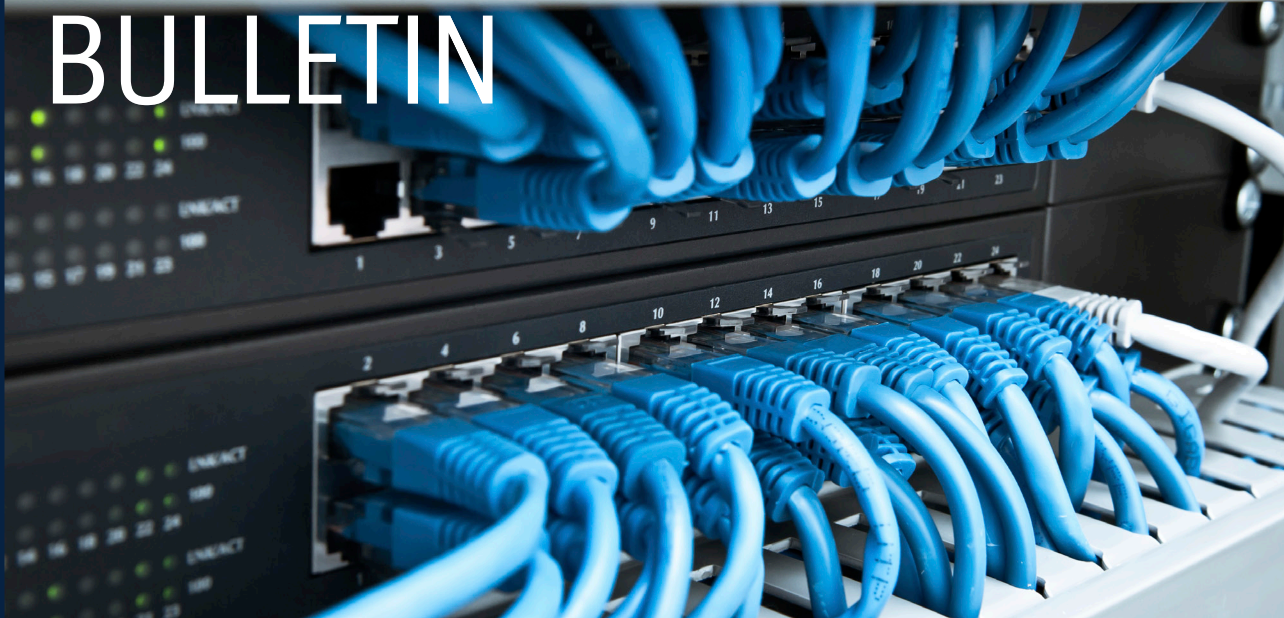
Dispute Resolution

September 2012

DISPUTE RESOLUTION BULLETIN



E-disclosure

These days, commercial organisations receive and produce an ever-increasing volume of electronic documents, from emails to multiple versions of Word and Excel documents. The management and storage of electronic documents can be a significant burden and it is worth having a well thought out document retention policy in place, both to facilitate the company's day to day business and because the company will be required to disclose electronic documents which are or have been in its possession or control if it becomes involved in litigation.

A party to litigation is required to disclose all the documents upon which it relies, which adversely affect its case or another party's case, or which support another party's case. In addition to hard copy documents, this extends to all types of electronic documents. As well as documents that are readily accessible from computer systems and other electronic devices, it includes deleted documents, documents which are stored on servers and back-up systems and metadata (information associated and stored with electronic documents, for example, information on who created the document, who has viewed and edited it and the dates on which it was created, viewed and edited).

Before providing disclosure, a party is required to make a reasonable search for disclosable documents. What is reasonable will depend on the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval of documents and the significance of any document which is likely to be located during the search.

