Chartered Institute of Arbitrators – Trinidad and Tobago Chapter

"Six Things Every Caribbean Business Should Do Now to Prevent and Resolve Disputes"

KEY TAKEAWAYS

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Your Objectives

There are 6 practical action steps that businesspeople and their lawyers should do now to:

- Prevent business disputes (at the front-end and during the life of a contract)
- Manage potential and emerging disputes effectively, thus reducing business disruption
- Reduce the risks of unhappy, expensive, or unexpected outcomes.

The 6 Things You Should Do Now

1. Play an Active Role Throughout

2. Focus on Interests

3. Plan for Disputes when in the Contract Phase

4. Get the Right Support (External Resources)

5. Be Ready to Settle by Being Prepared

6. Align Communications with Your Interests

1. Play an Active Role Throughout

As *a businessperson*, this is feasible – it is not too difficult nor time-consuming

- Preventing and resolving disputes is not "something for lawyers"

- Establish a working protocol with your lawyers:
    - what should be communicated to you & how often
    - input you want to provide (and matters on which you do not want to provide input)

- Accept your lawyer's guidance on certain things:
    - manner of dealing with the other side and the court or tribunal
    - procedural matters – e.g.:
        - granting reasonable time extensions
        - being forthright with court/tribunal
        - need to disclose documents as rules require
        - civility/courtesy to other lawyer [none are indications of a lawyer's weakness]

As a lawyer, your business clients will often be pleased that you encourage them to do/understand these things, explaining reasons as needed.

- Client involvement & understanding will:
    - assist you to do a better job
    - make your role easier
    - result in better outcomes
    - result in a more satisfied client, whatever the outcome

- Some clients may want less or little involvement in a dispute, but there is no downside to offering to keep them engaged.

2. Focus on Interests

- Reflect upon what the commercial relationship underlying the contract/dispute represents for your business, and for the other party

- Figure out what you want to obtain and set clear objectives – with priorities

- Think creatively about the objectives – i.e.: a restructured or new business relationship

- Winning is not a business objective: this is an objective for law firms – businesses want results

- Establish reasonable business objectives at the earliest opportunity, not late in a dispute
    - objectives can be updated if a settlement opportunity arises, not established for the first time

- Separate the people from the problem:
    - disputes are business problems
    - they should be handled in a business-like manner, with reasoned strategies and tactics, not emotions or personalities
    - punishing the other side or teaching them a lesson is not a valid business objective

- Sometimes litigation can be the appropriate option, but it must always be considered as a means, not a goal:
    - litigating to get results, not to win the case

    - too often, strategies and tactics for disputes are driven by emotion or a desire for "revenge" or vindication
    - statements such as "I want them to feel the pain" or "I don't care what it costs or how long it takes" are common red flags

- Encourage and incentivize those supporting the case – external and internal – to be realistic – you want those advising you to "speak the truth" to you and provide honest case assessments
    - you do not want your lawyer to be overly optimistic so that you will think the person is "tough" and "in your corner"
    - those supporting the case should have incentives to be realistic, not overly optimistic
    - conversely, overworked or stressed employees may sometimes be overly pessimistic about the chances of a dispute
    - expressing disputes in terms of best case, worst case, and most likely case can be reality testers that avoid overly optimistic or pessimistic views

3. Plan for Disputes When in the Contract Phase

- When drafting the dispute resolution clause consider all options
    - don't assume your options are going to court or doing nothing!

- Main available dispute resolution processes:
    - Negotiation
    - Mediation
    - Arbitration
    - Court litigation

- Key differences between arbitration and mediation:
    - arbitration is an adjudicative, binding process
    - mediation is a non-binding procedure where parties attempt to agree on a mutually satisfactory settlement with the assistance with a third-party (the mediator) who does not have any authority to impose decisions
    - if the disputing parties don't reach an agreement in mediation, they can proceed with (or continue) an adjudicative process, whether arbitration or court litigation

- Consider adopting an escalation clause (sometimes known as a step clause), with a non-adjudicative process (negotiation; mediation; or one followed by the other) followed by adjudicative process (arbitration or court litigation), but also consider that:
    - most of these options are not mutually exclusive: while arbitration and court litigation cannot interact, it is possible negotiate or mediate while involved in court litigation or arbitration
    - the processes do not need to be sequential – you can:
        - do them in parallel – can take a pause in the litigation/arbitration to negotiate/mediate
        - try them more than once during the adjudicative dispute resolution process, depending on what parties consider most fitting to their interests from time to time
    - it is not a sign of weakness to propose to negotiate or mediate

