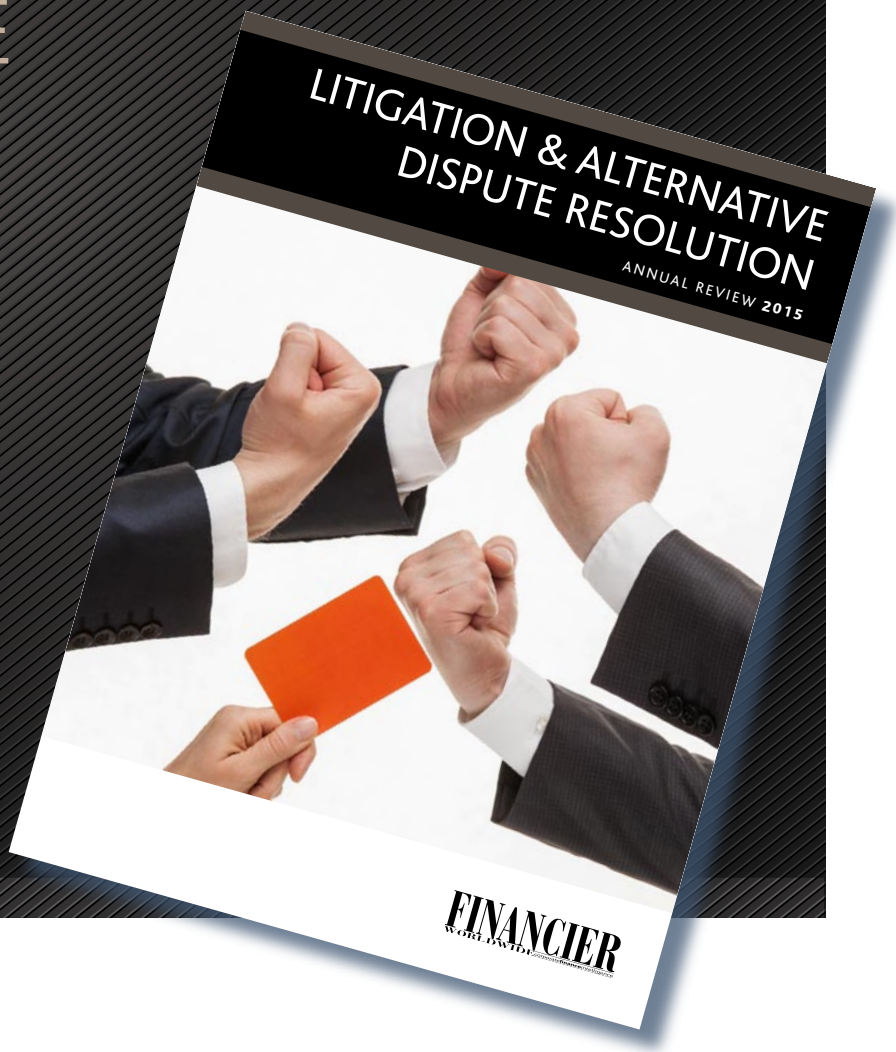
ANNUAL REVIEW

LITIGATION & ALTERNATIVE DISPUTE RESOLUTION



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CAYMAN & BRITISH VIRGIN ISLANDS

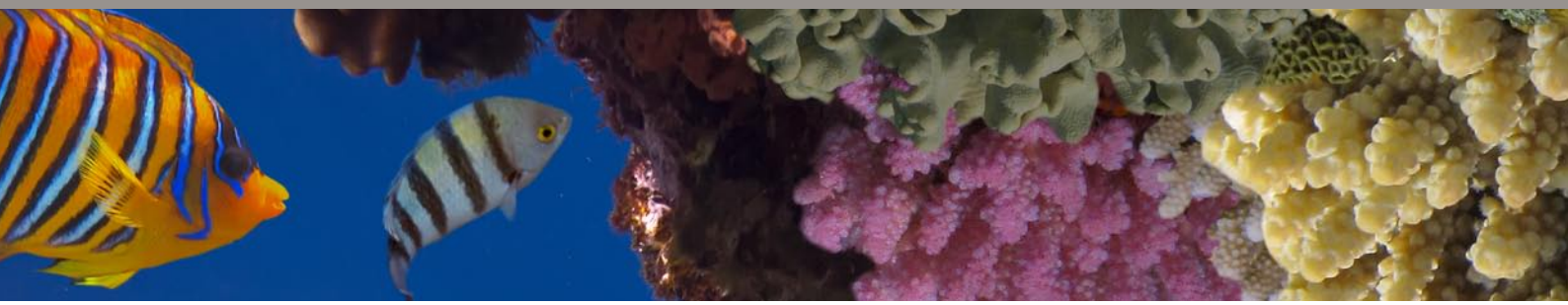
KIRSTEN HOUGHTON
CAMPBELLS

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN THE CAYMAN & BRITISH VIRGIN ISLANDS? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

HOUGHTON: In the Cayman Islands and the British Virgin Islands commercial litigation, in the main, tends to focus on formal insolvency proceedings in financial services matters, principally in hedge funds and banking. Both jurisdictions also host a large number of holding corporations for trading entities in developing economies, in particular in Central and Latin America, the Middle and Far East and Russia. Those structures have recently begun to generate contentious business. Recently in Cayman, we have seen an increase in the use of insolvency procedures, particularly the appointment of provisional liquidators, to facilitate the multijurisdictional restructuring of a number of holding company structures, in particular as a result of events in China, with some success. The main areas of underlying business have been agriculture and solar energy.