As a rule of thumb, the more complex a claim and the higher its value, the wider in scope the reasonable search will be. For example, in a fraud claim, a reasonable search is likely to include forensic examination of the relevant individuals' laptops, PCs and mobile devices and the retrieval of deleted material, whereas in a claim for breach of contract, it might be reasonable to limit the scope of the search to what is stored on the party's IT system.

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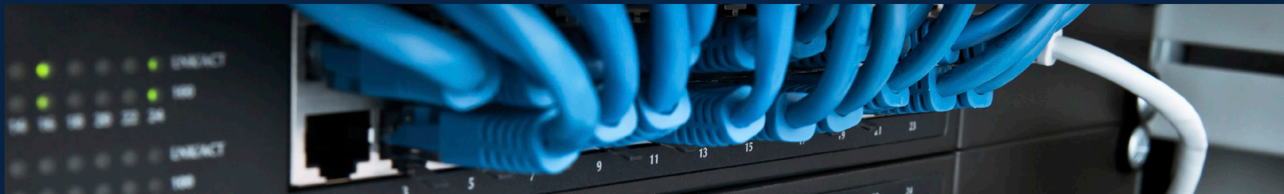

Searches for electronic documents are usually conducted by carrying out keyword searches within a particular date range. In higher value cases, the parties are required to discuss in advance and agree, as far as possible, the date range within which the searches will be carried out, the keywords which will be searched for and whether the search can be limited to particular custodians of documents.

The parties are also required to discuss the categories of electronic documents within their control; the computer systems, electronic devices and media on which any relevant documents may be held; and their storage systems and document retention policies. If it appears that any disclosable documents have been lost, for example because they have been deleted as a matter of routine in accordance with the party's document retention policy, the party will need to explain this.

In substantial cases, it is usually necessary to engage the services of an external e-disclosure provider to conduct the search using its own specialist software. E-disclosure software can identify and remove duplicate documents, which can substantially reduce the number of documents to be reviewed by the parties' solicitors.

When the solicitors have identified which documents must be disclosed, the parties will exchange lists setting out the disclosable documents which are or have been in their possession or control. The list must include any disclosable documents which are no longer in the party's possession or control, for example because the document has been deleted or lost. It is essential that the party believes the extent of the disclosure search was reasonable in all the circumstances and it has drawn attention to any particular limitations on the extent of the search and has explained why the limitations were adopted.

The disclosure statement is verified by a statement of truth which must be signed by an appropriate person on behalf of the party.

It is vital that the person signing the statement of truth has an honest belief in the truth of the disclosure statement because if it contains a false statement which he did not honestly believe to be true, proceedings for contempt of court might be brought against him. For a company involved in litigation, it is therefore vital to obtain legal advice at an early stage in the proceedings, in order to ensure that it complies fully with its disclosure obligations.

For more information, please contact Jane Hugall, Associate, on +44 (0)20 7264 8206 or jane.hugall@hfw.com, or your usual contact at HFW.

The basics of corporate insolvency explained (Part 2)

In the second part of his basic introduction to corporate insolvency, Charles Caney looks at administration, Company Voluntary Arrangements (CVAs) and liquidation.

Administration

The administration procedure can only be used if the company either cannot or will not be able to pay its debts and it is likely that the purposes defined in Schedule B1 of the *Insolvency Act 1986* (the Act) will be met. In order of importance, these are to:

- Rescue the company as a going concern.
- Achieve a better result for the creditors as a whole than would be available on a winding up.
- Make a distribution to preferential or secured creditors through the sale of property.

A company or its directors (and sometimes a floating charge holder) can initiate administration out of court. This is cheaper and easier, allowing members and directors to actively tackle financial difficulties, heading off trouble before it is too late. A creditor can only instigate insolvency proceedings by a court application.

When an administrator is appointed, he effectively takes over running the company, including negotiating with creditors. This is different to the procedure in many foreign countries, where the original management may remain in charge, subject to the court's supervision. An administrator's proposals can be accepted by a majority of creditors, with voting power based on value of claim.

