Practice Guidance Note on Dispute Resolution for Security Agencies

Introduction

1. Security Agencies ("**SAs**") provide outsourced security services to clients. The relationship between SAs and clients is typically set out and governed by a service agreement (the "**Contract**").

2. As in any industry, disputes may arise from time to time between SAs and their clients.

3. The Security Industry Committee of Practice[1] (the "**Committee**") has issued this Practice Guidance Note to assist SAs in such situations by setting out:

   a. Key obligations of SAs and clients pursuant to contract;

   b. What is a dispute;

   c. What are the modes of dispute resolution, including alternative dispute resolution ("**ADR**");

   d. Practical steps and considerations for SAs to resolve disputes.

4. While all parties to a contract would naturally seek to avoid disputes, where disputes do arise, it is critical that SAs understand how to vindicate their rights. The Committee suggests that SAs not shy away from dispute resolution if they have a legitimate cause of action to pursue.

Contractual Obligations of Security Agencies and Clients

5. A typical Contract requires that the SA deploy a certain number of licenced security officers ("**SOs**") in exchange for the Client paying a certain sum of money (the "**Contractual Sum**") to the SA.

6. Contractual terms may be treated differently under the law. Terms that are (a) conditions (i.e. a term that must be fulfilled for the continuance of the contract) or (b) innominate terms the breach of which would deprive the innocent party of substantially the whole of the benefit of the contract, entitle the innocent party to terminate the contract for breach.

7. Contractual terms that are (a) warranties (i.e. an assurance or promise in a contract) or (b) innominate terms that do not deprive the innocent party of substantially the whole of

[1] The Security Industry Committee of Practice is a Standing Committee of the Security Association Singapore that addresses and provides guidance on matters relating to the practice of providing physical security in Singapore.

the benefit of the contract, would not entitle the innocent party to terminate the contract for breach, but may give rise to other forms of recourse, like liquidated damages.

8. **Obligations of SAs**. The contractual obligations of a SA in Singapore can vary depending on the specific contract they have entered into with their client. However, there are some general obligations that most security agencies will have, broadly as follows:

   a. Providing the agreed-upon security services. This includes supplying the required number of security officers, properly trained and equipped to fulfil the specific security needs outlined in the contract.

   b. Meeting performance standards. The contract may define specific performance measures, such as response times to incidents or prevention of security breaches. The agency must strive to meet or exceed these standards. Such stipulations are common in outcome-based contracts ("**OBCs**").

   c. Confidentiality and data protection. Security agencies are entrusted with sensitive information about their clients and their operations. They have an obligation to maintain confidentiality and protect this data from unauthorized access, disclosure, or loss.

   d. Professional conduct. Security officers should conduct themselves professionally and ethically at all times. This includes being courteous, respectful, and avoiding any behaviour that could damage the client's reputation.

   e. Reporting. The agency may be required to provide regular reports to the client on security incidents, staffing levels, and other relevant information.

9. In addition to its contractual obligations, SAs must also adhere to **statutory requirements, applicable regulations and guidelines.** This includes the following:

   a. Statutes

      i. Private Security Industry Act

      ii. Protected Areas and Protected Places Act

      iii. Infrastructure Protection Act

      iv. Employment Act

      v. Employment of Foreign Manpower Act

      vi. Workplace Safety and Health Act

      vii. Personal Data Protection Act

   b. Regulations

      i. Licensing Conditions

      ii. Progressive Wage Model for the Security Industry

c. Guidelines

i. Tripartite Guidelines on Fair Employment Practices

ii. Tripartite on Wrongful Dismissal

10. **SAs cannot contract out of their statutory and regulatory obligations**. Failing to adhere to statutory and regulatory obligations may constitute an offence and open the SA and possibly, its directors and officers to prosecution by the relevant authority. In cases where SAs contract, or act contrary to their statutory and regulatory obligations on the instructions of their clients, their clients may also be found to have aided and abetted the SAs in committing an offence.

11. **Obligations of Clients**. As service buyers, Clients typically do not have extensive contractual obligations to SAs. The two key areas of obligations are:

a. Making complete payment on time. Clients are obligated to pay the SA for the services rendered according to the agreed-upon fees and schedule. **If a Client fails to pay the agreed sum on time, it is likely to constitute a material breach of contract that entitles the SA to terminate the contract and to sue for damages**.

b. Cooperation with the SA. Clients may be obligated to provide the SA with the relevant information and access to allow the SA to carry out its job.

12. In addition to their contractual obligations, Clients are also obligated to adhere to relevant statutes, regulations and guidelines. In addition to those set out in paragraph 8, where relevant, the following statutes may also apply:

a. Building Maintenance and Strata Management Act

b. Land Titles (Strata) Act

13. Where an SA has the primary duty under any statute, regulation or guideline (for example, pursuant to those set out in paragraph 8), but a Client instructs the SA to act contrary to that duty and the SA acts on the Client's instructions resulting in an offence, the Client may be found to have abetted the SA to have carried out the offence.

When does a Dispute Arise?

