

## **Guidance Note - minimising the risk of a commercial dispute**

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 minimise the risk of a commercial dispute.

### **1. Identify the risk factors**

Some transactions will carry a higher risk than others, for example a major supply contract, an IT contract or a construction project.

Identifying which transactions are a particular risk and taking steps to minimise the risk will help.

Disputes often arise from day-to-day business activities, such as:

- health and safety issues
- employer and employee disputes
- intellectual property disputes
- regulatory investigations

Having good systems and processes in place in these areas will help minimise risk.

### **2. Review your standard form contractual documentation and terms & conditions**

Make sure that your contractual documentation is appropriate to the transaction and as well drafted as possible, particularly in relation to payment terms, early cancellation and what happens in the event of a dispute.

In order to make sure that the key contractual terms are incorporated, a checklist should be drawn up for each type of contract, and guidelines given to business managers.

### **3. Make sure that your terms & conditions apply**

If the party you are contracting with also has terms & conditions, try to make sure that yours prevail by "firing the last shot".

### **4. Be clear on authority levels**

Have a written policy setting out who has authority to negotiate and enter into contracts, and who can make payments on behalf of the company. Make sure that the party you are contracting with is also aware of these authority levels.

### **5. Consider excluding or limiting liability**

In contracts between businesses it is possible to exclude or limit your liability in certain circumstances. It is always worth considering whether you can and, if so, whether you should.

### **6. Have an open culture**

It is important that employees feel able to tell you as soon as an issue arises so that you can manage it from the outset.

### **7. Choice of law and jurisdiction**

In the case of international contracts it is very important to incorporate into the contract that English law applies and that the English courts have exclusive jurisdiction to avoid the risk of having to litigate abroad.

## **8. ADR clause**

A well drafted contract should contain suitable provisions for what should happen in the event of a dispute that cannot be settled by negotiation but even if it does not the parties can still agree to use Alternative Dispute Resolution (ADR).

## **9. Keep records**

Make sure that you keep a copy of the signed contract, and any agreed variations to it.

If the contract was made orally, keep a contemporaneous note of the agreed terms (and when and where they were agreed, and by whom).

It is important to have a document storage and retention policy, so that employees know how and where documents (including electronic documents) should be stored, and for how long.

## **10. Take legal advice**

Taking advice on a contract before entering into it is an obvious way to minimise risk.