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Insights and Commentary from Dentons

The combination of Dentons and Hamilton, Harrison & Mathews (Kenya) offers our clients access to 9000+ lawyers in 167 locations and 73 countries around the world.

This document was authored by representatives of Hamilton, Harrison & Mathews prior to our combination's launch and continues to be offered to provide clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

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THE LEGAL CONNECTION WITH HH&M

RISK MANAGEMENT

With the ever increasing pace of business and life and the ever increasing pressure to generate profit and cut expense there is a risk of neglecting the procedures and practices which are essential to protecting our businesses and our selves from claims and losses. Most business transactions do not end up in disputes or litigation, but unfortunately some do - and we do not know at the outset of a transaction whether it is one of the few that will end up as a dispute. Therefore it is necessary to document each transaction with care in case it is the one that does go to litigation.

E-MAILS:

The advice of an e-mail being the same as an old fashioned letter typed on paper and sent by snail mail is still valid. When dealing with disputes for clients we are frequently told in response to the enquiry of whether there was a contract or anything in writing "Nothing - just e-mails"! You may not be printing your e-mails, but they can be printed and they are as good as writing. Contracts can be made by e-mail and will be enforced by the court just the same as an exchange of letters or a formal written contract document. The courts have power to order the discovery of electronic documents. In the United States of America courts frequently allow a party to litigation to take copies of the hard disks of an opposing party so as to search for any documents which might be relevant to the litigation. While we are not aware of any litigant trying this in Kenya, the day can not be too far away before someone does.

It is essential that care is taken over the wording of e-mails to ensure that commitments are not made when you do not intend to do so. Care must also be taken about what you say to the recipient about the recipient or someone else.

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E-MAILS: (Continued)

E-mails can be the basis for claims for defamation and for prosecutions for extortion or threatening behaviour. An employer could find himself being sued for defamation for remarks made by an employee using the employer's computer system, especially if the message goes out over the company's standard signature block.

SUBJECT TO CONTRACT:

One way of preventing the formation of a contract is to use the words "Subject to contract" either in the heading or the body of your e-mail or letter. The effect of these words is that no contract will exist until a formal contract document is drawn up and executed. However care must be taken to see that this is not used too often. Frequently you will want to get agreement on a matter quickly and with minimum fuss - agreement by a debtor to pay by instalments; or agreement to waive part of the interest if full payment is made within a limited period. Marking that correspondence "subject to contract" will prevent enforcement of any agreement until the formal document is drawn up and executed.

WITHOUT PREJUDICE:

This is protection for negotiations. It enables a party to put forward a proposal for settlement of a dispute or a solution to a problem in contract negotiations without the other party being able to refer to that proposal in any court or arbitration proceedings. The problem is that the words "Without Prejudice" are used too often and too casually. Often we see "without prejudice" put on letters that are not related to any negotiations or where the sender eventually wants to produce the letter in court or arbitration proceedings.

"Without prejudice" is not just for correspondence. If a meeting is being held to resolve a dispute these words should be used at the outset of the meeting to allow everyone to talk freely. If any agreement is reached then it can be agreed that the without prejudice negotiations are over and you are recording a formal agreement.

MEETINGS:

Whether a meeting is to negotiate new business or to resolve an existing dispute there is merit in keeping a contemporaneous written record of the meeting. Whether this is in a file note or attendance note or a confirmatory letter, such contemporaneous notes are of great assistance if a dispute should later arise as to what was said or agreed. The confirmatory letter is frequently the best option, as while there is no legal obligation to respond to letters, the recipient of such a letter may find it difficult to later dispute the contents of the letter on any matter of substance. The failure to dispute may have a serious impact on the credibility of the witness.

RETAINING RECORDS:

There is little point in documenting meetings and negotiations if the records are not retained - and it is not just retention, it is being able to find them when they are needed.

Many businesses require the signature of standard forms of general terms and conditions of business. Unfortunately when a dispute arises it is often found that the standard form has not been properly completed - it is not dated; there are blanks; no one know who actually signed it or when. Such incomplete documents are seldom of any value or use.

These standard forms are frequently changed or improved. It is important to keep samples of each edition or format and the dates when it was in use. If that is done it is sometimes possible to get secondary evidence admitted if there is a witness who can confirm that the standard form was signed at the start of business although the actual document can not be traced.

