on prevention and respect of confidentiality, rather than trying to enforce rights in courts. Maybe we've brought one suit in 20 years. It's really hard in most European countries. It's on prevention that we put the emphasis.

MARK POWELL: Yes, I think Germany may be the exception. The European Commission is looking at maybe introducing common laws on trade secret protection. Currently, we have disparate means of protecting trade secrets across the European Union.

CHARLES KAPLAN: I was just going to say, obviously, in the appropriate case, arbitration is the perfect environment in which to dispute trade secrets, given that, for the time being, at least, a certain degree of confidentiality is observed.

KAREN TODD: The next question is for Mark and possibly Patrick. How do you work with other practice areas and professionals to get approvals for deals?

MARK POWELL: In the old days, it was just really a legal game, in terms of getting the piece of paper from the authorities. Then, much to my regret, really towards the end of the '90s, it was almost impossible to do a deal without an economist, because the economists *within* the authorities started becoming more powerful. So you have a legal dimension, you have an economic dimension. Then, in almost all of our cases, there will be a political dimension, as well. You have to consider about whether you need a lobbyist to argue for the industrial policy dimension. So on the external side, you have three groups of people. Then internally, it's absolutely critical to get as quickly as possible to the people who are selling the relevant products to the customers.

On a complex merger case, you have very big teams which need to be managed and orchestrated, and that, in itself, is a project management challenge.

KAREN TODD: Patrick, how do you deal with that internally?

PATRICK NOONAN: In terms of parties necessary to get regulatory approval, I think Mark summarized it well. In terms of internal and external expertise to just make the decision to do the deal, I think the universe has broadened. For example, there's a representative in this room of a forensic consultant company which we consulted about doing due diligence on compliance issues. In fact, it's good compliance practice and good risk management practice, now, to do some specific, explicit and possibly in-depth due diligence on the compliance risk of the company you buy. For many years, it's been a routine practice to use an external environmental consultant for environmental risks. As another example, you may need specialized lawyers for specific risks, perhaps the risk of assessing a class action risk.

We used to try to do as much as we could internally and rely on contractual representations and warranties. More and more, due diligence is more important than a contract, the interpretation and enforcement of

which can be a source of unpredictability. It's better to avoid the risk or prevent it than to mitigate it only through reliance on the words of a contract.

MARK POWELL: And maybe just one additional layer is that you have all those disciplines, but what's become increasingly complicated is the fact that most jurisdictions across the globe have decided to have their own merger control regime, so it's fairly common to have to get clearances in a dozen, or maybe even more, jurisdictions. That just multiplies the cost. For companies, a single global authority able to clear deals with a single application would be the dream. But we will never get there, not within our legal careers. It's not going to happen.

Indeed, I see things getting worse, not better. I've been advocating for several years the introduction of voluntary filing regimes, where you only notify where there is a problem. But we regularly advise on transactions where there is no substantive issue whatsoever that requires approval in several jurisdictions. Why do I say the situation is getting worse? Germany, for example, recently changed its merger control regime so that it looked at the size of the transaction. They thought that this would be *great* because they somehow missed out on reviewing Facebook's acquisition of WhatsApp, because WhatsApp didn't have sufficient revenue. So, they said, "Oh, let's look at the size of the transaction," and they said, "Don't worry — this is only catching high-tech deals." The authorities considered that probably, on average, they would get about three notifications under this new regime. The very first day the law entered into force, we notified yet another private equity transaction, and many more. So, again, they've changed the rules, and that's just increased the number of filings that need to be made.

KAREN TODD: Thank you. Patrick, can you and Charles comment on some of the areas where Nexans has used arbitration?

> "A lot of forces have contributed to the changes I am describing. Lasting change results less from constraint and bludgeoning than it does from buy-in, and that's where I think value changes are very important." – *Patrick Noonan*

PATRICK NOONAN: I'd rather not talk about specific cases, but at least in terms of countries and types of arbitrations, we've had arbitrations about claims by the buyer under M&A contracts. We've had commercial arbitrations about different things, could be an insurance claim, could be a customer claim for damages. The arbitration may be about a technical dispute about the responsibility for a damaged cable. So, in just about any facet of business we've had recourse to arbitration.

