

THE CHALLENGE OF MANAGING COMPLEX DISPUTES

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Each business dispute may be different but following best practices can help to make a litigation or arbitration run more efficiently, says Ignacio D  ez-Picazo, dispute resolution partner at Herbert Smith in Madrid

Un conflicto complejo puede plantear cuestiones a las que ni el departamento legal de la empresa ni el Consejo se hayan encontrado antes y si bien cada disputa es diferente, una mejor

práctica puede ayudar a que el proceso judicial o el arbitraje sean más sencillos, dice Ignacio Díez-Picazo, socio de procesal en Herbert Smith en Madrid. Los conflictos inevitablemente causan tensiones y preocupan, por eso el desafío es como gestionarlos de la mejor manera posible, para determinar la estrategia y los objetivos definiendo claramente el papel de los abogados.

'It is often the case that a complex dispute will throw up issues that neither a company legal department nor the Board of Directors may have previously encountered. This inevitably causes tension and concern, the challenge therefore is how best to manage the dispute, to determine the strategy and goals, and define the lawyers roles.'

When a complex dispute emerges, the senior executives and the general counsel will inevitably be anxious.

But it is they who have the best understanding of the issues at stake, he emphasises. While external corporate or finance lawyers may have a track record of advising the client, invariably external litigation lawyers will not. It is vital therefore to ensure they fully understand the background to the matters in dispute.

'I always say, first of all tell me about the company. What is the corporate strategy, what has been its evolution and where are we now. To understand the context of the case it is vital to understand the business, the governance structure and decision-making processes.'

Such insight can also help external lawyers better understand the

company's strategic position as well as form a framework for negotiations and any potential settlement that might be agreed. But the goals always need to be defined, for example, to recover a specific monetary amount, protect the reputation of the company, or indeed, both.

What is also vital is for the inhouse legal department and external legal team to adopt a common and collaborative approach. But from experience, he says, what may seem an obvious desire may not always be so easy to achieve.

'Each legal department is different, in the way it operates and the nature of the work it takes onboard, and so too are external law firms. What is essential is to adopt common work processes and define roles. Disputes may last several months or even years and from the outset it is necessary to understand the nature of the team that is being built.'

There are technical issues to be clarified also. It is important particularly for multinational businesses to understand the substantive and procedural differences that exist between the Spanish judicial system and other jurisdictions, emphasises Díez-Picazo.

'In terms of managing expectations and timescales, it is important that not only do the General Counsel of a company understand that the continental approach to litigation is very different to that in the Anglo-Saxon legal world, but so too do the senior executives of a company:'

There may be no discovery in the Spanish judicial system, but fact finding is an important element of

the process, he says. An external legal team's understanding of the details is therefore very much in the hands of the in-house team, both in the way information is collected and transmitted.

Negotiations must also be considered in the light of what is being gained rather than lost, he insists. 'It can be difficult to persuade people not to look at settlements in terms of what would have achieved had the contract been fulfilled. The objective is no longer the fulfilment of the deal but to end the dispute.'

A certain scale of dispute will inevitably demand the attention of the Board and often also require their input, but sophisticated businesses inevitably ensure that it is the legal department that remains the conduit for any communication. It is they who will have an understanding of the 'big picture' throughout each stage.

In any event, what a business most usually wants is to cure the problem as quickly as possible and then move on, but in complex disputes there is no 'one-size fits all' approach. What is essential therefore is that the potential for conflicts should be foreseen in all agreements, believes Díez-Picazo.

'When negotiating contracts, inhouse lawyers must draw on their unique knowledge of the business to minimise risks. To imagine the scenarios in which disputes may arise: what may be the issues of contention, when might they occur in the life cycle of the agreement; and who will be the claimant or defendant?'