

ONC Lawyers
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Established in 1992, ONC Lawyers has become one of the largest domestic law firms with more than 150 solicitors and qualified staff. The firm is a member of the prestigious International Society of Primerus Law Firms, and designated by Asialaw Profiles as a 'highly recommended' law firm and ranked by Chambers and Partners as a leading firm in the Asia Pacific Region.

We are dedicated to providing quality services based on our four core values: Integrity, Collaboration, Excellence, and delivering Solutions without complications.

We offer a full range of legal solutions to individual and corporate clients of all sectors.

Before joining the legal profession, Dominic worked in the banking sector and the Independent Commission Against Corruption (ICAC). Dominic's practice focuses on advising clients on matters relating to anti-corruption, white-collar crime, law enforcement, regulatory and compliance matters in Hong Kong, including advice on anti-money laundering. He also handles cases involving corporate litigation, shareholders' disputes and insolvency matters, defamation cases, domestic and international arbitration cases, cybersecurity, data security and privacy law issues, competition law matters, e-Discovery and forensic investigation issues as well as property litigation.

TOP TIPS FOR

Successful negotiations

It is important to know your claim in terms of having a proper cause of action if you are suing, and whether the claimant has a cause of action if you are defending the claim.

Just because there is a signed contract does not mean that it is a valid one. It might have been time barred.

Or there might be a clause in the contract that the dispute should be resolved by arbitration, but the claimant has commenced a civil litigation claim in court, which could be stayed.

Know your facts well. Even if the law is not on your side, sometimes the facts might be and might at least help to give a good impression to the adjudicator.

Be thorough and do not just rely on the client's version of the story. One needs to test the case by probing it and ensuring that it is believable, logical and reasonable.

I QUESTION ONE**What is your best practice approach when advising General Counsel, to ensure dispute resolution clauses are to their real advantage and do not obstruct enforcement proceedings?**

General Counsel should work closely with their business colleagues who should know about the business counterpart, their financial situation and where their assets are located. There is no use in obtaining a judgment, even if that can be done quickly and cost effectively, that could not be enforced against the assets of the losing party. Identifying where the assets are, is important because some jurisdictions have reciprocal enforcement agreements and arrangements with Hong Kong so that it is easy to just register a judgment and then enforce it, without the need of re-litigating the action.

Some jurisdictions do not have such agreements with Hong Kong, which means that the matter might need to be re-litigated before the Hong Kong judgment can be enforced. In such cases, General Counsel should consider arbitration, because many countries are party to the New York Convention, including Hong Kong and a Hong Kong arbitral award can be enforced in places that do not have reciprocal enforcement judgment with Hong Kong.

The decision to include an arbitration clause in the dispute resolution clause needs careful consideration, as arbitration is not without its limitations. For example, arbitration may not have a fast track procedure for entering a quick judgment if the other party does not respond (a judgment by default of the defendant acknowledging the claim or raising any defence). This would mean that certain costs and time would need to be spent before one could obtain an arbitral award. Various factors, such as location of the assets, time, costs and likelihood of the other side being engaged will all need to be considered carefully with the business and operation colleagues to assess what dispute resolution clauses would best suit the particular party and business transaction.

I QUESTION TWO**Are there any particular rules around funding litigation in your jurisdiction that General Counsel should be aware of?**

Litigation funding in Hong Kong is not allowed due to the Maintenance and Champerty Rules, unless there are exceptional circumstances. The parties involved (e.g. the claimant and the funder) may, for example, have a legitimate common interest in the subject matter of the litigation, or genuine commercial interest in the outcome of litigation, which would justify one of them supporting the conduct of the litigation by another.

It is also possible to fund insolvency litigation. It is lawful to assign a cause of action by a liquidator to a litigation funder. Accordingly, for winding up and bankruptcy cases, litigation funding is an exception to the Maintenance and Champerty offences.

Recently in Hong Kong, a new law was passed to allow third party funding of arbitration. While we still have the offence of Maintenance and Champerty, the law provides that such offences do not apply to third party funding of arbitration. A Code of Practice that set out the practices and standards with which third party funders are expected to comply, are being

formed. Once that is in place, the new law allowing third party funding of arbitration will become effective. This means that, in the near future, litigation funders may fund parties in arbitration to resolve disputes.

I QUESTION THREE**What techniques are typically used by international counterparties in your experience when attempting to gain the initiative during a dispute? How important are civil procedural rules?**

- The party may choose to press on with the case quickly and also take procedural steps to force the engaged party to incur costs by responding to different types of applications such as discovery and inspection of documents, and providing further and better particulars of their pleading. Depending on the types of claim and whether the international counterparty is a claimant or defendant, the party might challenge whether Hong Kong is the proper jurisdiction to resolve the dispute. This might lead to a side battle on jurisdiction at an initial stage. The Hong Kong civil procedure has a voluntary mediation stage after what is known as 'close of pleadings', which means the claimant and defendant have completed filing their statement of claim and defence (and counterclaim, if any). While it is a voluntary process, generally the parties will try mediation first to see if the dispute can be resolved before moving forward. Hence one technique would be to push for the close of pleadings so that the parties could go for mediation and have that out of the way.
- Civil procedural rules are very important because if there is non-compliance and no proper justification for that, the court may have the power to disallow the party to file certain documents or could sanction that the lawyers be responsible for any wasted legal costs. There are rules that also require that one must state all arguable points and submissions and failure to do that without any good cause would mean that the party is not allowed to raise certain points or submissions, which could be detrimental to the party's case if the party's other points were not successful.
- Civil procedural rules also govern matters such as the use of experts and filing of expert reports, and the filing of witness statements. All these need to be thought through as there are case management conferences where the court will monitor the parties' compliance of the procedural rules. Failure to comply would not only mean legal costs penalties and delays, but in some cases, might mean the loss of chance to file important documents and submissions. It also does not create a good impression to the court, even if one has a good case in the dispute.