AVOID THE ‘CONTAGIOUS CONFLICT’ EFFECT WITH EARLY PREVENTION, SAY IN-HOUSE COUNSEL

Posted on 07/08/2013

Category: In-house news

In times of crisis, as transactional activity decreases, the number of conflicts increases at an almost proportionate level. And In-house Counsel say that they currently face the pressing problem of how best to manage this rise in conflicts, especially given the variety of issues involved and their complexity.

The question of whether to mediate, arbitrate or litigate is one of their most difficult challenges. But early prevention and negotiations are proving key to ensuring that as many issues are resolved before they reach a point of having to choose between the various resolution methods.
These issues were the subject of a recent Iberian Lawyer’s In-House Club Master Class held at the Círculo Ecuestre in Barcelona in collaboration with KPMG, moderated by Ignacio Redondo, Head of Legal at CaixaBank and Enric Olcina, a Partner at KPMG Forensic. The Master Class was attended by Heads of Legal, together with a group of dispute resolution experts from leading law firms in Spain.

Conflicting concerns

There is a growing concern surrounding conflict management, not just because of the legal complexities involved, but also because of the increase in economic and reputational risk due to the globalisation of business.

The group agreed that there are currently three distinct types of conflict dominating the market. "Those against the end-consumer, inter-company disputes and those against regulators or public administrations," explained Redondo at CaixaBank. Conflicts against consumers are harder to negotiate given that they are not usually a question of who is right or wrong but of a personal opinion, and involve much more of a reputational risk, added Redondo at CaixaBank. While inter-company disputes are more sophisticated and involve topics that not only allow for technical and legal arguments but greater possibility for negotiation, thus lessening reputational damage.

With the outcome of judicial proceedings becoming increasingly difficult to predict, said Jordi Calvo, a Partner at Roca Junyent, negotiating is essential as there are many more controls, guarantees and possibilities that the conflict is resolved before arriving at the courts.

Early conflict prevention is essential, and one method highlighted was the importance of incorporating contractual clauses for preventative conflict resolution. "It is essential to involve a litigator when drafting any contract," said Alex Ferreres at Uría Menéndez, "as these clauses are crucial when it comes to preventing risks and providing for conflict management measures when they arise."

Arbitration

When it comes to international investment, participants agreed that it is essential to have a 'plan B' alternative to the courts, and often the first choice is arbitration.

"This dispute resolution method is now very well known in the business world," said Enric Olcina, a Partner at KPMG Forensic, "which is curious because it's not that arbitration is the 'go to' method for investment conflict issues, but that due to the regulatory reforms in energy and renewables in Spain, we have been on the receiving end of lawsuits against the State and arbitration has been the method chosen to deal with these."

And as internationalisation is key for many businesses, explained Sergio Miralles, a Counsel at Freshfields, in many cases international arbitration ends in negotiations, which is key as cross border conflicts can have a big reputational impact. Arbitration, therefore, must be treated not only as a reactive measure but also as a preventative and strategic tool.

The contagious effect

But the most important thing to avoid is the 'contagious conflict' effect, said Redondo at CaixaBank. With reputation at stake, participants agreed that one of the best approaches is to filter out all those small claims that can be settled early, and do so before they evolve into something bigger.

"Sometimes even the smallest and seemingly irrelevant claim can turn into an 'example' case," said Ferreres at Uría Menéndez, "and this can lead to mass or class action further down the line".

The reputational fallout from this can turn into a PR nightmare, even though you are not actually dealing with a 'legal' risk. In-house counsel are therefore finding themselves having to work more and more with their internal communications departments.

Companies are now creating internal committees to decide on the best strategies for conflict prevention and management, and prevention is top of their agenda. "The key for any in-house counsel when there is a conflict or sensitive issues is to count on internal groups or support committees," according to Enrique Zapata, Legal Counsel at Orange. "This often involves engaging professionals from various departments and preparing and talking about arguments and scenarios on how best to handle the conflict before actually doing so."

Integrated solutions

The group concluded that nowadays, companies are looking for integrated solutions to resolve conflicts, both domestic and international. A good example of this is the current trend of companies

appointing committees to manage any issues, which include a mixture of product managers, legal advisers and the communication department. Companies must deal with the conflict as a natural and everyday part of business life, and ensure that they avoid the ‘contagious conflict’ effect.