Throughout an administration, a moratorium is in force. Creditors may not take action in respect of debts owed to them by the company and any existing winding up petitions will be dismissed by the administration order. This offers significant benefit to the debtor, holding back the potential tide of creditors.

If the debtor company has contracts with creditors which include insolvency termination clauses, these will not be affected by the moratorium: although creditors will not be able to sue, they could cease performance, with potentially drastic consequences.

Whilst an administrator does not have all of the powers of a liquidator, he is able to set aside transactions detrimental to creditors: those at an undervalue, or preferential to particular creditors, or that defraud creditors.

CVA

A CVA is a less formal procedure, created by the Act and supplemented by the *Insolvency Act 2000*. Since it is essentially a compromise agreement, the creditors must agree for it to work. CVAs can be entered into by a company board or an insolvency practitioner acting on its behalf and can be used alongside formal insolvency proceedings. The company may be in financial difficulties but need not be technically insolvent. The company will have a nominee (usually an insolvency practitioner) acting for it, who will make proposals to creditors and supervise implementation.

Traditionally, CVAs have been unpopular: there is no moratorium (except as an option for small companies, by application to court) and notifying creditors of proposed meetings was problematic. However, since 1 January 2003, both creditors who receive notice and those who would have been entitled to do so will be bound by a CVA agreed by the majority of creditors voting, making them a more effective tool.

Liquidation: the last resort?

Liquidation involves realising and distributing a company's assets between creditors, in line with the statutory order of priority. It spells the end of the company. It is usually a last resort when the purposes of administration cannot be met, as it is unlikely to offer the same returns for creditors and shareholders.

Insolvency is the primary reason for a decision to liquidate, although solvent liquidations can happen where shareholders wish to exit the company for other reasons. Liquidation can be compulsory (by court order) or voluntary (by shareholders' decision). Administrations can end in liquidation if a company cannot be saved or sold as a going concern.

Company directors must be very careful to avoid personal liability in these circumstances: where they have kept the company trading in circumstances where a director knew (or 'ought to have concluded') that there was no realistic prospect of it avoiding insolvent liquidation, they may be personally liable to contribute to the company's assets. Turning a blind eye or acting on the basis of wishful thinking will not absolve a director of liability.

Liquidators have very wide powers, to discharge security, review past transactions (with the possibility of setting them aside), sell assets and distribute revenue to creditors. They can cancel unprofitable contracts and relinquish unsaleable property. This is a key power not available to an administrator and is often used to rid debtors of expensive lease payments.

Liquidators cannot access a properly constituted trust. Funds or assets of the debtor held in this way will not be available to creditors. Specific advice should always be sought in relation to trusts.

There is no statutory moratorium in a liquidation. However, legal proceedings (widely defined and including enforcement actions and arbitrations) cannot be commenced or continued without the court's permission. This is intended to ensure that creditors are treated according to the 'pari passu' principle - that they must share equally any available assets of the company in proportion to the debt due to each.

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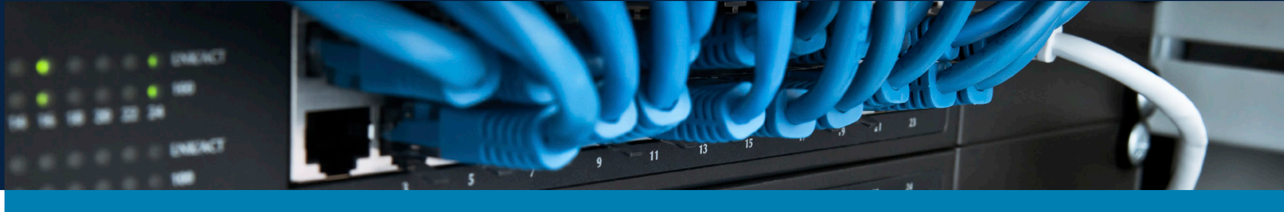
Another option for dispute resolution in the UAE: the DIFC Courts

The judiciary in the UAE has been taking significant steps to keep pace with the extraordinary economic development witnessed there in recent years. In addition to the UAE Courts, a range of other dispute resolution options are available, including arbitration in the UAE and in the Dubai International Financial Centre (DIFC) with different institutional Rules applying to each.

