Background

The 2013 LawTech Europe Congress took place in Prague over the 21st and 22nd Ocotober. Within the Enterprise Information Management stream, a panel session was held on The Advantages of a Dispute Resolution Readiness Plan on Compliance and Your Bottom Line. The following article is based upon the highlights of that session which was billed as:

"Why litigation readiness is the much better option as the fence on top of the cliff, as opposed to eDisclosure which is the ambulance at the bottom. The session will explore the theory and practice of being prepared for litigation, including an evaluation of the increasing use of litigation support tools within the firewall. Lack of a plan bought down the News of the World, should you be looking at yours before it's too late?"

The distinguished panel combined representatives from industry, clients and academia and resulted in a very lively debate. The people doing the talking were; **Alex Dunstan Lee**, a Managing Director in the Disputes and Investigations practice at Navigant, **Tomáš Hulle**, Director of Prague Summer School on International Business Transactions and lecturer of dispute resolution at Institute of Economic Studies of Charles University, **Browning Marean**, a senior counsel in DLA Piper's San Diego office, and **Jiří Matzner,** Legal Executive at Oracle, responsible for business operations and legal matters for Slovakia, Slovenia, Croatia and Bosnia-Herzegovina. They were moderated by **Andrew Haslam,** the UK's leading independent litigation support consultant.

The panel looked at five key areas:

1. Effectively handling "big data" volume, velocity and variety.
2. Adopting advanced technology, including analytics and predictive coding.
3. Efficiently re-using collected, processed and reviewed materials from previous matters.
4. Thinking and acting globally.
5. Budgeting with transparency and predictability.

Effectively handling "big data" volume, velocity and variety.

The debate explored the value of adopting an information economics strategy to control and curtail data growth through defensible disposal of data, and explored the following thoughts. If data is redundant, obsolete, and trivial, or has no business value; then asking how cost effectively it can be stored is asking the wrong question. As enterprise data continues to grow and IT budgets remain flat, we should really be asking how to more effectively maximize existing storage capacity and manage storage spend based on data value.

Alex Dunstan Lee : Organisations are asking themselves what is big data and looking at it from two viewpoints; Legal on one side, Compliance on the other. What often happens is that firms look at the scale of the exercise and quit before they even start the process as they are daunted by the volumes, BUT any kind of a plan is better than nothing. Those that do plan, often split it into two areas; 1) How do we deal with data going forwards, 2) what do we do with existing information if/when we need to access it. An approach is to put a plan in place that looks at the second scenario, that is what to do when there is litigation / governmental investigation / industry based enquiry, and use the outcomes of that plan to spot the indicators for change in the "going forwards" approach. Don't start from scratch but try to gradually improve the process. You might be in an industry which doesn't see much litigation, but you are still subject to the "threat" of regulatory or Governmental/ EU investigation.

Tomáš Hulle : My viewpoint comes from the fact that most EU legal systems are based on a continental approach to law, and not the UK / US common law approach. Therefore I am approaching the issue by looking at the information/data that you need to pursue a case, rather than managing data beforehand. Specifically looking at the growth of on-line resolution systems, that are the "public" sector trying to emulate the success of private dispute resolution environments such as the one used by eBay. For these kinds of systems you only need a specific

set of information, which could lead you to a corporate policy of only promoting such data to the first level of management/governance, and the rest to a secondary standard.

In the Czech Republic the courts request specific documents, so you need only focus on those (until you join the international world, at which point, it's a totally different story)

Browning Marean : You need to get your systems in place to control the current and future growth in data, existing information is not such a threat. It has been estimated that by 2020 (7 years away) there will be 50 times the amount of information that we currently have. If you don't get controls in place now, by then you will be in terrible shape. However you are also under competing pressures from different regulatory, legal and technological environments. Very often it is the case of what is the "least worst" option.

The approach and policies you evolve to meet the needs of litigation readiness / preparedness for Dispute Resolution employ many of the proven techniques for information governance.

Jiří Matzner : My organisation has a multi-national retention policy, that means the subsidiaries in the EU actually operate to US standards, as that is where the main focus of litigation is. We use our own products to store information and in a purely technical sense, storing everything is not an issue. In the real world, once litigation has started, having multiple copies of everything stored (just because it's easy to do) is a nightmare to process. Concept of data that is ROT, **R**edundant, **O**bsolete or **T**rivial, you need to remove all ROT from your system.

Adopting advanced technology, including analytics and predictive coding.

Browning : Looking at products such as Nuix's Illuminate that is specifically designed to work "inside the firewall" to help remove ROT. Also Recommind's Axcelerate range has been re-written around a new core engine designed to cope with the vastly increased volumes of data. That's the internal possible use, when it comes to external reacting to events, then it has become almost de facto that you use these technologies to keep the costs down.

Jiří : Within Oracle (and other large companies) the use of advanced technology is more focused on monitoring social media to quickly spot the beginnings of adverse publicity. They use technology to monitor comments in Twitter, Facebook, etc. under a "real-time" review so they can respond to issues. Seeing this a lot in the hospitality industry.

