

Control **Risks**



**Dispute Advisory
and Support**





About us

Control Risks is a specialist risk consultancy that helps create secure, compliant and resilient organisations. We believe that taking risks is essential to success, so we provide the insight and intelligence you need to realise opportunities and grow. And we ensure you are prepared to resolve issues and crises. From the boardroom to the remotest location, we have developed an unparalleled ability to bring order to chaos and reassurance to anxiety.

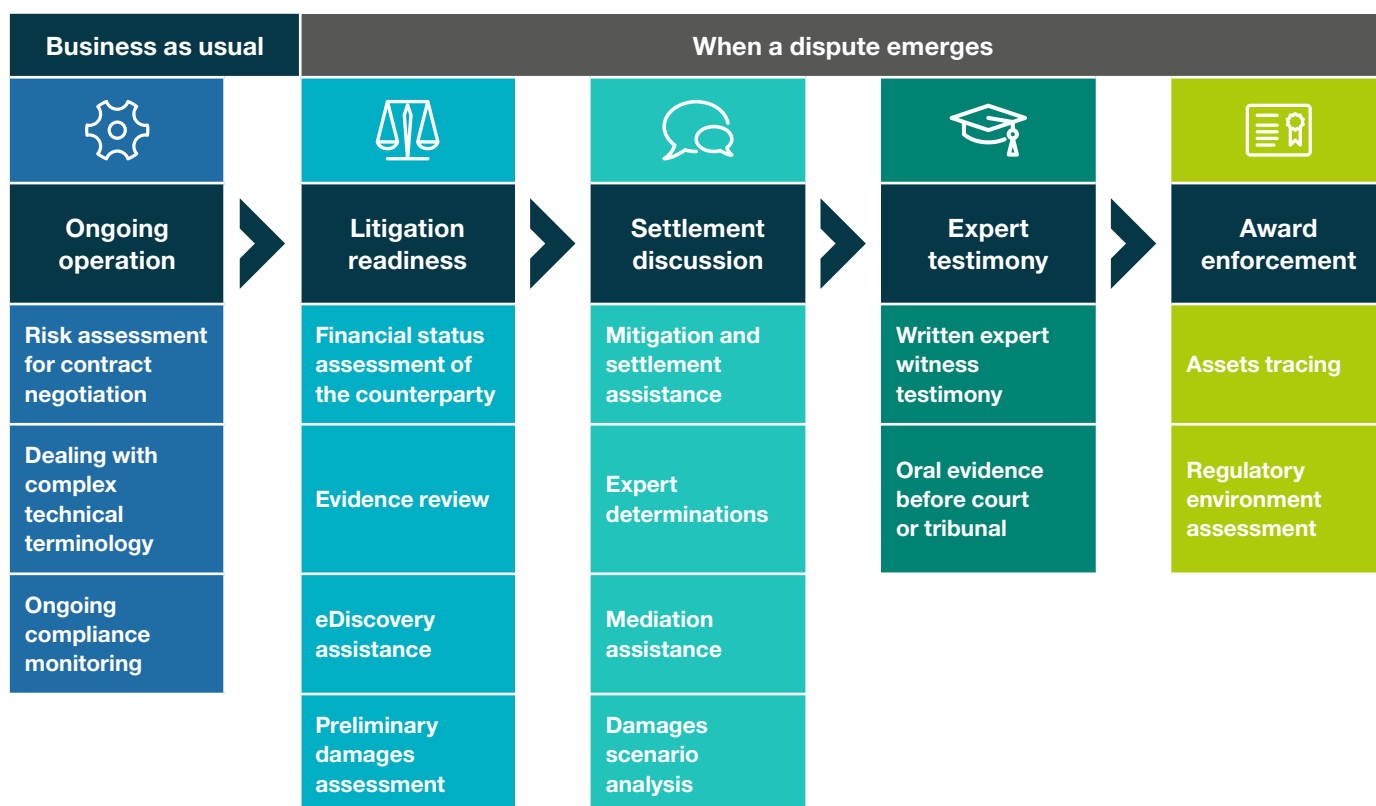
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Resolutions throughout the dispute lifecycle

Disputes don't just happen. Disputes build up over time. This can be referred to as the dispute lifecycle. Potential disputes need to be monitored closely. Appropriate remedies need to be applied at each stage of a dispute.

