



Litigation Update

12 MAY 2016

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Disputes come from two directions. Either a claim form or a letter threatening legal action lands on your desk, or you discover that you have a potential legal claim against a third party. When this happens, what are the most important areas to concentrate on?

1. Identify the issues

- If the dispute relates to a contract, locate the key agreements. What are the important provisions?
- Start establishing a factual chronology of what has happened. Update as more detail emerges.
- Work out who you need to contact to obtain more factual information on what has happened. Set up interviews. Is anyone with important information about to leave the organisation? If so, speak to them before they go and ask them whether they will still be happy to assist in future. Include appropriate wording to this effect in any compromise agreement.

TEN TIPS

1. Identify key contracts.
2. Pull your core team together.
3. Check all relevant dispute resolution provisions.
4. Identify who needs to be informed of what has happened, internally and externally.
5. Locate insurance policies and notify insurers if necessary.
6. Diarise key dates and act fast if you need to.
7. Halt routine document destruction.
8. Control the creation of new documents.
9. Think strategically. Ask yourself what you are seeking to achieve. As the case develops, re-visit your objectives.
10. Carry out a cost/benefit analysis.

2. Insurance

If you think the dispute might be covered by insurance, locate the policy and check it carefully.

- More than one policy may be relevant, either because the dispute covers different policy years or because it is unclear which type of insurance is engaged.
- You may well need to notify insurers. Check how you go about this. What are the time limits for doing so? Which entity has the benefit of the policy? Follow notice provisions to the letter or you may invalidate a claim.
- Does the claim actually fall within the cover at all? Are there any obvious exclusions? Seek advice - don't jump to conclusions.
- Check what rights insurers have. Do you need their consent to incur legal costs? Enter into settlement discussions? Start proceedings?
- Check what policy limits and excess apply.

3. Dispute resolution process

- Check dispute resolution clauses. If there are no governing law or jurisdiction clauses in the agreement, the chosen law or jurisdiction is unfamiliar or the clauses appear to be contradictory, a legal analysis will be needed at an early stage.
- If you have a choice about whether to arbitrate or litigate, or where to litigate, think carefully about the advantages and disadvantages of the processes and/or jurisdictions. Look ahead to where you might want to

enforce a judgment or arbitral award.

- Is there an escalation process that needs to be followed before formal legal proceedings begin? Some dispute resolution clauses will require parties to a dispute to hold discussions between key individuals in the business, or even a full mediation, before starting legal proceedings.
- Check whether the claim actually falls within a different dispute resolution process altogether. Some technical disputes for example may have to be resolved by expert determination.
- Might an early settlement be the most cost-effective outcome?

4. Time limits

If you have been served with a formal court or arbitration document, there will be a time limit for responding. Establish what the risks are if you fail to do so.

If you are the one bringing the claim, check statutory or contractual time limits. Time limits for notifying and bringing a warranty claim for example may be short. If you are about to be time-barred, you will need to act fast. This may include issuing a protective claim or agreeing a standstill agreement.

5. Documents

Documents may be critical to determining the outcome of the dispute. In due course documents will almost certainly have to be disclosed to the other side and to the court or tribunal.

- Issue a document preservation notice to ensure that all documents that may be relevant are preserved.
- Explain to employees what disclosure obligations entail.
- Suspend any routine document destruction policy.
- Remember that potentially disclosable documents include hard copy papers but also electronic data of any type.
- Involve the IT department, or an external forensic IT consultant, at an early stage.
- Remind the other parties to the dispute in writing that they also need to retain their documents and cease any routine destruction.
- You will not need to produce documents in disclosure that are protected by legal professional privilege. Think carefully now about how to maintain or create privilege in documents (see below).

6. Communications

- Identify who is going to lead communications with the other side and within the internal and external team.
- Remind everyone to think before creating emails or any other documents on sensitive issues.
- Think carefully about how to preserve privilege. In particular:
 - Identify the 'client' at the outset for privilege purposes and keep communication lines limited to the 'client' and the lawyers.
 - Do not assume that all communications with lawyers are privileged. Are you seeking legal advice, which is privileged, or pure commercial input, which is not?
 - Don't think that labelling a document 'privileged', 'confidential', 'without prejudice' or 'off the record' makes it privileged. The substance of the document is what matters, not the header.
 - If you start an internal investigation, consider before the work begins whether any report generated will be privileged or how it can achieve privileged status. Keep detailed notes of the purpose of the investigation. Lawyers should lead the investigation, collect information, conduct interviews and prepare the report.

For more information on privilege, please contact us.

7. Risk, regulatory and reputational issues

Immediate action may be required to prevent further potential damage arising (for example, a product recall).

Depending on the nature of the dispute, you may need to inform the relevant regulatory authorities or plan for regulatory intervention.

If the dispute involves a jurisdictional issue, you may need to act quickly in order to establish where the claim will be determined. You may also need to seek immediate court intervention, for example to obtain a freezing order if

the other side is at risk of dissipating assets, or a search order where important evidence may be destroyed. Speed will be of the essence.

Internally, consider which parts of the business should be consulted. Do you need to involve the board?

If adverse publicity is an issue, speak to your internal communications team or instruct an external PR agency. Some court documents will be accessible to the public, and court cases are almost always heard in public.

8. Costs / benefit analysis

If you are the likely claimant, consider the following:

- How much is the dispute worth?
- Can the other party afford to pay?
- Where are the other side's assets? If they are abroad, it may be difficult to enforce a court judgment. Seek legal advice.
- Is there a commercial relationship that you want to maintain?
- If you are contemplating a warranty claim, check financial caps on liability. Have the financial caps already been met?
- Don't forget that the other side may have a counter-claim.

Consult lawyers and establish the likely cost of pursuing or defending the claim – you are highly unlikely to recover all of your legal costs, even if you are successful. A case budget will help control costs. DLA Piper has its own budgeting tool. A range of options may also be available to help fund the claim.

If you are on the receiving end of a claim, you probably have little choice but to take appropriate action to defend it, but consider counter-claims and remember that an early commercial settlement might be in everyone's interests.

9. Team selection

Consider when you need to involve external lawyers. Do you also need to instruct lawyers overseas? An early assessment of the legal merits of a claim can be key in developing an effective strategy. DLA Piper has its own global litigation managed service.

Determine whether and when an expert should be instructed. This will be important if the dispute involves a technical issue.

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