Not a lot happening inside the firewall, however, as organisations get used to the handling of external information in this way, it might be a prelude to the adoption of technologies to assist with Information Governance.

Alex : Picking up on Browning's point, as a supplier of high technology solutions, it is almost mandatory that you use these kinds of technologies to keep costs down and provide a more proportionate response. The UK's Jackson reforms are also acting as another factor in getting these tools adopted within the UL legal profession.

Again, inside the firewall, it is early days, but you can see indications of how serious people are taking this when a company like Symantec buys Clearwell in order to get inside the Information Governance community.

Efficiently re-using collected, processed and reviewed materials from previous matters.

Browning :

The average Fortune 100 company is involved in about 125 pieces of significant litigation. Two points.

1) There are US companies that are serial litigants who are bringing most of the process in the EDRM model in-house, so as to control costs. Will we see the same outside of the US?

2) The C suite of directors in large firms are very often on almost constant legal hold. Once their documents have been through the very expensive process of being reviewed for Attorney Client Privilege then they (and all that coding) is preserved for future use.

Jiří : Oracle as a Fortune 100 company is indeed involved in a lot of litigation, but most of it is in the US rather than the EU. In the US they have developed a partnership with DLA Piper to make sure work product is re-used whenever possible.

Alex : Navigant are seeing a lot more of this from clients. Specific industries are banking and (possibly surprisingly) beverage companies. Within large firms, the senior management are always asking for information, and things like the FCPA mean you need to re-use the searches carried out on the firm's data.

One example of being prepared is where a firm carried out a house keeping / auditing exercise on all their back-up tapes so that they sorted the issues out once and are now able to accurately answer any queries on the tapes and their contents.

Tomáš : I have a different focus. I'm looking at how you can re-use knowledge / documents / experience in order to try and level the playing field when "small" users take on big businesses (David v Goliath). An example is in the on-line site for domain name arbitration where the process is kept deliberately simple in terms of the data requirements, so that the large firm doesn't "swamp" the claimant with irrelevant material.

Some re-use of data being made in terms of Legal Regulatory situations, but not a lot of that as yet.

Thinking and acting globally.

Jiří : Very quickly the group agreed that the mantra for this section was "Act local, but think global". Jiří does this every day. In terms of size Oracle is a mid-sized firm in the Czech economy, and yet his actions could have policy/strategic implications throughout the world-wide company. Litigators can seize upon actions that are outside global policy and use them to support a case on the other side of the world.

Alex : Constantly advising companies that they need to get their data out of geographically imposed "silos". You must have a global strategy for Information Governance and Cyber Security as geographical borders don't apply to IT/data. As an example international banks often have superb systems in place in the US and/or UK, but the French branches never want to talk to anyone.

Tomáš : Counter point is that legal systems are very specific to geographical area, look how the Google initiative to collect data for Google maps has run afoul of the privacy laws in a number of countries that don't share the US's more relaxed attitude to data privacy.

Browning : You have a conundrum to try to resolve. On the one hand the free flow of information is the life blood of international commence and development, yet on the other hand the EU privacy laws seek to limit or block this. It is a manifestation of a deep divide in cultural attitudes that are reflected in different legal approaches to the issue. Mind you, some of the fallout from PRISM has shown that the French and German governments are just as capable of the US of invading individual's privacy when they deem it to be in the National Interest.

As a subsidiary of a global firm you can be in the centre of a "perfect storm" of conflicting legal requirements, and very often the best thing you can achieve in terms of Information Governance policy is a "least worst" situation, were the laws you don't comply with, have the least impact upon your business.

Budgeting with transparency and predictability.

Alex : Good luck with this. Creating an accurate estimate for eDisclosure is notoriously difficult, and yet with the Jackson reforms in the UK, it is a hot topic. Hearkening back to an earlier point, the more understanding you have of your data, the better able you are to work out what processes and people are needed to prepare it for litigation. In an ideal world, the sooner a vendor can get involved in the process, the better, and yet for in-experienced clients this is much easier said than done.

Once you know your data, you are much better situated in terms of challenging disproportionate requests for information.

Tomáš : There is an initiative in the area of online ADR for domain names, where all results of the various settlements are published so that there is a body of knowledge being built on the likely costs and effort involved in litigation. This approach is spreading to other areas.

Even more "blue sky thinking" is the use of Artificial Intelligence (AI) engines work within the system learn the requirements and then act a guide/mentor to users.

Browning : There is definite increased demand for transparency on estimates / costs on eDisclosure. I have a spreadsheet that my firm use to budget for the eDisclosure process and it has been honed over time to become a highly accurate means of predicting the costs. It has recently been uploaded to the EDRM website for everyone to use.

Increased acceptance that you might spend more up front on technologies such as Clustering, Computer Assisted Review (CAR), etc. but you save significant amounts downstream.

Jiří : The principle is sound, the implementation is very hard. Unless you have control/knowledge of your own data, you cannot have an idea of the scope and thus the costs of the exercise. In an ideal world if you involve a supplier right from the start you can reach a point at which they are comfortable enough to share the financial risk, but in practice there are many barriers to overcome before you can let them in.