Control Risks has a comprehensive suite of skills that can assist our clients in identifying commercial solutions to resolve disputes amicably or support our clients presenting their cases to judicial bodies imposing resolutions upon the parties to a dispute. Control Risks can provide a range of support to clients and their advisors at each stage of the dispute lifecycle.



Contract negotiations

Irrespective of the nature of the dispute, it will have its origins in the relationship between the parties to the dispute. That relationship may be contractual or regulatory in nature, it may be formal or informal. The first opportunity to avoid a dispute is in the early stages of that relationship. Clarity in the rewards and responsibilities of each party to the relationship is key. Careful drafting of contractual arrangements, or a clear understanding of the respective positions of the parties in a relationship subject to regulatory provisions, is the first step to avoiding a dispute later on in the relationship.

Control Risks can assist clients better understand the risks it faces when entering into a business relationship, whether it be governed by contractual terms or regulations. Our **Business Intelligence** teams are able to help clients spot potential issues with future business partners in order to mitigate the impact of those risks during contract negotiations. Equally, our **Geopolitical Risk Advisory** team can advise clients on the potential sources of friction when entering into new regulatory environments. Our **Forensic** team can utilise its knowledge of past disputes to help identify risk that should be considered when entering into a new business relationship.

Clear terminology

One cause of contractual strife we frequently assist our clients in resolving is a lack of clarity in the wording of the contractual arrangements, such as those dealing with accounting issues. We can assist clients in avoiding these future disputes by advising on the wording of contracts and by reviewing the accounting or operational elements of the contract.

Example

We were engaged to assist a client resolve a dispute that arose as part of a purchase price adjustment (PPA) clause in a sale and purchase agreement (SPA). The client had agreed to a PPA based on the number of unique customers subscribed to its services as at the date of the SPA. However, the agreed definition of what constituted a unique subscriber could not be determined using the data available in the company's books and records. A lengthy and costly dispute could have been avoided had the definition been checked against the available data.

Understanding the risks

To prevent disputes in the future, one must understand the potential areas of dispute. We have accumulated a great understanding of potential areas of dispute during our work with clients to resolve disputes. We use that knowledge to guide our clients to addressing the relevant risks during the contracting stage. Our geographical knowledge assists clients in identifying potential risks arising from future events, such as what might occur in the event of a regime change. Our industry knowledge assists client with identifying emerging risks specific to the industry.

Example

Our client approached us to perform due diligence on the potential purchaser of its asset.

In doing so, we did not identify any of the common concerns the client requested we look for in our research. However, we did identify other red flags that we brought to the client's attention. The client adjusted the provisions of the purchase agreement to address the resulting potential risk, that later came to fruition. Our client materially benefited from the resulting changes to the contract.

➤ Ongoing operations

Increasingly clients are entering into more complex financial arrangements that better align the risks of performance of the contract with the resulting rewards. For instance, rather than agreeing a fixed price per widget, clients are increasingly agreeing a cost-plus mechanism. With the increased regulatory focus, clients are concerned that as the profile of customers changes over time, the risks that the client has agreed to accept will increase.

Our **Business Intelligence** team can monitor business counterparties public profile to identify any emerging risks, such as sanctions compliance or financial difficulties. Our **Forensic** team can assist with monitoring the key performance indicators agreed to by the parties.

Example

We were engaged jointly by the parties to a contract that specified a cost sharing arrangement for the material jointly used by both parties. Each month we assisted the parties by reviewing the accounting for the costs of production of the jointly used material, including allocation of indirect costs. We raised any concerns we identified, with reasons for our concerns and our suggested resolution, to the parties for resolution on a timely basis.



