

ACTIVE litigation management is often overlooked by small and medium-sized enterprises (SMEs). This can stem from a number of reasons. Some businesses do not fully understand the implications of a dispute and may hope that the matter ultimately gets resolved through negotiation. In some cases where businesses have to prioritise their resources, such measures are best seen as low-priority preventive measures for a situation that might not materialise.

Active litigation management should not be seen as simply a luxury. Rather, it should be an important and integral part of an SME's overall business plan. This article will explore the importance of active litigation management, especially as Singapore companies are venturing beyond our shores to developing countries where the legal systems may not be particularly sophisticated.

ASSESSING THE IMPLICATIONS

Conducting a proper appraisal of the full implications of any litigation (as part of active litigation management) allows SMEs to make better, more well-informed decisions on whether, and at which stage of legal proceedings, to push for a settlement of a dispute rather than to pursue litigation. This will in turn lead to better outcomes from disputes. Here are some implications which should be considered in appraising a dispute.

• **Length of time for court litigation**

The length of time taken to conclude a court litigation is an obvious factor to consider in deciding whether to commence court proceedings. Long-drawn court proceedings often result in escalating legal costs, and also take up valuable management time. Active litigation management allows SMEs to work out realistic estimates on the expected length of a litigation, which leads to more optimal budget planning.

In developing countries such as Thailand and Myanmar where court timelines may vary significantly in practice between different levels of courts and between courts in different parts of the country, the involvement of a good, locally-savvy legal adviser in litigation management becomes very useful.

Good litigation management would also factor in the possibility of an appeal (or appeals) against a first-instance judgment, which could significantly prolong the total time needed to reach final resolution of a matter.

For example, while the grounds for appeal in the Courts of Justice in Thailand are limited, a litigant could in an appropriate case have up to two rounds of appeal, and each round of appeal could take between one-and-a-half and two years to resolve.

Further to working out realistic estimates on the expected length of litigation, active litigation management can often allow SMEs a certain degree of control over the rate of progress of court litigation. This can be useful, particularly in cases where, for financial reasons, SMEs may want to position for litigation to conclude within a certain time window.

In developing countries such as Myanmar where courts take a more "hands-off" approach to the progress of a case, active litigation management can make a significant difference to the progress of a court litigation.

• **Legal costs**

Another factor to consider is the likely quantum of legal



TAKING ADVICE

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costs recoverable from (or payable to) the adverse party in a litigation. This may vary quite significantly between jurisdictions. In Thailand and Myanmar, costs awarded to the winning party are remarkably low (rarely exceeding US\$2,800 and US\$50 respectively).

SMEs would do well to consider, with the benefit of good legal advice, how to improve their chances on obtaining a higher award of legal costs against an adverse party and minimise their exposure to legal costs in the case of an unfavourable judgment. In Singapore, this can be done by serving an adverse party a well-considered offer to settle in a prescribed form.

• **Reputational consequences**

Finally, SMEs would do well to consider the reputational implications of bringing a matter to court. In certain cases (eg a civil action against a trademark or copyright infringer), the real value of a court litigation may lie in the signalling effect that it sends to other industry players or counterparties.

In other cases, winning a litigation may come at a severe cost to the SME's reputation in the particular industry. Due regard and attention to the potential

reputational consequences of a court litigation is vital, especially for SMEs looking to build their branding in developing countries. Knowing the potential reputational consequences for a counterparty can also give SMEs a vital edge when engaging in settlement negotiations.

AVOIDING POTENTIAL PITFALLS

Active litigation management can also ensure that SMEs avoid potential pitfalls in navigating the dispute resolution process. To this end, we recommend that SMEs seek legal advice on a dispute as early as possible in order to identify and avoid any pitfalls that may exist. Here are some commonly encountered pitfalls which, if not properly managed, could severely prejudice an SME's chances of a positive outcome in a given litigation.

• **Limitation periods**

Most jurisdictions impose certain time limits on when litigants can bring their claims. These time limits differ from jurisdiction to jurisdiction, and a failure to observe them has put many a claim at risk of being time-barred.

Also, certain actions taken may inadvertently result in limitation period being reset. For example,

under Sections 26 to 28 of the Myanmar Limitation Act, the accrual of a debt may, in the case of an acknowledgement of the claim or the making of part payment, be deemed to have taken place on the date of such acknowledgement or part payment.

• **Taking consistent positions and preservation of evidence**

It is also important in any litigation to ensure that, as far as possible, consistent positions are taken throughout the course of the dispute. Inconsistent positions can seriously compromise the credibility of one's position. It is therefore important for litigants to craft a coherent case theory as early as possible, and to actively manage its communication channels with adverse parties.

Keeping proper records and proper preservation of evidence is also vital for success in any litigation. This can take the form of preserving the documentary records of an employee who is leaving the company, or even taking steps to ensure that key witnesses

are available to give evidence on the SME's behalf when required. All of the above require active litigation management, which can go a long way to increasing one's chances of success in a litigation.

• **Enforcement of judgments**

Finally, active litigation management entails paying proper attention to issues of enforcement of judgments, even before litigation proceedings begin. This is especially important for SMEs venturing beyond Singapore's shores, where cross-border enforcement issues come to the fore. It is no use obtaining a favourable court judgment if the same cannot be effectively enforced against the adverse party's assets, which may be situated in another jurisdiction.

CONTRACT DRAFTING

Ultimately, active litigation management must start from the point of contract drafting. SMEs often pay little or no attention to the dispute resolution and governing law clauses in their contracts. This can lead to serious problems down the road when relations with one's counterparties turn south.

For example, Singaporean SMEs investing in Thai-incorporated joint venture companies often prefer, for reasons of familiarity, to specify that all disputes arising out of the joint venture or shareholders agreement should be submitted to Singapore courts. However, this leads to problems of enforceability down the road as Thai courts do not recognise or enforce foreign judgments, but can only accept foreign judgments as evidence in a new trial.

Having a good working understanding of the various alternative means of dispute resolution available also allows SMEs flexibility in crafting a dispute resolution clause in their contracts which best suits their business needs. ■

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