Strelia

Cooperation between the company lawyer and the attorney to optimize the handling and winning of disputes: checklist

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It goes without saying that good cases lead to winning disputes. It also goes without saying that even good cases sometimes lead to lost disputes, and that all disputes disturb the company's daily operations because they involve the company's significant time, effort and cost. Yet, thanks to a good cooperation between the company lawyer and the attorney and to optimal preparation, handling of disputes can be enhanced to increase the company's chances of success in the event of a dispute.

During our presentation on 16 September 2021 under the auspices of the IBJ-IJE, we shared our insights on how to optimize the handling of disputes. Our detailed presentation has been shared with you already. Via this newsflash, we submit our checklist for your future eased reference.

1. Key points in any litigation case

It is often said that winning a dispute requires the appointment of a good attorney. Even though that is correct to some extent, winning also (if not primarily) requires proper case preparation at the company.
To this end, it is crucial that the **company in-house counsel should:**

- ✓ **facilitate** fact finding, with the possible help of their attorney;
- ✓ **"educate"** their attorney on the relevant facet(s) of the company's business and culture. In court, credibility is key. Such credibility can only be achieved if the attorney knows what they are talking about;
- ✓ **challenge** their attorney's work: "assumptions" are often the difference between a win and a loss.

2. Optimized (future) case preparation

Optimized case preparation does not start when the actual problem occurs. The foundations for the optimized preparation are laid down during the **contract drafting**, during the **execution of the project** and can be **fine-tuned once the dispute has arisen.**

2.1. Future dispute preparation during the contractual phase

During the contract drafting, shift the midnight clauses – dispute resolution and applicable law clauses – to the afternoon agenda! The forum selected will have an impact on the cost, speed and decision on the merits of the dispute.

Consider arbitration as the preferred forum if the contract/project:

is very **technical**	because	the arbitrators of your choice are more likely to **study the entire file in detail** whereas state judges might not
requires highly **pragmatic** and **specialized** knowledge	because	your company has a say in **selecting the decision-maker**
is **delicate** so that **confidentiality** of a potential future dispute may be key	because	arbitration is **confidential**
is **international**	because	arbitration guarantees a more **neutral forum** and often an easier way to **enforce judgments internationally** thanks to the New York Convention
is **dynamic** so that a lot of people may be involved but **less paper trail**	because	**witnesses** can be heard in arbitration but (mostly) not in Belgian court proceedings
involves **foreign languages**	because	arbitration is more flexible than in approach to **multi-language issues** than Belgian, and in particular French-speaking, state courts

But be aware of the:

- cost (higher than state courts),
- lack of appeal,
- slower start of the dispute (appointment of arbitrators may lead to a delay).

If the project does not have the above characteristics, **state court is likely to be more interesting.**

Think about **aligning dispute resolution clauses in related contracts:** arbitration envisaged in the main contract but state courts in sub-contracts equals looking for trouble.

Verify if **multi-tier dispute resolution clauses** are useful and if so – whether the first stage should be **mediation, conciliation or yet another form of ADR,** and whether it should be mandatory or a mere intention. Mandatory first phase may lead to an obligatory suspension of a court case. Beware that Belgian courts currently more and more impose mediation initiatives on the parties.

Think about **applicable law:** it can make your case win or lose. Classic example: CISG with the strict requirements regarding course of action in case of material breach, which varies significantly from national (Belgian) law.

Have particular attention to interest:

- beware of the current **mandatory rules** which impose strict framework on **payment terms** (new rules as of 1 February 2022: Law of 2 August 2002 on payment terms in commercial transactions);
- consider **interest rate** to be applied for compensations to be paid out under the contract: if no contractual solution stipulated, legal interest rate will apply (currently 1,75%).

2.2. Particular points of attention during the project's execution

Make sure your company's **correspondence** exchanged over the course of a project is **optimal**.
From the perspective of a dispute, the correspondence:

- should be drafted having in mind that it may some time be **read by a third party** (court or arbitrator);
- can at some point be **used against your company**;
- should be **sufficiently polite** and to the point, without unnecessary aggressive, emotional and polarized language;
- should **explain** why there may be longer silences between various e-mails;
- might be **drafted in the future language** of the dispute to limit litigation costs;
- be **stored in one place** (e.g. cloud) so that the company has access to it even after various people involved in the project leave the company.

Make sure to prepare **proof of potential damage and contractual fault** for when things go sour.
Keep track of the possibilities to prove the fault (bailiff intervention? witness affidavits? own expert reports?).

2.3. Particular points of attention shortly before the occurrence of and during the handling of the dispute

Check the **best course of action** before taking it to avoid backfiring: legitimate actions on the face of it can turn out illegitimate because of nuances in the applicable law such as abuse of right.

Check whether a **final notice of default** is needed.

Check the **financial situation of the opponent** before launching the case:

- is security for costs required?
- is securing the claim required?
- what are the chances of actual enforcement against the opponent's assets?

When the dispute is imminent:

- check whether it is best to appear as claimant or respondent:
  - strategic considerations (psychological impact on the decision-maker),
  - legal fees: determined only based on the amount of the principal claim, not the counterclaim;
- determine the budget for the case;
- check the available dispute financing options:
  - own financing?
  - third party funding?

Consider when to request **assistance of the attorney?** Consider **which attorney to hire:** "fresh" attorney or the one that has accompanied the project from its inception? Have we submitted the **entire case file** to the attorney including the disadvantageous documents?

When the dispute is ongoing:

- Have we considered accrual of interest or, to the contrary, the possibility of putting the amount at stake in escrow in order to stop the running of the interest?
- Will the company lawyer take part in the oral hearing?
- Is the company prepared to participate in a conciliation or mediation that the courts may require at the introductory hearing?

For any additional information, do not hesitate to contact us or your usual Strelia contact person.

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