Another option became available by virtue of *Dubai Law 16* of 2011, which allows parties to choose to submit to the jurisdiction of the DIFC Courts. As some of the dust has settled following the issuance of Law 16 of 2011, it is timely to examine its possible impact.

By way of background, *Dubai Law 12* of 2004 established the DIFC Courts, setting out their jurisdiction and providing for the independent administration of justice in the DIFC. Under Law 12 of 2004, the DIFC Courts have jurisdiction in the following circumstances:

1. In civil or commercial disputes involving the DIFC, any of its Bodies or Establishments.



2. In cases or disputes arising from or related to a contract which was executed or a transaction which was concluded, in whole or in part, in the DIFC.

During the IBA conference in Dubai in late 2011, to the surprise of many, Law 16 of 2011 was issued. An amendment to Law 12 of 2004, it extended the jurisdiction of the DIFC Courts by allowing parties to choose it by agreement *"in writing whether before or after the dispute provided that this agreement must be according to a clear and explicit special provision"*.

More than 400 cases have been decided in the DIFC Courts since 2007. It remains to be seen whether the widening of its jurisdiction by Law 16 of 2011 will give rise to an increase in those numbers. Parties should take into account a number of important factors, including:

- The judiciary: the DIFC Courts offer experienced judges from a common law background. Cases are actively managed.
- Right of appeal: this is not automatic in the DIFC Courts. The automatic right of appeal in the UAE Court can lead to protracted litigation.
- Costs: successful parties can recover approximately 60%-75% of their legal costs in the DIFC Courts. Only nominal costs are recoverable before the UAE Courts.
- Part 32 offer: in order to exert pressure to settle, either party may make a formal Part 32 offer in the DIFC Courts. The offer is without prejudice, except where the offering party may wish to rely on it at the conclusion of the liability hearing in order to recover a higher proportion of costs than usual.
- Privacy: hearings before the DIFC Courts are public and on record. Although hearings before the Dubai Courts are public, the documents submitted by the parties are not disclosed.
- Enforcement: some questions remain about the ability to enforce a DIFC Court judgment in the other Emirates in the UAE, the GCC and the Middle East. Consideration must also be given to the ability to enforce in any jurisdiction around the world where the counterparty has assets. In June 2012, following a public consultation earlier this year, the DIFC issued a guide to enforcing DIFC Court judgments in Dubai, the UAE and across the world.

The UAE and GCC business community is fortunate. Numerous choices are available when identifying a suitable dispute resolution mechanism for contracts. Arbitration is a viable option, particularly where privacy is paramount and a specialised tribunal is required to determine a complex dispute. Numerous countries in the region, including the UAE, are signatories to the New York Convention. The UAE Courts offer a suitable forum for certain disputes and the extension of the jurisdiction of the DIFC Courts provides another option, allowing for more tailored dispute resolution, depending on the subject matter of the contract and the nature of the dispute.

For more information, please contact Rajaee Rouhani, Associate, on +971 4 423 0522, or rajaee.rouhani@hfw.com, or your usual contact at HFW.

Dispute Resolution Breakfast Seminars

HFW will be hosting a Dispute Resolution breakfast seminar at the Al Manzil Hotel, Dubai on 11 September 2012. The seminar will cover topical regional and international issues concerning arbitration, enforcement and choice of jurisdiction. These will include:

- Law and jurisdiction clauses - issues to remember.
- Enforcing your local/foreign judgments and awards in the GCC.
- Arbitration in London, Singapore or Dubai - is there a preferred choice?

Please contact events@hfw.com, if you would like to attend.

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