14. Contractual disputes can arise for a variety of reasons, but they generally occur when there is a disagreement between the parties about the performance, terms, or interpretation of the contract. Here are some of the most common triggers for contractual disputes:

a. Non-performance. Where one party fails to fulfill their obligations under the contract: This could be a complete failure, such as an SA failing to deploy security officers or a Client failing to make payment on time, or a partial failure, such as an SA having shortfall in its deployment.

b. Disagreement over interpretation. This could occur when there is ambiguous language in the contract leading to differences in interpretation, this is commonly seen in relation to LDs. Disagreements over interpretation could also occur when unforeseen circumstances occur, making it difficult to determine how the terms should be applied, for example during the pandemic or during spikes of infections affecting manpower availability.

c. Violation of terms. This could occur when there is a breach of a specific clause, for example, a breach of a confidentiality clause.

d. Unrealistic expectations. Where one or both parties may have unrealistic expectations about what the contract will deliver, leading to disappointment and disagreements that often translate into a contractual dispute and nitpicking over terms and what they mean.

15. It is important to note that not all disagreements about a contract will necessarily lead to a full-blown dispute. Often, minor issues can be resolved through open communication and negotiation.

16. However, dispute resolution, where needed, is part and parcel of a contractual relationship and **SAs should not shy away from seeking legal advice, taking legal action and commencing proceedings where necessary**.

17. The following two sections elaborate on the most common triggers for disputes in security contracts: breach of contract and liquidated damages.

Breach of Contract

18. A breach of contract occurs when one or more parties in a legally binding agreement fail to fulfil their obligations as outlined in the terms of the agreement, without a legally valid excuse. This can happen in various ways, ranging from minor omissions to complete failures to perform.

19. There are various types of breaches, the nature of which largely determines the recourse available to the non-breaching party:

a. Material breach: This is a significant failure that goes to the heart of the contract and substantially undermines its purpose. **It may entitle the non-breaching party to terminate the contract and seek damages**. Examples of material breaches are where the SA completely fails to deploy security officers for a shift, or when a Client does not make payment for the SA's services on time.

b. Minor breach: This is a smaller or less significant failure that does not fundamentally undermine the contract. The non-breaching party may still be entitled to compensation for the breach, typically in the form of liquidated damages, but may not be able to terminate the contract. An example is where an officer arrives late for a shift.

c. Anticipatory breach: This occurs when a party communicates their intention to not perform their obligations under the contract before the performance deadline.

Liquidated Damages

20. Liquidated Damages ("**LDs**") are a common part of headcount-based security contracts. SAs may wish to look out for incorrect and unlawful application of LDs by Clients, as it is a common occurrence in the security industry. **LDs that are applied as penalties or that are intended to shape the behaviour of the SA by acting as a deterrent, may be found to be unenforceable by the Courts**.

21. LDs are a pre-determined sum of money agreed upon in a contract that would be paid by a party if they breach the contract. It is essentially a way to **estimate the potential damages from a breach in advance**, saving both parties the time and expense of going through a legal battle to determine the actual damages later.

22. The nature of liquidated damages is important – **it is meant to be an estimate of actual loss, that when applied restores the non-breaching party to a position it would have been if the contract was performed as agreed**. **LDs are not meant to be used as backdoors to reduce contract sums or to penalise SAs.**

23. Hence, using LDs to, for example, deter security officers from smoking at site, is likely to be a penalty that is unenforceable in the Courts. To use another related example commonly found in the security industry, where a second offence of smoking in the same month attracts a higher sum for liquidated damages, it is likely to be an unenforceable penalty, unless the Client is able to justify how it suffers a greater loss from the second incident than from the first incident, if at all.

24. There are often also **inconsistencies** in the quantum of LDs that may expose certain LDs as being unenforceable penalties. For example, if a contract that imposes $150 for the shortfall of one officer for a shift also imposes $50 for the missing of one clocking round, the natural question that will arise is whether each clocking round constitutes one-third of an officer's duties or is of such weight that the failure to carry out the clocking would cause loss to the Client worth one third the value of failure of deploying an officer for one entire shift. If it cannot be justified accordingly, it may be considered an unenforceable penalty by the Courts.

25. If the SA and the Client do not agree on the LD to be applied, and the Client proceeds to make payment to the SA deducting the LD sum without the agreement of the SA, then there the Client has breached the contract, and the SA may be entitled to sue and to claim for damages.

26. A final important point on LDs is that LDs can be challenged **even if** they are contained in a contract that is signed by both parties. The question before the Courts would be whether these are **unenforceable regardless of an existing valid contract**.

Delays or Breaches caused by Managing Agents

27. It is common for Clients to appoint Managing Agents ("**MAs**") to administer their building or estate and they are often the primary point of contact for SAs, as well as the appointed entity to oversee the fulfilment of the contractual obligations by SAs, including *inter alia* imposing liquidated damages and preparing cheques. MA, however, are typically not parties to security contracts.

28. In this regard, where there are breaches of the security contract caused by actions or omissions of the MA, **the SA's course of action is against the Client, not the MA**. Where, in such circumstances, an SA successfully litigates against the Client, **the Client can consider subsequently claiming for the damages it has suffered from the MA**.

