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TEMPLARS ThoughtLab

Pre-Dispute Planning: Protecting Business Relationships in Nigeria

Introduction

The author of *The Art of War*, Sun Tzu once said, *“In war, prepare for peace; in peace, prepare for war”*.

The reality of modern commercial relations is that disputes have become an inevitable feature of doing business, particularly in Nigeria, given the peculiarities of the Nigerian commercial sphere. However, the way disputes are managed can significantly impact the long-term health of business relationships.

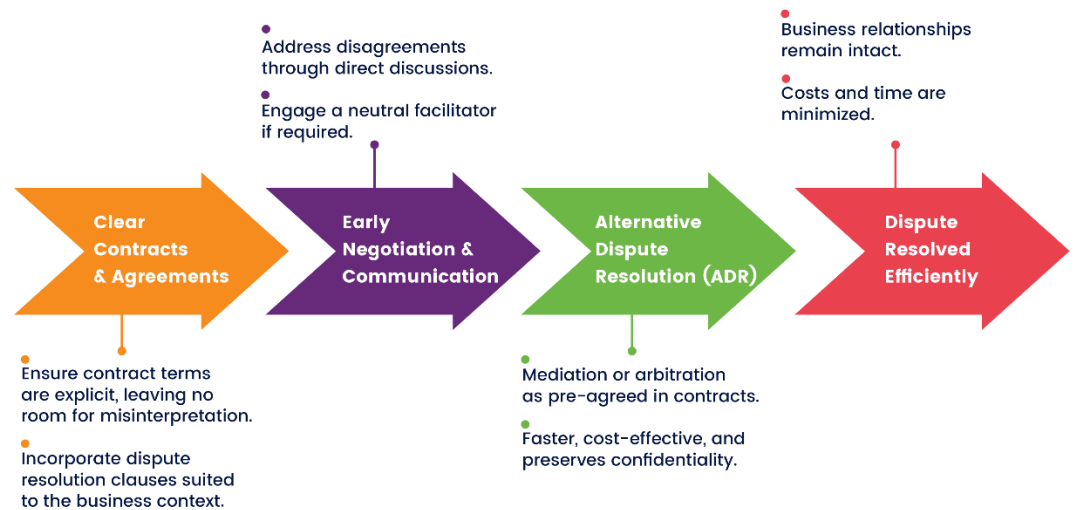
Commercial entities in Nigeria, ought to prepare for war in times of peace and adopt pre-dispute strategies to mitigate risks, reduce costs, and preserve valuable partnerships when disputes arise.

This article explores the concept of pre-dispute planning, its benefits, and practical steps Nigerian businesses may take to implement it effectively.

Understanding Pre-Dispute Planning

Pre-dispute planning involves businesses taking proactive measures, to establish frameworks for avoiding disputes all together and for resolving the conflicts that ultimately arise, amicably and efficiently. These measures often include drafting clear and comprehensive contracts, adopting alternative dispute resolution (ADR) mechanisms, and maintaining open communication channels. The goal is to anticipate potential areas of contention and implement strategies to address them before they escalate.

Pre-Dispute Planning Approach



Preservation of Business Relationships

There is a Nigerian adage that: *“two people cannot go to court and remain friends”*. Disputes that escalate into adversarial litigation often result in damaged relationships. Pre-dispute planning can assist in creating avenues for amicable resolution of inevitable disputes as well as foster trust and collaboration even during conflicts. For businesses in Nigeria, where personal relationships and networks play a critical role, preserving goodwill can be crucial for long-term success.

Costs and Efficiency

Pre-dispute planning helps parties to budget for potential costs that may arise in the resolution of potential disputes and to select appropriate dispute resolution mechanisms in line with their purposes. This is essential for providing clarity to businesses on potential costs that may be incurred and whether such costs can be accommodated by the relevant commercial entity. For instance, litigation in Nigeria can be very time-consuming due to backlogged courts and procedural delays. Arbitration, on the other hand, may be expensive, but it usually provides a level of certainty to parties as they can choose their Arbitrator(s) based on their expertise in the field and it is also usually much faster than litigation. Pre-dispute planning enables businesses to choose what dispute resolution mechanism works for them well in advance of any dispute arising between the parties.

Enhanced Predictability and Control

Pre-dispute planning also assists parties in achieving a certain level of predictability and control over how their disputes will be handled when they arise. This allows businesses to retain greater control over the dispute resolution process and reduces uncertainty.