➤ Emerging disputes

Clients often sense that the relationship with a counterparty is not going well, but cannot identify the issue causing the friction between the parties. Not identifying the root cause of the dispute early enough means the opportunity to resolve the matter in an amicable manner is missed. We assist clients in understanding the root cause(s) of an issue early so that appropriate remediating steps can be taken. At times this includes establishing the facts behind the concerns, such as by reviewing correspondence between the parties to understand what has been said historically, discussing policy changes at senior levels within governments to understand the shift in position, or conducting research into the counterparty to understand its corporate objectives and constraints. An understanding of the root causes of a dispute allows for effective actions to be taken to resolve the matter in an efficient manner.

Our **Business Intelligence** team can help our clients understand the current status of its counterparty with a focus on understanding why the counterparty is acting in the manner that is giving rise to the potential dispute. Our **eDiscovery and Data Analytics** teams can assist the client in having a complete and comprehensive view of the facts underlying a potential dispute. For instance, while certain emails, taken individually, may seem innocuous, seeing the totality of the correspondence between the parties may show those same emails were perceived differently. Similarly, not all accounting records can give management a comprehensive insight into the transactions between the parties. Analysing that data may uncover trends or statistics that put the actions of the counterparty in a different light.

Example

Our client contacted us as the counterparty to its contract was not acting in compliance with the contract and had ceased communication with our client. We assisted the client in identifying that the principal behind the counterparty had been recently arrested, on charges of fraud, leaving the counterparty in disarray. Our client decided not to continue seeking enforcement of the terms of the contract, but rather opted to issue a notice of termination of the contract to the counterparty, which was not disputed by the counterparty. Our client then proceeded to find a replacement for the counterparty and continued with its operations.



Amicable resolution

Not all disputes require the services of an adjudicator, be it a judge or an arbitrator, to reach resolution. Discussions amongst the parties to an issue can often lead to an amicable resolution. However, at times the parties require assistance in resolving one portion of the dispute to amicably resolve the remainder of the issues in dispute. Examples of third-party interventions that assist the parties in resolving their differences include:

Dispute advisory boards or panels:

Parties that are expecting there to be ructions in their relationship often appoint a group of three individuals to assist them in a timely resolution of those ructions. The key differences in the approach are that dispute advisory boards tend to provide a majority decision as to the resolution of known issues, whereas the dispute advisory panel are more proactive in identifying potential emerging issues for the parties to resolve in a timely manner. In either approach, the resolution binds the parties until such time as a higher authority, such as a court, issues a decision, should either party appeal to that higher authority.

Our **Forensic** team can assist clients by sitting on such panels or boards and by helping prepare presentations to a dispute advisory board.

Early case assessments/ early case analysis

At times, clients consider that the dispute will be resolved entirely in their favour, without necessarily taking into account the difficulties in their position, either factual or legal. One mechanism to provide a balanced view on a case is to request a suitably qualified individual to review the case and to provide a wholly independent view on the matter.



Control Risks can assist clients in preparing the fact pattern to be presented to the independent reviewer so that the resulting advice is based on the correct and complete fact pattern.

Expert determinations

Often the subject matter of a dispute is more technical than legal. For instance, in the case of purchase price adjustment clauses, the dispute is typically less about the legal interpretation of the contractual

provisions as it is about the application of accounting standards. Therefore, it is logical to engage the services of an accountant to assist the parties resolve the dispute rather than engaging with the judiciary. Equally, while arbitration is typically confidential, court proceedings rarely are and therefore our clients often prefer to engage the services of an expert to determine the outcome of a dispute rather than air the dispute in public.

➤ Amicable resolution (continued)

Our Forensic team is often appointed as an **expert determinator** to help clients arrive at a commercial resolution of disputes confidentially and quickly.

Example

We were jointly appointed by three siblings who could not agree upon the accounting for a commonly held pool of resources that had been freely used by the siblings for an extended period. The siblings agreed to be bound by our decision as to who had historically benefited from the use of the available resources which allowed the siblings to agree the future use of the remaining resources.

