

EFFECTIVE DISPUTE RESOLUTION STRATEGIES

In this second edition of Law Bites I will focus on how to successfully manage commercial disputes.

1. Prevention is better than cure.

Everyone hopes that they will never be involved in a commercial dispute. Protracted and expensive litigation or arbitration is not an appealing prospect. Disputes are, however, an unfortunate fact of life, so it is more a case of minimising your company's exposure to the risk of a dispute.

Whenever possible and practical, use a written contract rather than rely on an oral contract. A standard form contract will cover the essential terms and conditions for a simple commercial transaction. A bespoke contract will deal with more complex matters and should adequately address all the major considerations, including the assignment of risk in a project or commercial transaction. Don't leave things 'loose at the edges' and make sure you protect your business' reputation and legal position.

A written contract should contain the following terms:

Parties – Names and addresses of the parties to the contract. Definitions and interpretations. Payment provisions. A specific description of the goods or services. Term of the contract. Timescale. Limitation of liability. Termination provisions. Change of control (during course of contract). Dispute resolution clause. Confidentiality clause. Intellectual property rights. Warranties. Indemnity clause. Force Majeure clause. Assignment clause. Governing law clause.

2. Have in place good dispute management policies

A dispute is sometimes akin to a game of chess, namely tactical in nature with plays and counter-plays, so try to see the big picture. Dispute resolution is in itself a risk and the use of good management techniques should become routine for the successful management team. Be full and frank with your lawyer from the outset. Nominate a 'point man' to act as the day-to-day contact for your lawyer. Be prepared for a good lawyer to challenge you on some of the more problematic areas of the dispute which the other side may seek to exploit to your detriment. Many years ago, I was witness to a case imploding on the first day of a trial due to the lawyer becoming too friendly with a client possessing a strong personality and definite opinions about the presentation of the case. The lawyer was reluctant to play devil's advocate and challenge the client's defence to the claim.

3. Prepare a paper trail

Diaries, minutes of meetings and emails can be of vital importance during any dispute. Make sure proper records are kept and that your filing systems are up to date.

4. Adopt a commercial outlook for dispute resolution

I am never too surprised to see warring parties decide on the first day of a hearing that they finally need to settle a dispute. The reason? Well, a previous mutually beneficial relationship and the prospect of perhaps working with the other party again in the future. The years spent building and developing that commercial relationship are simply too valuable to lose in what may later be seen as an expensive misunderstanding.

Aside from the legal costs, never underestimate the management time and stress which is involved in the dispute resolution process. A tough, successful underwriter once admitted to me that he was not sleeping well a few days before the start of an arbitration. He was very happy when the case settled and he no longer had to give evidence and be cross-examined. He could return to his day job and earning a living!

5. Use lawyers effectively

Involve lawyers at an early stage to marshal the evidence, to identify the issues, give preliminary advice on the matter and develop a strategy. Make sure that they are fully involved with the company so that prompt and full instructions are given.

6. Use experts in the right way

Use experts wisely. Ensure they are truly independent, have the right pedigree and experience, particularly if they are likely to be giving evidence. Not someone who just says what you want them to say!

7. Consider mediation

Explore the possibility of mediation. It is an increasingly important forum to resolve disputes cost effectively, expeditely and privately. Never lose sight of an opportunity to settle. A formal mediation is not always necessary. It is not a sign of weakness to contact the other side and to try to settle. Rather, it is a sign of strength.

8. ... And finally

If a dispute does occur - stay calm, don't panic. Contact me and I shall be very pleased to assist.

This article contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances.

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