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?

HOUGHTON: Parties are often not familiar with the range of dispute resolution strategies available to them. It is important to make sure that they understand the differences between 'negotiation' strategies, such as mediation, and that those strategies can run either before or during a more formal binding process, such as arbitration or litigation. Parties should be asked to consider before entering into a binding agreement, whether they wish to make negotiation or mediation a precondition to litigation or arbitration – which is becoming increasingly popular – and whether they wish to air their disputes in a public forum, by way of litigation, or behind closed doors, as in arbitration. They will no doubt also wish to be advised about the relative costs of the various options, and, very importantly, their speed, which can vary enormously between processes and between jurisdictions.



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?

HOUGHTON: Many of the commercial contracts we deal with, even if subject to Cayman Islands or BVI law, contain exclusive jurisdiction clauses which take the resolution of commercial disputes out of our home jurisdictions, usually in favour of the principal place of business of one or other of the parties to the contract so that we are not usually in a position to advise on pre-litigation alternatives. However, each of the Cayman Islands and BVI is developing ADR strategies. In the Cayman Islands, we now have the Cayman Islands Association of Mediators and Arbitrators, a body of trained professionals willing to take on appointments, and which also has in place a procedure for the neutral nomination of mediators over disputes. Companies are increasingly asking about ADR procedures, particularly mediation, and they are beginning in some instances to include Cayman Islands mediation clauses in their contracts.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE CAYMAN & BRITISH VIRGIN ISLANDS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

HOUGHTON: Arbitration in the Cayman Islands and BVI is relatively rare at present, although each jurisdiction now has supportive legislation based on the UNCITRAL model. There is growing interest among legal professionals in arbitration processes and in Cayman, apart from CIAMA, we also have a growing 'chapter' of the Chartered Institute of Arbitrators including several Fellows and Chartered Arbitrators. Cayman has ample facilities for hosting arbitrations and there is some interest in developing a dedicated international arbitration facility, although that may be some time away. The BVI's recent Arbitration Act established an International Arbitration Centre, but it is not yet in operation. Many of the commercial contracts which pass through the hands of Cayman Islands and BVI attorneys include arbitration clauses, but currently, it is relatively rare to see a clause which provides for either jurisdiction to be the seat of the arbitration, although the number is increasing slowly. We have recently seen a number of cases in which the target

of a winding up petition has argued that the petition should be stayed or dismissed because the matters in dispute should be referred to arbitration. The law in this regard is still developing, but some success has been achieved.

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?

HOUGHTON: It is impossible to predict at the outset which disputes or differences might arise during the course of a commercial arrangement. Prior to entering into binding arrangements, companies should carry out the necessary due diligence on their counterparties and also conduct a thorough risk assessment of the transaction on a 'what if' basis. If the transaction documents are complex, or there are regulatory or other obvious risks – such as possible political risk or moral hazard – prudence dictates that they would be wise to take specialist legal advice prior to signing, in all relevant jurisdictions. Companies should also make sure that they have a carefully documented timetable for compliance with any time critical obligations, and a clear allocation of responsibility for enabling proper performance.

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

HOUGHTON: Disputes happen because of stress placed on parties by difficult people, unusual or unexpected situations and poorly managed processes. If companies focus on those key themes, they will go a long way toward mitigating their risk. For example, thorough due diligence on counterparties, whilst it can never be 100 percent reliable, is an effective tool in determining whether it is worth taking the risk to bind yourself to a third party. Similarly, being on top of the paper trail, by having procedures in place for documentation of decisions and reasoning, and making sure that those procedures are followed, will put a company in a better place to avoid disputes by having accurate and hopefully undisputable records, or fighting disputes because they have good contemporary evidence available. 'Events' are always unpredictable, but parties can help to minimise their effect by early risk assessment and having procedures in place to deal with them proactively and promptly.

"Parties that venture into a foreign jurisdiction without appropriate local advice are inevitably setting themselves up to fail."

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

HOUGHTON: In the offshore context, probably the most important issues to decide before even considering the mechanics of a dispute resolution strategy are choice of governing law and choice of jurisdiction for the determination of disputes. When clients use offshore vehicles to set up their investment or holding structure, but are actually domiciled or carry on business in another jurisdiction, they often fail to appreciate that there may well be subtle – or sometimes significant – differences between their 'home' laws and process and the laws which might govern the conduct of the offshore vehicles by default if they do not consider the question. This can lead to serious problems in dispute resolution, because expectations may well differ from what is possible under the relevant law, and should be addressed at the outset if possible. In this context, the use of external advisers is clearly critical to the chances of success. Parties that venture into a foreign jurisdiction without appropriate local advice are inevitably setting themselves up to fail.

Campbells

Kirsten Houghton

Senior Associate
Campbells
+1 (345) 914 5854
khoughton@campbellslegal.com

Kirsten Houghton graduated from St. John's College, Cambridge with a BA Honours degree in Law. Subsequently, she practised at the Bar in London for over 15 years in two leading sets of commercial Chambers, appearing regularly as an advocate in the High Court and Court of Appeal.