Kluwer Mediation Blog

Global Currents: Trends in Complex Cross-Border Disputes

Deborah Masucci (International Mediation Institute) · Friday, April 18th, 2014

In February 2014, the Litigation and Arbitration Practice of international law firm Hogan Lovells announced the findings of a survey they conducted among 146 senior lawyers and executives from among the world's largest companies in 18 industries to assess how cross border disputes have affected the legal landscape. The survey's findings reveal some interesting perspectives, and hint at the scale of opportunity for mediation.

Respondents to the survey indicated that 73% of international corporate contracts included a provision selecting arbitration as the dispute resolution mechanism – though only 29% said their cross-border disputes involved arbitration. This dichotomy is left unexplained in the summary of the survey's findings. However, the summary does go on to say: "*Arbitration is not an alternative to dispute resolution – it is a mechanism for dispute resolution. But there are other ways to solve the problem. Before and during an arbitration the parties may choose dispute resolution boards, mediation or other alternative dispute resolution mechanisms to resolve a controversy*".

Respondents reported that one of their biggest challenges was intensified Corporate Board scrutiny of cross-border disputes. Explaining this, the summary says:

> Since the market troubles of the early 2000s and the financial crisis of 2008, Boards have been forced, through a combination of regulation and pressure from shareholders and other stakeholders, to be more accountable for the actions of their companies. This has meant greater collaboration between the Board and their in-house and external lawyers at the highest level. General Counsel are still working through best practices in managing their expectations, and globalization continues to bring new and different challenges in this arena.
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> Forty-five per cent of respondents said their Boards are increasing internal scrutiny of cross-border disputes. Their main concerns are financial, but involve both the cost of handling the dispute and broader exposure stemming from it, including reputational risk. At their worst, these disputes may threaten ongoing business. Boards are also concerned about the uncertainty and the drain on internal resources. Internal teams are under increasing pressure to analyze cases, involve the appropriate teams within the business, develop and adjust a strategy, and inform the relevant constituents throughout the project. Those that then seek the input and preparation from external counsel then risk raising budgetary concerns.

The corporate door to effectively address cross-border disputes is labelled “Mediation”. While some law departments and law firms recognize mediation as an essential step in the resolution of cross-border disputes, others argue that lack of understanding and information, varying industry demands or even differences in legal and cultural landscapes prohibit effective mediation. These same postures were used to block mediation use in the United States in the past but today U.S. corporations have adopted dispute resolution clauses that include a mediation step; adopt early dispute resolution processes that include mediation; seek outside counsel who are proficient in mediation; and train their in-house staff to include mediation in their dispute resolution strategy.

So this leads to several questions that need to be addressed:

- How can mediation fit into a global corporation’s cross-border dispute resolution strategy?
- Is mediation a best practice for in-house counsel and, if not, how can they be convinced that it is?
- Does the corporate litigation counsel require outside counsel to be proficient in mediation strategy? If not, why not?
- Do in-house correctly assess the value of mediation as an outcome generation route?

For more information including a copy of the survey findings see: www.hoganlovells.com/globalcurrents/

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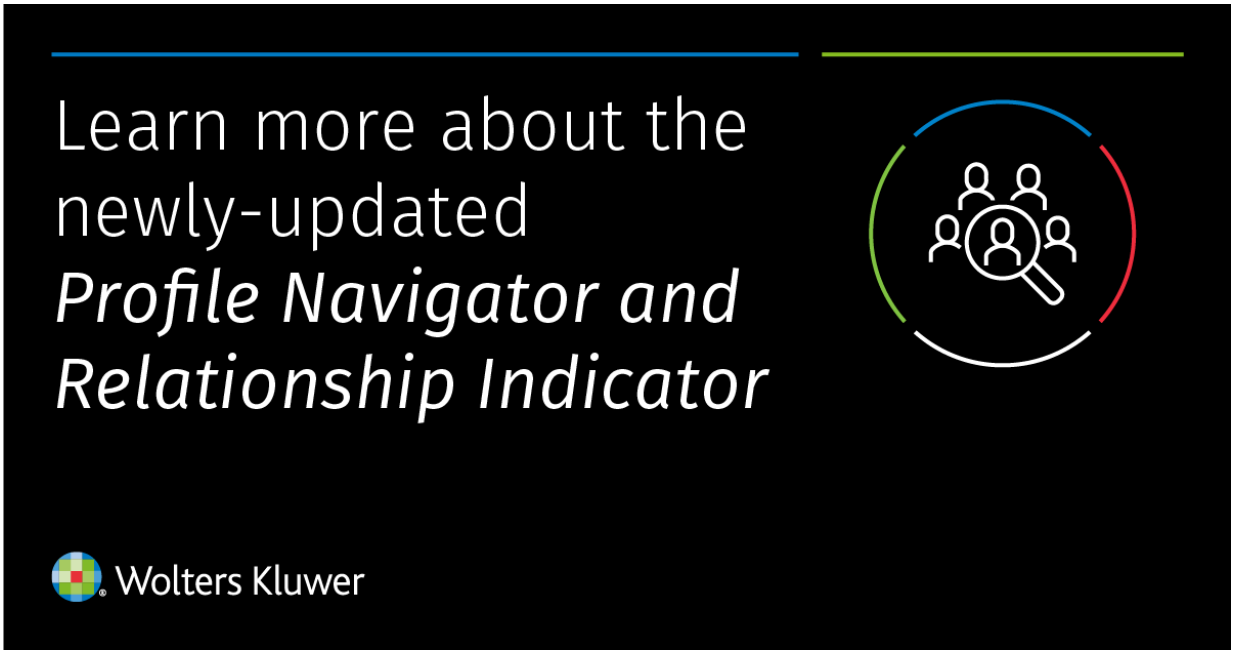

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