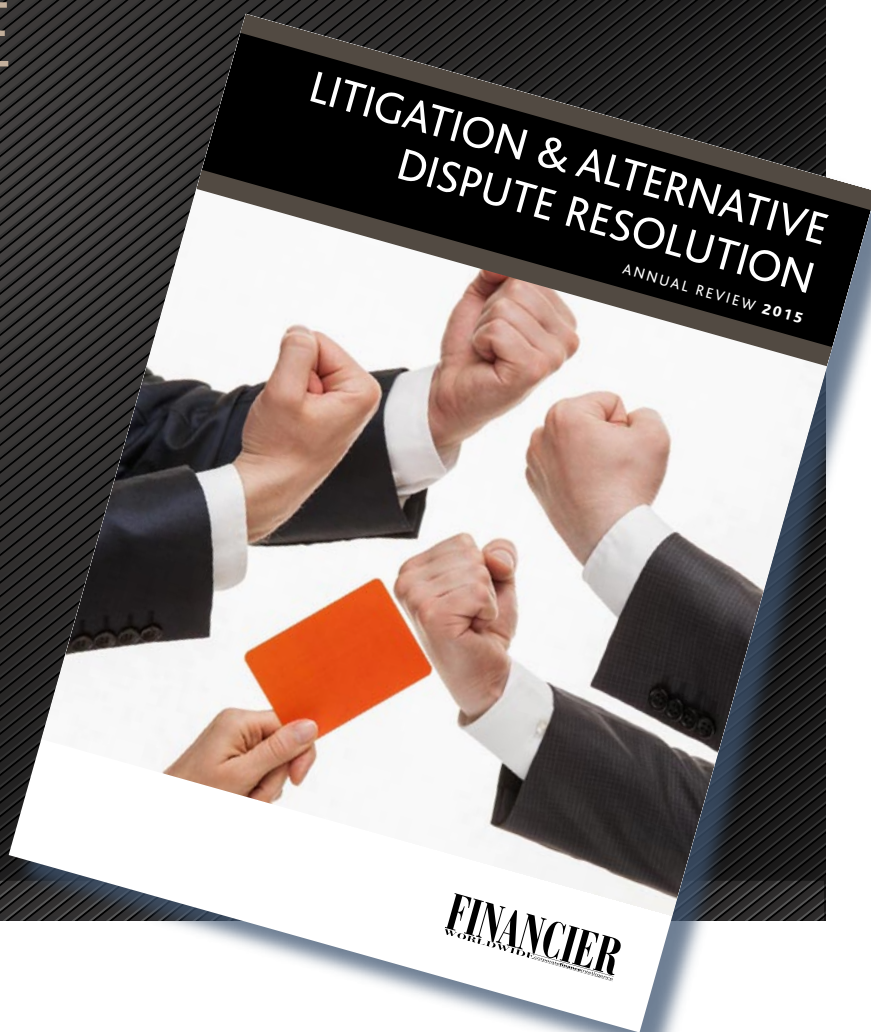


ANNUAL REVIEW

LITIGATION & ALTERNATIVE DISPUTE RESOLUTION

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HONG KONG

NICK GALL
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Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN HONG KONG? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

GALL: Commercial disputes in Hong Kong usually involve shareholders', directors' and joint venture disputes, both international and domestic. These matters tend to proceed to litigation quickly, often to restrain persons from dealing with assets under dispute. A common recurring theme in Hong Kong is the use of interlocutory injunctions to prevent the dissipation of assets pending the determination of litigation or arbitration. We are also continuously seeing an upswing in disputes between PRC-based entities, largely involving oil, gas and energy infrastructure.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF MEDIATION, ARBITRATION, LITIGATION AND OTHER METHODS?

GALL: Commercial parties are encouraged to consider their dispute resolution strategy at the outset, even before a situation of conflict arises. Parties should recognise that there is no 'one size fits all' approach that can be adopted while implementing an effective dispute resolution strategy. Parties are better advised to rationally assess the cost/benefit and risks involved before choosing a particular strategy. A combination of general and specific strategies or multi-tiered mechanisms must be considered while negotiating through dispute resolution clauses in the contracts. Finality offered by arbitral awards and the extent of their recognition compares favourably with court judgments. However, cost remains an ongoing matter of concern. Whilst it is often assumed that arbitration is less expensive than litigation, that may not always be the case. Mediation is often less expensive and speedier than other techniques and has proven quite successful, particularly in the construction industry in Hong Kong.



