Guidance Note - managing the risks involved in a commercial dispute

It is inevitable that a company will face commercial disputes from time to time. A commercial dispute can be a significant drain on a company's financial and management resources. This note provides guidance on how a company can manage the risks involved if a commercial dispute does arise.

1. Take legal advice

The company should get legal advice, (the earlier the better), on the strength of its position and what strategy and tactics it should adopt and the likely cost and timescale of litigation.

If a dispute escalates it may become much more difficult and expensive to resolve and the company may inadvertently weaken or compromise its position by what is said or done in the early stages.

Choosing the right legal adviser is critical. The company may already have solicitors but, whether it does or not, it is important to check that its legal advisers have the necessary resource to handle the case and expertise in:

- the area of law relevant to the dispute
- the subject matter of the dispute
- dealing with cases of similar size and complexity
- the range of alternative dispute resolution mechanisms

It is better to use an experienced lawyer who works quickly but may be more expensive than a cheaper lawyer who takes too long and does not maximise your prospects of winning.

2. Collate your key evidence

The process of getting an accurate early evaluation will be much quicker and cheaper if all of the essential documents are collated into an organised format together with a detailed statement about the case.

Confidential communication with a lawyer for the purpose of seeking, providing or receiving legal and all documents created for the dominant or sole purpose of advising on litigation or collecting evidence when litigation is contemplated or pending are "privileged" and need not be disclosed in litigation.

However, communications within the company or with third parties, such as accountants, about the dispute may well not be covered by privilege and have to be disclosed as part of the litigation process. This may damage or weaken the company's case.

3. Preserve all documents and evidence relating to the dispute

As soon as you are aware that there may be a dispute, ensure that all documents (including electronic documents) relating to the issue (whether helpful or unhelpful to your case) are preserved. You will be required to disclose these documents during the litigation process.

In addition, if a piece of machinery or a sample product is going to be a key item of evidence in the litigation ensure that it is kept in a secure place where nobody can alter or remove it.

4. Formulate a dispute strategy

Is there a continuing business relationship? Could there be adverse publicity or damage to relationships with customers? Is the dispute likely to damage the business? On the other hand, is there a commercial advantage to pursuing or defending a claim, for example by recovering sums due to the company or protecting its intellectual property rights?

It is important to be clear about what the business objective is and how it can best be achieved, and what the alternatives are.

5. Work with your legal adviser

It is important that you co-operate with your legal adviser throughout the life of the dispute.

If you tell your legal adviser about the weaknesses as well as the strengths in your case, they can give you a more accurate assessment of your prospects of success.

Equally, you should tell them if something changes which might affect your case. If they are kept fully informed they can work with you to adapt your strategy in the light of new developments.

6. Establish the value of the claim

Only when you know the realistic value of a claim can you make a sensible cost benefit analysis.

Courts are now very focussed on managing litigation so that the costs are proportionate to the value of what is in dispute.

7. Carry out due diligence on your opponent's financial position

There is no point litigating in order to get a judgment that you cannot enforce because your opponent has no money. You should find out as much information as you can about the state of your opponent's business, and what assets they have.

8. Consider settling the dispute

Given that most disputes settle, it is sensible to explore the possibility of settlement at an early stage.

Negotiations to settle a dispute can take place at any time, before or after proceedings are started. The convention of negotiating on a "without prejudice" basis enables the parties to make offers or concessions without them being used in evidence.

Lawyers can use the Civil Procedure Rules and pre-action protocols to help the parties engage and exchange information that might help them reach a settlement. Lawyers will also advise on making offers under "Part 36" or "without prejudice save as to costs" to encourage settlement at an early stage and protect against adverse costs orders.

If negotiations aren't appropriate or successful, Alternative Dispute Resolution ("ADR") provides the opportunity for the parties to engage in a process that can lead to settlement. ADR methods include:

- mediation
- arbitration
- expert determination
- adjudication

There is a separate guidance note giving more information about these here.

9. Record the terms of the settlement

However a settlement is reached it is important it is recorded in a document that is binding on all parties and clearly sets out the terms of the settlement so there can be no misunderstandings and the terms of the settlement can be enforced if necessary.

10. Consider how the litigation is to be funded

If negotiation or ADR does not result in settlement, litigation is the only alternative if the company wants to pursue or defend its interests and in order to put it into a position to negotiate from a position of strength.

A company needs to be in a position to afford litigation if it becomes necessary. The company's solicitors are under a duty to advise on costs at the beginning and throughout the litigation and provide a reliable estimate.

It is not only the company's own legal costs it has to budget for; it also has to assess the risk of losing the litigation and make provision for having a costs order made against it.

If the company cannot afford the cost of litigation, settlement may be the only option irrespective of the merits of its case.

There are ways in which a company may be able to fund the litigation and/or minimise the risk of an adverse costs order:

- Insurance
- Litigation funding
- Sharing the risk with your legal advisers

There is a separate guidance note giving more information about these here.