Confidentiality

For commercial clients, maintaining confidentiality is often important. Every dispute resolution mechanism has different levels of confidentiality control attached to it. For instance, in Litigation, every component of the parties' dispute has the potential to become a matter of public record. On the other hand, other Alternative Dispute Resolution mechanisms like Arbitration, Mediation or Negotiation, offer privacy, ensuring that sensitive business information remains protected. Pre-dispute planning helps parties decide in advance what levels of disclosures they may be comfortable with and ensure that certain components of their dispute remain confidential where necessary.

Key Components of Pre-Dispute Planning

Clear and Comprehensive Contracts

Contracts are the foundation of any business relationship. It is a popular saying in the legal community that: *"the language of a contract is not just a means of expression but a battlefield for interpretation."* It has also been said that most conflicts in contracts arise not from bad intentions but from ambiguity resulting from bad drafting. A critical component of pre-dispute planning is to ensure that contracts are properly drafted, as the clarity and exhaustiveness of the contract itself limits certain disputes from even arising. Nigerian businesses should ensure that their contracts include precise terms and conditions to minimize ambiguity.

Incorporating Appropriate Dispute Resolution Mechanisms

A necessary component of clear and comprehensive contracts discussed above is the incorporation of appropriate dispute resolution mechanisms based on the unique requirements of the business. Dispute resolution clauses are sometimes wrongly considered as *"one size fits all"*. This is not the case. The more appropriate way of considering these clauses in contracts is to see them as *"made to order"* or *"bespoke"*, in the sense that they should be tailored to fit each unique set of circumstances. For instance, why choose to incur the expense of three Arbitrators where one would suffice in a dispute that may not be overly complex? On the other hand, why choose one Arbitrator in a complex and specialised dispute where it is preferable to have three Arbitrators who are experts in the field to resolve the issue holistically? Or why go to Arbitration at all, when litigation may better suit the objectives of the relevant business. Businesses need to consider all the possible factors involved in the dispute when drafting dispute resolution clauses. They need to clearly specify the preferred method of resolution, governing law, and jurisdiction. Businesses should also consider multi-tiered clauses mandating negotiation or mediation before proceeding to Arbitration or litigation.

Regular Relationship Audits

Periodic evaluations of business relationships can help identify potential areas of conflict. By addressing these issues early, businesses can prevent them from escalating into full-blown disputes.

Training and Sensitisation

Certain conflicts that result into full-blown disputes, often could have been effectively settled at a preliminary stage if not for mismanagement of the conflict in the early stages, by the personnel of the relevant businesses. Often, it becomes apparent that a dispute can be settled after an action has been commenced and funds have already been dissipated in either defending or prosecuting the dispute. Educating key personnel on dispute resolution strategies ensures that they are equipped to handle conflicts effectively. Nigerian businesses should consider training programs that

Focus on negotiation and mediation strategies that help manage conflicts before they escalate into full blown disputes.

Also, personnel need to be trained on the impact of external correspondence and the need to be careful about what is being put in writing in the course of a transaction or contract management. For instance, a simple letter may potentially revive a matter that has already become statute barred.

Document preservation

Proper document preservation is a crucial aspect of pre-dispute planning for businesses, as it ensures that relevant records are available in the event of a dispute. Courts and arbitral tribunals rely on documentary evidence to assess the merits of a dispute making it essential for businesses to implement robust document retention policies before a dispute arises. Effective document preservation not only strengthens a party's position in litigation or arbitration but also mitigates the risk of adverse inferences, spoliation sanctions, or loss of critical information.

Businesses should implement clear document retention policies that comply with legal and regulatory requirements while also considering operational needs. It is crucial to account for relevant statutes of limitation, ensuring that no document is destroyed before the applicable limitation period for the subject matter has fully elapsed.

Witness preservation

Related to the point above is the need to ensure proper witness preservation. Businesses need to identify employees or third parties who played essential roles in transactions. These individuals are often best positioned to provide reliable testimony due to their direct involvement.

Business may consider having these key figures sign agreements to remain available as witnesses which will have the effect of securing critical testimony and mitigate the risk that, once a dispute arises, these individuals might be unavailable or unwilling to cooperate. These agreements may include clauses that extend witness availability even after an individual leaves the organization. Often, disputes surface after personnel changes and ensuring that former employees remain bound by their witness obligations preserves their evidence.

Conclusion

Pre-dispute planning is a strategic approach to disputes that underscores a business' commitment to long-term success and relationship management. For Nigerian businesses, adopting this proactive mindset can offer significant advantages in navigating the complexities of commercial disputes. By adopting clear contracts, embracing ADR mechanisms, and fostering open communication, businesses can protect their relationships, enhance their reputations, and position themselves for sustainable growth.