To the comments from Charles about one thing, I agree wholeheartedly. On another I have reservations. In China and Korea, we've been in several arbitrations, which I consider a success, because I think the results have been fair, after an objective hearing, and above all, the awards were enforced, even in China. We won a Singapore arbitration against a Chinese state-owned enterprise, and then we had to go to China to get it enforced, because the Chinese state-owned enterprise refused to pay. So, we went to the Chinese court to enforce the arbitration award. Although the Chinese Court judgment followed a "mediation" imposed by the judge for the sake of form, at the end of the day, we were paid in full, and the judge even participated in the process to obtain the foreign exchange control authorization for remitting the payment in dollars outside of China. So, hats off to China for respecting its obligations in international arbitration.

I hesitate sometimes in the western world when there is a highly fact- and witness-based type of arbitration, because then you have what you might call the court risk. If you have a bad day in court because your witnesses wake up on the wrong side of the bed, there's no appeal from the decision. I find that unsatisfactory and so I'm reticent to accept arbitration in a case within North America or Europe or another judicial system which meets Charles' list of criteria regarding dispute resolution risk.

CHARLES KAPLAN: What we're actually finding is that we're in pretty solid agreement there. Because what you've pinpointed, and I entirely agree, is a situation where the dispute resolution risk is relatively low, which I would say is the case in most of North America and in Western Europe. Then there's another factor. It's a trade-off between the relative risks, so you may even say that in an arbitration situation, you only get one shot, so that's riskier. You trade that off against actual time and money, because *that* is an environment in which arbitration is probably less expensive, and given that there is no appeal, it's probably quicker.

MARK POWELL: Can I ask a question? I was intrigued because I do work with several other General Counsels, and there's a lot of discussion on risk management. But this concept of accepting the other side's contracts, and the question there is, would they contain international arbitration, or do they tend to favor courts? And the five sentences — I'm intrigued — what are these five sentences? What does the addendum contain?

PATRICK NOONAN: I'll answer the second question first, because my memory will suffice. Basically, it's something like this: the liability is limited to the amount of the contract, consequential damages are excluded, liquidated damages for delay or late penalties not to exceed 10% of the contract, fitness for purpose is excluded. I look to Florence in the audience who knows this by heart for the fifth one.

FLORENCE CARTEROT: Termination.

PATRICK NOONAN: Termination, yes, that's a particular thing in our industry. If the customer cancels his order or terminates it, we have typically already made a commitment to purchase the metal. Half of the internal value of our cables tends to be metal, and to manage the risk, we buy the metal forward or basically buy it the day we get the order, so we want the customer to pay back the cost of this hedge if there is a variation in metal prices before termination.

We are basically saying that we can live with the customer contract as long as these recurring risks are limited.

MARK POWELL: I find it quite interesting that they're happy to sign it, because it's a success for them, they've got their contract, and yet at the same time, the most important thing is you've limited the liability, and they've accepted that. That's pretty good.

CHARLES KAPLAN: Yes, but I'll go back to the example of —

AUDIENCE MEMBER: Having an international arbitration?

CHARLES KAPLAN: No, that comes second! [LAUGHTER]

That was the second thing I was going to say! The *first* thing I was going to say was based on Patrick's philosophical example of, "Are you against murder?" And to which the answer is, "It depends what the definition of 'murder' is." And here, I would say, yes, it's all very well to have a limitation, do you accept a limitation of liability, but depending on applicable law and jurisdiction, that limitation may be more or less enforceable.

KAREN TODD: Thank you. Does anyone in the audience have a question for someone on the panel?

AUDIENCE MEMBER: I only had one question for Mark, and it was about document disclosure. You mentioned good

lawyering to help the client. You mentioned WhatsApp, Messenger, it is not just emails. Isn't it also the issue, the way we express ourselves these days? There are risks when our language is a little loose. Sometimes we express ourselves and say, "You know, this time around, we're going to corner the market!" and someone responds, "Yes! We're really going to cream the competition!" [LAUGHTER]

But that's not what they *mean*. Because that's *not* the economic context of the deal. But those can seriously be used against you, and the legalities in our emails and our exchanges, we should be more professional, because you used to have memos before, and memos would be a little more tailored. Today, with this rapid Internet era, we're being a little too loose with the way we express ourselves.