Q IN YOUR EXPERIENCE, ARE COMPANIES IN YOUR REGION MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

GALL: Since the enactment of the Civil Justice Reforms, Hong Kong solicitors are under a duty to encourage and facilitate settlements. Practice Direction 31 (Mediation) issued by the Chief Justice of Hong Kong encourages parties to consider mediation and there can be adverse costs consequences if a party unreasonably fails to engage in mediation. Due to its informality and flexibility, mediation is often considered as a favourable alternative. However, the effectiveness of mediation ultimately depends on the willingness of the parties to compromise. In international commercial relationships, many parties prefer to choose arbitration over litigation. Arbitration is often perceived as a more independent form of dispute resolution, especially if a state-owned enterprise is involved. Further, procedural flexibility and confidentiality remain key attractions. However, a poorly drafted arbitration clause can present major obstacles for the parties once a dispute has already arisen. For example, unless the parties agree upon preliminary matters such as the seat of arbitration, arbitration can often be delayed, thereby escalating the costs significantly.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN HONG KONG? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

GALL: Hong Kong remains the preferred seat of arbitration given its arbitral regime which conforms to international best practices and is supported by a judiciary which maintains a policy of minimal intervention. Enforcement of both domestic and foreign awards in Hong Kong is time and cost efficient. Further, emergency relief granted by an emergency arbitrator in or outside Hong Kong is also enforceable in accordance with the provisions of the Arbitration Ordinance. To uphold the integrity of arbitral awards, the courts have in many cases been awarding indemnity costs against defendants in unsuccessful applications to set aside arbitral awards or challenges to enforcement.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

GALL: A well-drafted arbitration clause will save parties both time and cost in eliminating potential challenges to forum and jurisdiction. Typically, the incorporation of a model clause can provide greater procedural certainty; however, the nature of the dispute will have an important bearing upon the incorporation of such clauses. Aside from the procedural and jurisdictional provisions, great care should be taken to ensure that the scope of the clause is clearly defined and is binding and enforceable. Also, parties must ensure that communications and agreements between the parties are properly documented. These are crucial to avoiding time and money being wasted and the duration of dispute resolution being unnecessarily prolonged.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

GALL: From a disputes point of view, parties must always deal with the assumption that there will be conflicts. Recognising this possibility will go a long way in effectively dealing with a situation of breach if it arises. Apart from clarifying the roles and responsibilities of the parties in an agreement, parties must ensure that the termination of contract and dispute resolution clauses are thoroughly discussed and clearly set out in the agreement. Parties will also be well advised to ensure that the dispute resolution clause is reviewed by litigation lawyers. This is especially important when conducting business in foreign jurisdictions. The assistance of local lawyers can greatly minimise the risk of procedural or jurisdictional disputes.

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“Parties must ensure that communications and agreements between the parties are properly documented.”

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Q HOW IMPORTANT ARE EXTERNAL ADVISERS TO HELP COMPANIES NAVIGATE THEIR WAY THROUGH A COMMERCIAL CONFLICT?

GALL: External advisers are extremely valuable in facilitating the resolution of a commercial conflict. External advisers, with their legal expertise and experience, can assist companies in formulating a strategy that will best protect its legal rights whilst causing the least disturbance to the company's business and reputation. Engaging suitable external advisers with the relevant experience and expertise will help companies navigate their way through commercial conflicts. This is especially so in foreign jurisdictions.

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GALL



Nick Gall

Senior Partner & Head of Litigation

GALL

+852 3405 7666

nickgall@gallhk.com

Nick Gall specialises in dispute resolution focusing mainly on business litigation, shareholder disputes and employment disputes. He also specialises in dealing with multijurisdictional fraud and international asset tracing litigation which often requires cross-border applications, freezing/gagging applications, urgent injunctive relief, the examination of senior executives/bank officers and recovery and enforcement proceedings generally. He has acted for senior employees, the Hong Kong Government, the US Government, major international banks and corporations throughout the world. Mr Gall is also instructed to act in respect of investigations and charges arising out of the Independent Commission Against Corruption and other regulatory bodies in Hong Kong.