29. For example, where the payment to an SA is delayed because the MA had failed to prepare the cheque in time, the SA would proceed against the Client, and the Client can then look to claim for the damages paid to the SA from the MA.

Types of Dispute Resolution

30. In Singapore, there are multiple options for resolving disputes, both within and outside the court system. The type of dispute resolution is determined by the dispute resolution clause in the contract. For example, if the dispute resolution clause states that the disputes are to be settled by arbitration, then the SA and Client are bound to settle any disputes they may have on the contract by arbitration. Where there is no dispute resolution clause, an SA has the right to commence proceedings in court, or if it wishes to pursue alternative dispute resolution, it must seek the concurrence of the Client.

31. Security contracts in Singapore are generally subject to Singapore law.

32. There are various types of dispute resolution as follows:

    a. Litigation. This is the traditional route for dispute resolution. The level of court that a claim would originate in is dependant on the quantum of the claim.[2] Parties present their case before a judge, who makes a decision that is biding on all parties. Parties may appeal a decision from the originating court, and the appeal decision is usually final and binding. Proceedings are a matter of public record.

    b. Alternative Dispute Resolution ("**ADR**"). The Singapore courts heavily encourage ADR to resolve disputes efficiently and amicably. Unlike litigation, ADR proceedings are usually private and the details of the dispute confidential. The types of ADR are as follows:

        i. Mediation. Facilitated negotiation between parties by a neutral third party. The neutral third party does not make a decision, but encourages parties to come to

[2]

their own settlement. If the mediation is successful, parties will sign a settlement agreement setting out the terms. This settlement agreement is a contract that is binding on parties.

ii. Conciliation. Similar to mediation but usually facilitated by a judge.

iii. Neutral evaluation. An expert evaluates the case and provides an opinion on each party's merits i.e. who is likely to win or lose. Neutral evaluation can be binding or non-binding. If non-binding, the expert renders his opinion and parties then decide what to do after; if binding, the parties agree to be bound by the expert's opinion.

iv. Arbitration. Binding decision made by an independent arbitrator(s) chosen by the parties. Usually, the dispute resolution clause will stipulate the rules of arbitration for parties to abide by.

33. The Committee strongly encourages SAs to engage lawyers to represent them if they intend to pursue dispute resolution proceedings, whether litigation or ADR, or if they are the subject of proceedings. SAs may refer to the SAS Panel of Law Firms at **Annex** for assistance. SAS has negotiated preferred rates with the Panel Law Firms so that proceedings will be economical for SAs. The preferred rates apply only to SAS members.

Dispute Resolution Procedures

34. Whether litigation or ADR, the dispute resolution process generally begins with the SA sending the Client a Letter of Demand. This letter states clearly the claim that the SA is making against the Client and the contractual basis for the claim. It will usually give a deadline to the Client to respond, failing which the SA would proceed to take legal action.

35. In many cases, settlement negotiations with the Client commences in earnest only after the Letter of Demand is sent. SAs are strongly encouraged to seek professional legal advice to draft the Letter of Demand.

36. In the event that the Client does not meet the deadline or if settlement negotiations are not successful, SAs may commence proceedings in accordance with the dispute resolution type stipulated in the contract.

    a. For litigation in the courts, the process may be found at this link: https://www.judiciary.gov.sg/civil/civil-claims-(from-1-april-2022)

    b. For arbitration, the process depends on the rules that were stipulated in the dispute resolution clause, although most arbitral rules have similar processes. As an example, the process for arbitration under the Law Society Arbitration Scheme may be found at this link: https://law-society-singapore-prod.s3.ap-southeast-1.amazonaws.com/2020/02/Frequently-Asked-Questions-on-LSAS.pdf

c. For mediation, the process may be found at this link: https://www.judiciary.gov.sg/alternatives-to-trial/mediation/what-is-mediation -:~:text=It%20is%20a%20flexible%20process,at%20fault%20in%20a%20dispute.

d. For conciliation, the process may be found at this link: https://www.judiciary.gov.sg/alternatives-to-trial/conciliation/what-is-conciliation

e. For neutral evaluation the process may be found at this link: https://www.judiciary.gov.sg/alternatives-to-trial/neutral-evaluation/what-is-neutral-evaluation

Practice Guidance

37. The Committee's Guidance is as follows:

a. SAs should be aware of their contractual rights and obligations, in particular, whether there has been a breach of contract by the client that may entitle them to bring an action against the client.

b. Common issues in the security industry are the imposition of unfair and/or unenforceable liquidated damages and late payment. As these matters affect SAs profitability and cashflow, SAs should weigh out their options between client management and asserting their contractual rights to recover sums owed to them through legal action. Where the contract has been terminated or where the client or managing agent is particularly difficult, it falls to reason that the SA should seriously consider commencing legal action.

c. SAs should carefully scrutinise contracts before taking them up and either avoid taking up onerous and unfair contracts or take into account these risks by increasing their prices.

d. SAs should be aware of the modes of dispute resolution stipulated in their contracts and how they can go about commencing action if necessary.

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Security Industry Committee of Practice

https://www.sas.org.sg/initiative/committee-of-practice/