MARK POWELL: Absolutely. This is where you find the dangers. In the banking sector, certain banks realized that the Bloomberg chats were a huge liability for them, some banks got together and said, "We will have, from now on, a secure chat which will not be available, it will disappear like SnapChat — it will disappear after 24 hours." Its selling point was, "Reduce your fines to the regulators," and then someone pointed out that probably wasn't a great selling point. Eventually, the service was not launched. But it's very clear that this is a huge liability.

In Europe, at least, you stray into very delicate areas of data protection and privacy. It may be possible to have rules regarding the company email account. But what about the Messenger? What about the WhatsApp? This is all part of the compliance culture. For these informal methods of communication, they have to be constantly on their guard, because those messages could easily be misinterpreted. Then it's going to take a lot of effort and a lot of expense and a lot of management time to explain what those messages actually meant. It's just a feature of the landscape right now, and we have to deal with it.

CHARLES KAPLAN: I was just thinking of an example. Actually, it wasn't an arbitration example. We were being sued — and this was not Nexans — for unfair competition. An enthusiastic manager had sent a message out to all his salesmen saying,

"Keep up the pressure!" That was the main evidence against us in the case, that we were encouraging unethical conduct.

AUDIENCE MEMBER: I've got a question for Patrick. Is there any policy with respect to communication, over text or through social media, for example, with your employees and third parties who may be business people but they also strike up a friendship and therefore communicate by ways other than email?

PATRICK NOONAN: We are struggling with that issue. Once again, it's hard to have policy that doesn't reflect societal behavior. Everyone has multiple channels of communication nowadays and you try to sensitize people and make recommendations, but a person who uses new media may not exercise control, because everyone uses texting, WhatsApp, etc, in their personal life. And they don't really see the risk of lasting traces in the same way as those of us who are from the wood-based generation of pencils and paper. It's sort of a losing battle right now, to be honest. I've even read about some companies that said they were going to ban all emails, but it hasn't happened.

KAREN TODD: Does anybody have any other questions?

AUDIENCE MEMBER: I want to ask this question to Patrick, you gave another list, and number one was contract negotiations. My question is about preparation state of negotiations. Do you have any specific program or any policy to train business people on *how* to interact with the legal department when it comes to preparation of a negotiation? Because the general tendency I've seen in business communities, whenever a document is written in Microsoft Word, it's legal department issue and nobody really cares about it [LAUGHTER], but we got ourselves the content, whether it's a technical specification or full of commercial issues. This is your document; you will own it. Do you have any specific program, training, or how do you handle this issue? Thank you.

PATRICK NOONAN: It's a great question, so I'm going to digress a little bit on evolution again. When I first came to work in France, it had been typical for management to avoid lawyers, and the caricature of a lawyer was that he would quote the law but not be of a lot of practical help. I was very happy to participate in some change management, as from the 1980s. Lawyers are now seen as providing a useful function and there is discipline in having lawyers review contracts. Let me get to the stage where it picks up on your remark. The change we have been trying to implement for the last few years in this lean manufacturing process actually goes in the other direction, which is to empower managers to deal with at least some basic contract issues themselves without consulting lawyers. For the training, we even did an internal video; we put it on our intranet site and in our internal learning university. My department routinely trains non-lawyers. In fact, as an example, the other day I checked the use of our agent contract model and was happy to see that the model that was used was archived in a database where these contracts are kept. But the person who used the model obviously was not a lawyer, because on the very first line where the contract should say "Nexans," it just said, "name of entity." [LAUGHTER]

At least he used the right model for it and I was happy to see that. But the paradoxical thing in this whole story is to now change the way my lawyers act in some cases. Instead of being responsive to *any* request to review a contract, I say, "Your instruction is to *refuse* to review certain contracts, if they meet the criteria for low-risk and they can be dealt with using our five-sentence clause." It's gone full circle from trying to get managers to consult lawyers to avoiding that they over-consult lawyers. One of the side benefits, we believe, from our program, is that we're making salespeople more responsible to understand what they are signing or what they're proposing. There are a lot of different aspects, in answer to your question.