Mediation

While it has been a powerful dispute resolution mechanism for centuries, mediation is currently being discussed frequently by parties to a dispute. In part this is due to the recently ratified Singapore Convention on Mediation that allows for international enforcement of agreements reached during mediation. Mediation however requires careful planning to be successful. Parties to mediation should consider:

Goal definition

One key element in any negotiation is to understand what a suitable outcome might be. This is not necessarily an all or nothing situation. The respective strength of legal positions and the likely views of adjudicators need to be assessed. The weighted probable outcome of such a decision needs to be applied to the desired outcome.

Our **Forensic** team assists clients by independently assessing the quantum of any potential claim. We also work closely with counsel to assess the probability of achieving that outcome, resulting in a probable value of the claim. We then work

with our clients to understand the cost of achieving that outcome, resulting in a realistic settlement amount.

Negotiation strategy

As with any negotiation, negotiations to resolve a dispute requires a deep understanding of the dispute's origins, the relevant facts, legal obligations and rights and an understanding of what your counterparty can offer to resolve the dispute.

Our **Business Intelligence and Geopolitical Risk Advisory** teams provide our clients with a deep understanding of the motivations of counterparts, the resources available and the constraints under which the counterparty is negotiating. Our clients use this intelligence to formulate their negotiating strategy to achieve the outcome they have identified as being optimal.

Example

Our client suffered a loss because of the negligence of a counterparty. However, there were various limiting provisions in the contractual terms and there was limited precedent in the relevant jurisdiction for a claim of the magnitude envisaged. We worked closely with counsel to set out a probable outcome on the various heads of claim as well as the costs of achieving that outcome before a judicial body. We also identified the constraints under which the counterparty was negotiating and the resources it had available to settle the dispute. Our client was able to negotiate an amicable settlement involving both cash and non-cash elements.



Expert witness

At times, despite the best efforts of the parties to a dispute, it is not possible to find an amicable, commercial resolution to a dispute. The matter therefore has to be put before an external decision-making authority which imposes a decision that is binding upon the parties to a dispute. It is key in such situations to ensure that all amicable resolution mechanisms have been considered, and tried if appropriate, so that the investment decision to proceed to a judicial process is made on a sound basis. One of the key questions in any investment scenario is the likely returns from the investment.

We assist our clients in assessing the realistic quantum of any claim, along with the costs of achieving that outcome, so that the client is able to make an informed investment decision. Our **Business Intelligence** team assist our clients in assessing the likely returns if our client prevails in its case by identifying the location of potential assets that can be seized or attached. Our **Geopolitical Risk Advisory** team can help educate the judiciary about the relevant regulatory environment, including political pressures, that existed at the relevant time to put the actions of the parties into the appropriate context. Our **eDiscovery** team assists our clients in establishing the full set of facts relevant to the dispute, so the investment decision is based on a complete understanding of the facts as well as to argue its case before the judiciary without being surprised by documents not previously known about. Our **Data Analytics** team assists clients in presenting complex data, such as extensive transactions between the parties, to the judiciary in a manner that is easily understandable. Our **Forensic** team can assist clients present elements of its case in a clear and understandable manner as expert witnesses on quantum, accounting and regulatory matters. We can also testify on matters pertaining to the merits of the case as subject matter experts.



Example

The parties to a contract agreed to a purchase price adjustment clause that was based on the audited financial statements prepared in accordance with International Financial Reporting Standards ("IFRS"). The purchaser made various adjustments to the accounts following a change in accounting policy that materially changed the reported profitability. The revised accounting policy was within the parameters of IFRS but diametrically opposed to our client's previously adopted accounting policy. We provided expert testimony as to the acceptability of the respective accounting policies, as well as the economic rationale for the accounting policy chosen by our client, and the resulting impact on the purchase price adjustment clause.

Example

Our client was sanctioned by a regulatory body for the purported financial support of a regime deemed unacceptable to the regulatory body. We assisted the client in establishing that it had not provided financial support to the regime in question. The courts accepted our evidence and removed the sanctions.



