Hot Topics for In-House Counsel Handling Disputes

Presentation to ACC Members

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Thursday 25 March 2021 12pm to 1pm

Topics to be covered:

1. Managing Portfolios of Claims in the Current Landscape:
    - Debt Recovery
    - Asset Investigations
    - Funding for Potential Claims and Defences
2. Practical Tips for In-House Counsel to Maintain Privilege
3. Assisting with Gathering Evidence
4. How should In-House Counsel prepare their companies for hearings?
5. Case Study

Managing Portfolios of Claims in the Current Landscape

Managing Portfolios of Claims:

- Tips for Debt Recovery
- The Importance of Asset Investigations
- Risk-sharing, and Third Party Funding

General Tips for Debt Recovery:

- These are **emerging markets** so there is an element of risk
- Pre-contract due diligence
- Act quickly!
- Communication and pressure are key – what are the reasons for non-payment?
  - Cash flow difficulties/insolvency
  - Market conditions
  - Goods not onsold
  - Alleged defects
- These reasons can be used to negotiate. For example, if the debt arises under a supply contract and the goods are still in the buyer's possession, you can seek to negotiate to take them back and resell them to mitigate your loss.

General Tips for Debt Recovery:

- Have evidence to support the debt (original documents)
- Does the company still exist/is it trading?
- Are the contact details current or working?
- Have realistic/achievable targets
- Be flexible
- Get a written admission or commitment to pay or **negotiate a repayment agreement**
- Seek pre-litigation assistance if you can
- Litigation should be a last resort

Case Study on Debt Recovery

Company A is a foreign seller / exporter of non-perishable goods to SEA.

Company A enters into sales contracts with Company B in Indonesia on standard trade credit terms, with payment due 90 days after delivery (without any form of payment security).

Company A does not know much about Company B since they have never dealt with Company B and are limited to whatever they can find about Company B through the internet.

Company A now faces difficulty collecting monies from the Company B who has defaulted on the 90-day payment terms.

Case Study on Debt Recovery continued…

After trying unsuccessfully for several months to contact Company B, Company A is told that the sales representative whom they dealt with has left the company and Company A is experiencing difficulty engaging with anyone else in Company B that is willing to discuss the debt seriously.

Company B does not deny receipt of the goods, nor has it raised any complaints as to the quality of the goods supplied. It appears that it has on-sold all of the goods to other buyers.

After several emails and phone calls which end up inconclusively, 6 months pass and Company A finally manages to speak to the Finance Manager of Company B. Company A is told that Company B is facing financial difficulty due to market conditions and payment problems with its own customers. Company B asks for more time to raise payment, citing substantial payment from its own customers in three to six months' time.

Twelve months later Company A still has not received repayment and is resolved to seeking help to collect the debt.

Tips for Legal In-House Counsel to Maintain Privilege

Privilege: Common law

- ‘**Legal advice privilege**’ or **'Attorney-client privilege**' applies to communications between a client and lawyer if made for the purpose of obtaining or giving legal advice

- ‘**Litigation privilege**’ or '**Attorney work product privilege**' applies to communications between a client, lawyer and third parties, once legal proceedings are contemplated or have commenced, and where the communication has been created for the dominant purpose of such legal proceedings.

Privilege: Common law

To be covered by legal advice privilege, communications with In-House Counsel must fulfil the following criteria:

1. Communications must be with a legal professional (ie. a qualified lawyer)

2. Communications must be **confidential**

3. Communications must be with In-House Counsel in their legal capacity and In-House Counsel must be acting “independently” (or “professionally”) – what does this mean?

Privilege: Civil law

- Seen as an issue of confidentiality and there is a duty on lawyers not to disclose confidential communications between themselves and their clients. Therefore in many instances, privilege only covers documents in the hands of a lawyer.

- Many civil jurisdictions will **not** include as confidential/privileged communications with In-house Counsel

How is privilege approached in international arbitration?

- Three popular approaches:
  - Applying the law of the place where the relevant lawyer is qualified
  - Applying a “most favoured nation” approach
  - Applying the closest connection test ie. the law of the country with the closest connection to the events or documents

Privilege: practical tips

- At the beginning of an investigation, and for sensitive matters, consider gathering evidence orally before sending written correspondence

- In civil law jurisdictions, consider getting external lawyers involved in disputes at an early stage and discuss with them how privilege will be applied in their jurisdiction

- Restrict dissemination of privileged documents on a strictly need-to-know basis and instruct recipients not to forward them without checking with you first. Before forwarding emails, check if they contain privileged information – **it's usually better to start a new email chain!**

Privilege: practical tips

- Remind recipients of privileged information that it is confidential and privileged at the time of providing it

- **Use of the same document for multiple purposes should be avoided**, so communications containing legal advice should be kept **separate** from communications containing other advice (for example, commercial advice)

- Documents generated in the course of the investigation (for example, interviews of employees) should be marked "**Privileged**“/"**For the purpose of legal advice and in contemplation of litigation/arbitration**” or words to similar effect**.** Although the privilege label is not conclusive, such a label may lend weight to the claim of privilege. The privilege label may also serve as a caution to the recipient and help protect against inadvertent dissemination.