MARK POWELL: This is, again, one of the things that is constantly discussed in this group that I chair. The difficulty is

everyone is trying to differentiate contracts. Some require a lot of our attention because of this high risk. Whereas other contracts are low-risk and can be dealt with by the business. The problem is, when it comes to performance evaluations, the people who ask for assistance from the legal department are going to have to give their views on how they think the legal department is performing. They are saying, "Two years ago, these people would return my calls, would look at everything, all of our contracts, and now, suddenly, they're telling me, 'Just refer to the intranet, and you can see some basic guidance.'" What happens is that the legal department then gets poorly rated as a result of this change, because the business just got used to having *every* particular need catered for.

PATRICK NOONAN: That risk is there, and that's why the members of my department are supposed to always propose to train and accompany managers in the use of these tools when it's for the first time. The concern remains that the lawyers feel that their clients will no longer perceive them positively for that. This is an aspect of change management, where the resistance can be on both fronts, the commercial team that previously just delegated to the lawyer and think that a contract is simply a lawyer question, and the lawyer, who is afraid that he will be perceived as being unresponsive. Overcoming such resistance and changing the mindset is part of the change management process.

KAREN TODD: Thank you. I have one more question for Patrick, which is, could you tell us something about your company's social responsibility program?

PATRICK NOONAN: Once again, we started it in 2007, and it was under my supervision at the time; now it's supervised by the Human Resources and Communications Director. We've made great progress. One of the notation agencies — there are a lot of agencies nowadays which rate corporate social responsibility — put us in the category of being eligible for socially responsible funds. Just as there are a lot of investment funds which require a financial rating such as "Triple A" to invest, there is a certain CSR level you must reach before the social responsibility funds can invest in your company. We've made progress every year. Our Board of Directors put corporate social responsibility, or RSE, as they say in French, in the objectives of our CEO. That speaks to its importance. One of the increases in our rating, by the way, comes from the good perception of our compliance, risk management and governance which are aspects of corporate social responsibility, as are respect of the environment, respect for employee welfare, and respect for other stakeholders.

KAREN TODD: Thank you. I would like to thank everyone who came today, to Patrick Noonan and Nexans, to our attorneys that are also here — thank you so much for your participation. Thank you to our panel for their expertise. We appreciate everything that you've done today. [APPLAUSE]

James Blank
Partner

James S. Blank focuses his practice on patent litigation. Mr. Blank represents major international technology and consumer products companies including Nintendo, Nexans, Bosch, The Hain Celestial Group, and QinetiQ. He has been lead counsel in numerous patent litigations at every significant level—he has argued before the Federal Circuit, tried cases to juries and judges in district courts, litigated *inter partes* reviews (IPR) to conclusion before the PTAB, and conducted arbitrations. His experience covers litigating patent cases involving high-speed data communications cables, liquid crystal displays, stereoscopic (3D) image capture and display devices, power tools, video game systems and controllers, optical components, and encryption technology, among many other technologies. While his practice largely focuses on patent litigation, he also has experience litigating trade secrets, trademark, trade dress, false advertising, and unfair competition cases.

For his various trial and appellate victories for notable clients, Mr. Blank was named an "Intellectual Property MVP" by *Law360* in 2016. Mr. Blank is ranked for patent litigation by *IAM 1000 – The World's Leading Patent Professionals* (2017). *IAM 1000* touts Mr. Blank for his "persuasiveness and perseverance," "*appellate nous*," and "build[ing] deep and meaningful relationships with clients — getting to know what makes their business tick helps him to craft commercial litigation strategies that look beyond the immediate case at hand."

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We have appeared in courts throughout the U.S., and have established a strong record of success in significant patent jurisdictions including California, Texas, Delaware, and New York. Our lawyers have also gained prominence for our work in the Federal Circuit, such as successive victories in a rare doubleheader. We also litigate patents before the English Patent Courts and the International Trade Commission, handle oppositions in the European Patent Office, and manage cross-border patent litigation across Europe.

Charles Kaplan
Partner

Charles Kaplan is an experienced arbitration lawyer based in Orrick's Paris office. He has conducted arbitrations on gas pricing disputes, oil production sharing agreements, tax stabilization agreements, international joint ventures, as well as aircraft development programs, in France and elsewhere.

Highly regarded in the international arbitration market, Charles is consistently recognized as a key practitioner particularly in Europe, Africa and the Middle East. According to *Chambers & Partners*, clients describe him as an "extremely bright" expert on cross-border matters and praise his "commercial insight and dedication." Ranked among *Chambers France*'s top International Arbitration lawyers, Charles is said to be "a very good lawyer whose experience in international arbitration is superb."

