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CD corporate disputes

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PERSPECTIVES

TIPS FOR AVOIDING & WINNING CORPORATE DISPUTES

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Success in business is often down to knowing who to trust, but also taking risks. If every entrepreneur checked every step they took with their lawyers, nothing would ever get done. English law often follows common sense, and is your sword and your shield. The aim of this article is to provide some tips for businesses to avoid disputes and, where they arise, to help you win.

Contracts

An oral agreement is generally a good contract with some exceptions (e.g., a sale of land which must be in writing and an assignment of copyright which must be signed). Difficulties arise and legal costs increase where there is a need to prove before a judge what was in fact said and agreed. By recording terms of agreements in writing in emails you can avoid a lot of this: the key terms and understandings are there for everyone to see.

An agreement to agree in England is unenforceable, hence why heads of terms are often useless and cannot be sued upon. If you want protection, consider agreeing some clear, enforceable terms with an exclusive option period, pending a more detailed agreement.

Keep it simple. Judges are attracted to simplicity. Often long contracts are a litigator's dream because they can create competing clauses and sow conflict and confusion.

Contractual terms

If you want to sue through the courts, ensure you have an appropriate choice of law clause and exclusivity for your favoured court. You want to avoid choosing different clauses, e.g., New York law to be applied in the English Court.

If you are contracting with foreign customers, ensure you have a contractually agreed method of service to avoid delay serving proceedings outside of the jurisdiction. This is particularly true of parties based outside of the EU, where defendants may rely on the difficulty of effecting service of proceedings.

Be clear when drafting termination clauses so that you can exit contractual relationships quickly and cleanly without liability. Take care when terminating yourself when you perceive that the other side is in breach of contract. You may cause yourself to be in fundamental breach by wrongful termination, which will allow the other side to sue you.

Do not agree to the other side's standard terms and conditions other than on small deals. They are

not subject to tests of reasonableness, although limitations on liability are.

Costs

A winning party is entitled to their costs: if you are sued by a company with limited assets or are sued by a party outside of the EU, you should be entitled to obtain an order for 'security for costs'. This requires the claimant to pay monies into court shortly after the commencement of proceedings by way of a bond for your costs should you win. It is a very effective tool for dealing with frivolous and vexatious claims.

The court will not order security for costs where a defendant brings a counterclaim which requires examination of the same facts as the claimant's claim. This is known as the 'Crabtree principle'.

'After The Event' (ATE) insurance will provide cover for payment of your opponent's legal costs in the event you lose. But it is very expensive – it is often at least one third of the level of cover, or half if payment of the premium is deferred.

Strangers to a claim cannot take a bare assignment of a claim. This principle is policy driven to avoid ambulance chasers hanging around outside hospitals. But where you have a real interest in a claim, you may be the perfect person to take an assignment of a legal action, although you will be liable for costs if you lose. Third-party funders are liable for adverse costs (a court order requiring a party to pay the other side's legal costs). Take care when funding a claim that you do not become liable for an adverse costs order (awarded where the opponent wins).

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Pre-2013 conditional fee agreements are now assignable, which means that they can be 'novated' or transferred from one lawyer to another with the client's agreement. This is significant for any agreements that were entered into pre-2013 or pre-2016 for insolvency cases as you can then recover double your costs and your ATE insurance premium from the opponent.

Freezing orders

Always consider whether you should apply to the court to freeze a defendant's assets before you sue: there is no point in a pyrrhic judgment against an

entity or person with no money. Delay is often fatal to a freezing injunction.

'Cross undertakings' in damages are required to support applications for freezing injunctions. If the court finds that a freezing injunction was granted when it should not have been, it will look to the applicant to make good any damages caused by having obtained the freezing injunction. Be prepared to put up security and lose it.

Arbitration

Doing business in, say, Zimbabwe does not mean that you will want that country's Courts to determine your dispute, and if you choose your home Court, and assets are located elsewhere, you may not be able to have your English judgment recognised in the country where assets are located. Nearly every country in the world is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) and pursuant to that international treaty will recognise and enforce an arbitration award. That is the primary reason why businesses who undertake work internationally opt to agree that any dispute should be settled by way of arbitration.

The downside of arbitration is that it is more expensive as you have to pay the fees of the arbitrators who are often senior lawyers. However, it is generally faster than the court system and is confidential.

Choose your arbitrators very carefully. Selecting a professor of German law at the outset will be of little use if the governing law is found to be English law: the professor may simply follow the lead of the ex-English judge who the other side appointed.

Disclosure and protecting confidentiality

In disclosure (known as discovery in the US) all your communications, including SMS messages and messages sent through Facebook, WhatsApp, SMS, Viber, etc., as well as emails, are relevant and disclosable unless they were to/from your lawyer or created for the purpose of obtaining legal advice in which case they will be 'privileged'. These privileged communications remain private and confidential unless you waive that confidentiality in them. Correspondence with accountants and other professionals are not privileged.

In negotiations where you want to protect confidential ideas and you have not got the time to enter into a non-disclosure agreement (NDA) then mark your emails 'Confidential'. One of the key legal tests is whether the recipient understood that the information being imparted was confidential, the other being whether it was in fact confidential.

Insolvency

An employee of a lender can be a receiver. This is not a job reserved for an insolvency practitioner.

A fixed charge without control over the assets will be held to be a floating charge. Think about what

control rights you have on your security and how you can effectively control the borrower and the asset so as to make sure you stay ahead of the other creditors.

An administrator's powers of sale will trump a receiver's powers of sale: thus you may wish to think carefully about taking a floating charge as well as fixed security. This is particularly relevant in, say, a hotel business where you want to have a floating charge over the hotel receipts and a fixed charge over the property.

If you are a creditor owed money by a company which appears insolvent, you may be able to appoint a provisional liquidator. This is a powerful tool, which can stop the rot and prevent dissipation.

A proprietary claim is one by which a claimant can follow or trace money through different hands and accounts. It may be your saviour where the defendant is bust and you are able to identify funds which fall outside of an insolvent estate.

Private prosecutions

A private individual can bring a criminal action in the English Courts by way of a private prosecution. It is not cheap, but should be an option on the table, for the right case.

Law firms

Do not assume that you always need a worldwide firm to undertake worldwide litigation. Boutique firms often have strong relationships with the leading lawyers in another jurisdiction. They can choose to work with the best lawyers as opposed to being tied to an internal office staffed by mediocre ones.

Most law firms set billing targets for their lawyers: do not be surprised when you see a large team racking up hourly rate costs without any regard for the value being delivered. They may at times (inadvertently) be conscious of their own personal positions and bonuses. Better to agree fixed fees, capped fees, contingent fees or costs linked with delivery of value. CD

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