The Credit Crunch and Commercial Contracts – The Essentials - Professor Khawar Qureshi QC

Businesses are increasingly being forced to assess whether contractual commitments are commercially viable in the present economic climate.

When a business is considering its options, there are some DO's and DON'T's which, if followed, can help to minimize the risk of Litigation.

DO's

- **Analyse the Agreement very carefully as soon as possible using Lawyers who have knowledge of the applicable legal system and consider whether:**

    1. **The Contract terms are flexible enough to allow for variations in payment and performance.**

    2. **There is any argument which can be used against the other party that it is in breach of the Agreement – if the Agreement contains technical requirements (such as a Construction Contract) then obtain technical expert advice as soon as possible.**

    3. **If there is a breach of Agreement or a risk of a breach, consider very carefully whether the other party has any available assets – can you try to obtain an order to freeze the assets (there is little point in trying to litigate if the other party has no funds which can meet a damages claim).**

    4. **If the applicable legal system allows (which may not be the case in some Civil Law systems), try to communicate a negotiated settlement with the other party on a "Without Prejudice" basis as soon as possible before litigating. "Without Prejudice", if it is properly invoked, creates an immunity for all communications made to settle a dispute – whatever is said cannot be used later on in the dispute before a Court or Arbitral Tribunal to show that a party has admitted liability.**

5. **If a dispute seems likely and the matter is subject to a Court's jurisdiction, consider whether you can agree mediation (fast and cost effective non-binding evaluation by a neutral third party of both parties position to try to achieve a settlement), or ad hoc arbitration (meaning dispute resolution outside the Court system so as to achieve a faster result) – it will often be in the interests of the "weaker" party to create delay and resist anything which leads to a faster outcome.**

DONT's

1. **Never write any letter/e-mail or say anything to the other party which concerns the Agreement and could be used to argue that you are not performing your side of the agreement WITHOUT having consulted your In-House Counsel or an external Lawyer.**

2. **Avoid communicating only by telephone – it is vital that you keep a good paper trail of communications with the other party. Memories fade, and documents recording what is happening are the most powerful source of evidence when a dispute takes place. Confirm important matters by e-mail or fax and make sure your records are not lost or destroyed.**

3. **If you must terminate an Agreement or are in circumstances which require you to suspend performance NEVER write immediately to the other party – ALWAYS take legal advice. The reason you might give for termination/suspension may provide no justification and expose you to a large damages claim. However, it is not uncommon for a review of the Agreement and the relevant documents to show that a good reason might exist to justify termination/suspension. It is vital that any letter to terminate/suspend an Agreement is written very carefully so as to identify any justification or defence which might exist.**

<u>CONCLUSION.</u>

In these uncertain times, there have been recent high profile examples of Businesses terminating/suspending performance of Agreements in a way which indicates that proper legal advice was not taken beforehand. The resulting Litigation will, unfortunately (and too late), reveal to these Businesses the importance of doing a "Legal Audit" before taking such steps.

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