

# Article

## Dispute-wise in the Supply Chain?

Martin Brink\*

### 1 Introduction

Dutch Chemical Company One had a residue product which could serve as raw material to produce an industrial product ('the Product') that was in high demand. It entered into a joint venture agreement with Chemical Company Two in France, where the Product would be produced to be delivered back to Company One who would sell it through a joint sales company of which both Company One and Company Two held 50% of the shares. The cooperation went well for several years, until Company One discovered that Company Two was selling the Product also directly to customers bypassing the joint subsidiary company. Company Two had grown tired of the high purchase price for the residue product. Company One started litigation for breach of contract and demanded compensation for damages and loss of goodwill. Litigation went for 13 years – all the way to the Supreme Court and back – jointly spending about one million euros on legal fees until both companies were tired of fighting, wasting costs, management time and negative energy. Finally, they engaged a mediator and after a day and a half of meetings in Brussels, they reached a settlement. They liquidated the sales company, divided the liquidation balance, agreed new terms for delivering the residue product to Company Two and for delivering the Product to Company One. Company Two paid Company One 2.5 million euros by means of compensation for damages and henceforth they would each sell the Product independently.

\* Martin Brink (Van Benthem & Keulen BV, advocaten en notariaat at Utrecht, The Netherlands), is Editor in Chief of this Journal. This article was first published in the Newsletter of ICC Netherlands of May 2020 and is reprinted courtesy of ICC Netherlands.

Commercial success often is built on cooperation with suppliers, co-producers, sales partners and others. Commercial relationships however are like marriages. They do not all work out well. When it is no longer moonshine and roses, things may become nasty. Plenty are the examples where – like Company One and Company Two – (former) partners end up in court for more than 10 years at the expense of much costs, loss of energy and new business opportunities. Every big problem starts small and much can be gained by dealing with (potential) conflict in a *dispute-wise* manner right from the start. But how to be dispute-wise, when you know you are right, and the other side is wrong? That is the question.

In this article, some recommendations are mentioned how to be dispute-wise when confronted with (potential) conflict. The use thereof may safeguard relationships in the supply chain, which otherwise might go sour due to miscommunication, emotions, or the simple fact that the time has come to conclude things are no longer running satisfactorily. The following recommendations are not so easy to stick to when emotions get involved – as they almost inevitably always do – but can be very effective and helpful when practised consequently when things become complicated in the supply chain.

### 2 Dispute-wise Pointers

- Do not assume: The saying goes that 'to assume is making an ass out of u and me'. Try to phrase an assumption in the form of a question, preferably an open question such as 'have I understood this or that correctly?' Avoid the word 'why' when posing a verification question, since it contains a hint of an accusation (see also the last bullet hereinafter). Do

not follow up with the word ‘but’, since that will be construed as contradicting everything that was said earlier, rather replace that word for ‘and’.

- Appreciate: Try to listen carefully and understand not only what is being said, but also why it is being said. Make clear to have understood the explanation and what the motivation behind it is. That is not the same as agreeing to it. Think of a figure lying on the ground between two parties, the one maintaining it is a six and the other that it is a nine. Who is right? When parties are sincere, they are both right; they simply look at the same figure – or a constellation of events – from a different angle. ‘Perception is truth’ is a myth. One’s own perception is one’s own truth. A disagreement therefore ought not to invoke a reproach but invite an open ear and an open mind.
- Affiliate: Despite the existence of a (potential) conflict, the question to ask all involved is whether they want to be ‘*partners* with a problem’ or ‘*parties* with a problem’. In both cases the problem will be there, but the difference is that *partners* with a problem can concentrate on what may be required to solve the issue (what tool or solution is available and may work), rather than on who is right or who is wrong. The latter question will absorb the conversation between *parties* with a problem. Propose a choice of what it will be, partners or parties with a problem.
- Respect autonomy: Delete the word ‘must’ from the conversation. Something can be requested, recommended, advised or suggested, but whether to agree with something or to disagree is the prerogative of oneself not of anyone else. Everyone makes his or her own decisions and that ought to be respected and acknowledged.
- Remain respectful: Many a conflict is the result of impingement – consciously or unconsciously – on the self-respect of the other. To (re)validate that self-respect of the other may help to restore communication. Observing the autonomy of a person is also paying respect to that person.
- Understand role: Particularly in business relations people often represent their organisation and act to serve their organisation best. This may result in standpoints one would rather not encounter but remember the other is acting in as a representative trying to do what is best for his or her organisation. This means that one may dislike the position they take, but not who they are.
- Use the I-message: Understand the difference between an I-message and a reproach. An I-message expresses one’s own feelings without blaming other, e.g.: ‘I feel less comfortable to respond without this or that information and would be grateful to receive that still’, rather than something with an element of blame, e.g. ‘you have given insufficient information’.