In particular, Charles advises French and international energy majors, and industrials. He has extensive experience of arbitration under ICC, ICSID, French Arbitration Association, LCIA and Milan Chamber rules. He regularly sits as arbitrator.

He originally qualified as an English barrister and then as a French avocat. In addition to investment disputes, he has handled civil as well as common law disputes in a number of jurisdictions in Europe, Africa, the Middle East and Asia.

Before he joined Orrick, he was co-head of Herbert Smith Freehills LLP's Global Arbitration practice and led the Paris Arbitration group.

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Orrick is ranked in "2015 Global 20 Firm" by *Law360* and *Fortune 2017* said Orrick was in the "100 best companies to work for."

In France, the 120 lawyers of Orrick's Paris office advise French and international services companies and industrial groups, listed or non-listed, as well as commercial and investment banks, investment funds, governments and public entities on complex cross-border and domestic transactions.

Orrick Rambaud Martel is a key law firm that provides an exceptionally broad platform of legal advice in the following practice areas: Banking & Finance, Capital Markets, Competition & Antitrust Law, Corporate M&A, Employment Law, Energy & Infrastructure, International Arbitration, Litigation, Public Law, Real Estate, Restructuring & Bankruptcy Proceedings, Tax and Tech.

Mark Powell
Partner

WHITE & CASE

Mark has been advising clients on competition law issues for nearly thirty years. His practice has a particular focus on the interface between competition law and sector-specific regulatory requirements, in such areas as telecommunications, pharmaceuticals, energy, the media and transport.

Clients benefit from his considerable experience handling regulatory clearance for complex mergers and acquisitions, including Zimmer/Biomet, Telia/Telenor (abandoned), Acergy/Subsea7, HBO/Ziggo, and Sanofi-Aventis/Zentiva. His work on Aegean/Olympic II was so persuasive that it resulted in the European Commission clearing it in a Phase II proceeding- the first time that it had cleared such a deal, having previously prohibited it.

In addition, Mark has developed a significant track record representing and advising clients involved in cartel investigations, in areas including Euribor derivatives, nucleotides, synthetic rubber, candle wax, calcium carbide, ball bearings and power cables.

Executive Partner of the Brussels office, he has helped clients to make successful appeals to the European Commission regarding matters ranging from infringement decisions to the re-negotiation of fines. Based in Brussels and London, he is able to advise international clients on both European and UK market investigation and merger cases.

White & Case LLP

White & Case is a truly global law firm, uniquely positioned to help our clients achieve their ambitions in today's G20 world.

As a pioneering international law firm, our cross-border experience and diverse team of local, U.S. and English-qualified lawyers consistently deliver results for our clients.

In both established and emerging markets, our lawyers are integral, long-standing members of the community, giving our clients insights into the local business environment alongside our experience in multiple jurisdictions.

We work with some of the world's most respected and well-established banks and businesses, as well as start-up visionaries, governments and state-owned entities.

In 2015, the United Nations adopted the Sustainable Development Goals—the 2030 Agenda for Sustainable Development. These 17 Global Goals aim to end poverty, protect the environment and ensure prosperity for all by 2030. They follow and expand on the Millennium Development Goals adopted in 2001. Achieving the goals will require participation from governments, the private sector, civil society and individual citizens.

White & Case became a signatory to the UN Global Compact, the world's largest voluntary corporate sustainability initiative, in July of 2016. Signatories commit to doing business responsibly by aligning their operations with ten principles related to human rights, labor, the environment and anti-corruption. The Compact emphasizes collaboration and innovation on issues such as the Global Goals.

White & Case is committed to fair and ethical operations that respect the interests of all our stakeholders and recognize the importance of our natural environment.

We adhere to the highest standards of professional conduct and continually communicate and train all of our lawyers and employees in ethics and professional responsibility.

In a major new initiative aligned with our commitment to the UN Global Compact, we introduced training on business and human rights for all of our lawyers to ensure they are aware of how this emerging field affects their area of legal practice.

We are proud to help advance the Global Goals through our Global Pro Bono Practice as well. Our work ranges across all the issues covered by the Global Goals, from combating human trafficking to promoting good water governance to closing the credit gap for women entrepreneurs.