The environmentalists tell us not to print an e-mail unless it is necessary. But will you be able to find that e-mail when the need arises? The old fashioned paper file with everything filed in date order had merit and many people still print all e-mails and electronic records so as to maintain a hard copy record. If you are not printing then it is vitally important that systems are in place for the storage of

RETAINING RECORDS: (continued)

electronic documents in a way that they can be found and accessed even several years later or when you have changed your computer software or system.

READ THE CONTRACT:

This includes the conditions of business printed on the foot or reverse of documents. It is especially true in relation to insurance policies or guarantees. The title of such documents may not convey the full import of what you are required to do or what you can expect. Disclaimers and exclusions may negate the whole purpose of taking out an insurance policy. Raise your concerns before entering into the contract or immediately the printed terms are produced. An insurer will often be prepared to extend cover in return for an additional premium at the start of the cover, but he will not do so after you have suffered a loss.

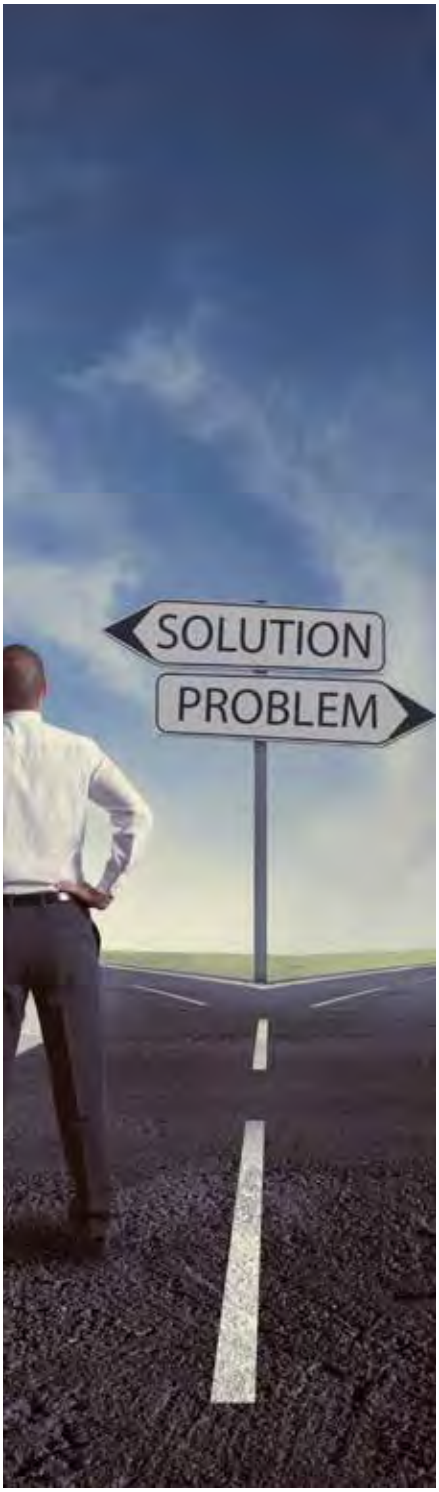
COMPLAINTS:

Many experts on marketing and customer care say that complaints properly handled can be one of the best marketing tools. That is so in many cases. However complaints ignored or badly handled lead to many disputes and court cases which could so easily have been avoided. It is our experience that the quicker a problem is addressed the better the prospects of reaching a resolution and avoiding litigation. All customer facing staff must be made aware of this and the correct procedure to courteously and quickly either deal with the complaint or escalate it to someone who can.

CULTURE:

Many clients tell us that they have systems covering the various matters set out in this article, but when we start to interview the witnesses who handle the customers and the transactions, the practice is often very different from the theory or the management instructions. As noted at the start of this article, the ever increasing pace of business and the ever increasing pressure to generate profit and cut expense often act against risk management and best practices. Employees are out to create more business and more profit - and often to gain bonuses or promotion. Disputes and litigation are - thankfully for lawyers - a fact of life, but educating your employees and creating a culture of following systems can reduce your exposure and put you in a much better position to successfully deal with disputes and litigation when they arise.

K A Fraser SC, Partner



DISPUTE RESOLUTION & LITIGATION

The firm has been listed as a top-tier (Band 1) firm with respect to arbitration and dispute resolution. Our team of lawyers has been involved in successfully advising clients ranging from corporates to government agencies on risk and conflict management.