- <u>Key points for dispute resolution clauses:</u>
    - keep dispute resolution clauses realistic both in terms timing and expectation
    - prefer model clauses:
        - they are drafted by experts and tested in the courts
        - they avoid legal costs for the drafting
        - they minimize the risk of interpretation issues, with consequent time and costs savings
        - model clauses are easy to find; they are provided with every set of arbitration and mediation rules

4. Get the Right Support (External Resources)

- Get the right support
    - get support based on expertise, not just because of a long-standing relationship
        - a trusted advisor should ensure you engage the most appropriate lawyer for the dispute
        - being a “junk yard dog” / aggressive litigator is not a qualification of a lawyer’s expertise
    - you need a lawyer who will:
        - provide an objective assessment of strengths and weaknesses of your case
        - work with you to develop a strategy and tactics to achieve your dispute resolution objectives

- is reasonably familiar with the type of dispute and the resolution process, in order to deliver the results

- Get an honest and reliable assessment of the case at the outset: best/worst/most likely outcome

4. Assessing risk & cost

Potential Outcomes	Costs
Best Case $ _____	$_____
Worst Case $ _____	$_____
Most Likely $ _____	$_____
Est. recoverable vs adverse costs?	$ _____
Other considerations: Relationship?	
[Net financial impact if no settlement: $ ____]	

- get an updated assessment as new information comes to light and/or circumstances changes (including business circumstances)
- figure out and then truly focus on the real issues of consequence that are in dispute
- reassess periodically

5. Be Ready to Settle by Being Prepared

- "Winning" means getting a good result, not necessarily winning the court litigation or arbitration

- Goal Setting

  "Three numbers" you need to have before any negotiation or mediation:

5. The three numbers you must have for every dispute

- Assuming you determined realistic objectives at the beginning of the dispute (as advised in point 2 above):
    - keep true to your objectives, i.e., avoid being influenced by emotions or momentary ups and downs in a case
    - BUT be agile, know when to *pivot* when new information or circumstances should change your objectives

- Budgets/Financials
    - Recovering sunk costs is not a valid business objective – it's too late: they are sunk
    - Third Party Funding: if you have a big dispute, you can consider funding (financing) options.
    - expenditure on a dispute should be proportional to the amount in issue and the importance of the dispute to the business
    - adverse costs are awarded in many jurisdictions and in some dispute resolution processes (arbitration), and this risk should be included in cost calculations
    - consider your non-monetary costs: they can be significant, especially in any dispute involving senior executive/management time, which takes them away from their main objectives of growing the business.

6. Align Communications with Your Interests

- Quick rules on writing effective letters & emails:
  - written communications have a *long shelf-life*: before writing and sending, make sure you might not regret it in the future:

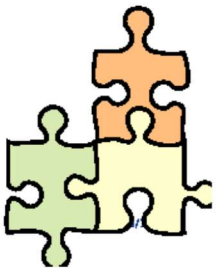
6. Written communications

Audience/Evidence: who are the likely readers?

Objective: state the reason for the letter. If you cannot, then do not send.

Argument: the facts and the contract or law that support your "ask".

Request: Is this something the other side can reasonably provide? If they do not, what is the consequence?



- Communicate clearly:
  - with the other party (for dispute prevention and in direct dispute resolution negotiations)
  - with your lawyer
  - among your team members

- Align communications – whether written or oral – with your objectives for the dispute

Conclusion

There you have them!

6 things that every business should do now to prevent and resolve disputes.

Of course, there are other things you should do, but if you do these 6 things you will be much further ahead on preventing and resolving disputes.

View the Webinar

These Key Takeaways are substantially based on a 60-minutes webinar presented on 22 November 2021. The webinar is available to view, without charge, at:

Facebook: *https://www.facebook.com/CIArbTT*
LinkedIn: *https://www.linkedin.com/company/ciarbtt*
YouTube: https://www.youtube.com/channel/UC2FuU3RlRucXf_kKm5KskBQ

Any Questions?

If you have any questions, feel free to directly contact any of us at the email addresses below:

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