Without Prejudice Privilege:

- In **Common law** jurisdictions, e.g. Singapore, communications made in a genuine attempt to settle a dispute that are protected by "*without prejudice*" privilege may not be disclosed or relied on in legal proceedings.

- The rule is rooted in "*the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish*", without being discouraged by the concern that "*anything said in the course of negotiations may be used to their prejudice in the course of the proceedings*".

- Substance over form – "*Without prejudice*" privilege would apply to a communication if it was part of settlement negotiations even if not expressly made/labelled '*without prejudice*'. Conversely, merely labelling a document 'without prejudice' will not guarantee protection

Without Prejudice Privilege:

- If the communication contains a clear admission of liability such that no dispute remains, it could not be considered to be part of a course of settlement negotiations. However, if a dispute remains as to the quantum of the liability, it could still be considered to be part of settlement negotiations and thus protected by "*without prejudice*" privilege.

- Parties may also agree to waive the protection accorded by "without prejudice" privilege.

- In **Civil Law** jurisdictions, the concept often does not exist!

Without Prejudice Privilege: practical tips

- Clearly designate/label where meetings or correspondence are meant to be "*without prejudice*" – protection still depends on substance of discussions, but a more convincing argument can be raised if clearly designated/labelled. When in doubt, mark it as "*without prejudice*"

- Make sure your commercial teams attempting to negotiate a settlement are aware of this! Particularly in civil law jurisdictions….

- If discussions or documents do not amount to genuine attempts to settle a dispute, they will not be protected from disclosure to the court, regardless of any attempt to label them '*without prejudice*'.

Assisting with Gathering Evidence

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- Begin the process at the earliest opportunity as gathering evidence from a pool of voluminous and unorganised documents only after the dispute arises can be an expensive and frustrating process, and may also cause unnecessary delay in starting the proceedings or responding to a claim
- Adopt internal policies and practices to maintain electronic records of email correspondence, key documents, invoices (for proof of damages), meeting minutes.
- Timelines for document production in arbitration can feel very short when documents are voluminous, and have to be organised, or brought out of archive.

Preparing for Hearings

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- Carefully brief witnesses on hearing procedure – what to expect, what they are allowed or not allowed to do during the hearing, sequestration of witnesses, who is allowed to be in the same room etc.
- Ensure that virtual hearing equipment (headset microphones, second camera etc) is prepared in advance and tech support on standby during the hearing
- Agree on how to communicate (securely!) with your instructed counsel during the hearing if instructions need to be conveyed – instant messages etc.
- Request to have access to the real-time transcript (if you wish to follow proceedings closely).

Theoretical Case Study

- We acted for a large PRC company, as Claimant, against a SG company, as Respondent, in a SIAC arbitration in Singapore.
- Before we were instructed, In-House Counsel of the Claimant had initially instructed Chinese Counsel, who were not experts in international arbitration, and advised to sue the Respondent in the Chinese Courts, as this was what they were familiar with.
- Respondent took out an anti-suit injunction in the Singapore Courts to stop the Chinese Court proceedings and brought arbitration proceedings in Singapore instead. Claimant continued to use Chinese Counsel for the arbitration proceedings.

- One of the Claimant's key personnel left the company by the time the arbitration was commenced, without a witness statement having been taken, and without securing his relevant knowledge over the identification and location of key documents, with the result that the Claimant was handicapped in the arbitration as many key documents could not be found and relied upon.
- The Tribunal recused himself halfway through the arbitration because the Tribunal discovered that his firm's Singapore office had acted for the Claimant's subsidiary company two years ago in an unrelated transaction (even though the Tribunal was based in his firm's London office).

- Numerous delays in meeting the administrative aspects of an arbitration invited the Respondent to cast a negative image of the Claimant before the Tribunal, labelling them “guerilla tactics”, poisoning the Tribunal’s mind and prejudicing the Claimant’s case even before the merits hearing.
- The final tranche of SIAC deposits could not be paid within the deadline due to foreign exchange transfer limitations. An application for unpaid deposits was made by the Respondent, and an order was made by the Tribunal against the Claimant for these unpaid deposits.
- We were instructed to replace Chinese Counsel one month before the merits hearing.

- The procedural order for the hearing provided that witnesses could not be present when other witnesses were giving evidence – this meant that as a witness himself, the Claimant's CEO could not attend the hearing while other witnesses were giving evidence.
- Chinese Counsel were disinstructed abruptly – we were not provided with all the documents and could not properly prepare until the hearing bundle was shared with us, which took time as payment for the virtual bundle could not be made promptly to the service provider.

WHAT COULD IN-HOUSE COUNSEL HAVE DONE DIFFERENTLY?

Thank you

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