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Hong Kong Approves Third Party Funding for Arbitration

Abdulali Jiwaji (Signature Litigation) · Sunday, July 16th, 2017 · HK45

The Hong Kong Legislative Council (LegCo) recently adopted a new law permitting the third party funding of arbitration. This comes as a welcome development, bringing Hong Kong into line with other common law jurisdictions and ensuring that it keeps pace with its international rivals. It also strengthens the position of the Hong Kong International Arbitration Centre (HKIAC).

This is something of a boost for Hong Kong as an international arbitration hub as the legislation should enable parties involved in arbitrations seated in the jurisdiction to access a much wider spectrum of funding arrangements. An appropriate Third Party Funding for Arbitration Code of Practice in Hong Kong is to be drawn up and will take effect later this year.

According to a 2015 survey, conducted by Queen Mary University of London, Hong Kong and Singapore are respectively the third and fourth preferred venues for international arbitration, behind London and Paris. While third party funding has traditionally been regarded with suspicion throughout much of Asia, the move to recognise third party funding to support arbitration in Hong Kong matches Singapore, which passed a similar law earlier this year - the competition continues between the two centres for the position of leading Asian arbitration venue.

The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, which allows third party funding for arbitrations seated in Hong Kong, will apply equally to domestic and international arbitrations. This follows their unification into a single regime in 2011. The term 'third party funder' has a distinctly broad meaning under the new Hong Kong guidelines. In addition to professional funders, it can also include any party without personal interest in the proceedings. The funded party will be obliged to disclose the existence of the funding agreement, together with the identity of the funder, to the other party and the tribunal or court hearing the case.

LegCo's adoption of the bill follows the Final Report of Hong Kong's Law Reform Commission (LRC) Sub-Committee, which was published last October. This showed that express authorisation of third party funding in arbitration had overwhelming support in the territory. Some 97% of those who took part in the consultation process - arbitrators, barristers, solicitors, government bodies and arbitral institutions -

favoured the legislative amendments as recommended by the Commission, namely that the archaic common law torts of champerty and maintenance should no longer apply to arbitration, mediation or proceedings before the court connected to the arbitration.

In its response to the consultation, The Hong Kong Bar Association (HKBA) commented: 'Hong Kong can be better placed to compete with other international commercial arbitration centres, like London where legal practitioners (save in class actions) are now allowed to practise on a contingency basis. The same is allowable in the US and Mainland China.' It further noted that 'the HKSAR government with the objective of maintaining and consolidating its premier position as an international dispute resolution centre, proposed the reform of the current arbitration legislation regime by expressly allowing third party funding.'

Arguably, the territory has not invested as much in self-promotion as some other regional arbitration centres, notably Singapore. This means that there is some catching up to do if it is to maintain a competitive position.

Looking ahead, some parties may be interested in the possibility of proceedings being funded when making choices about the jurisdiction when negotiating their contractual arrangements. This might draw parties involved in a Hong Kong connected contract to choose arbitration rather than litigation for dispute resolution, should they consider that the potential for obtaining funding is a decisive factor. And in general terms, this development will at least maintain Hong Kong's relative attractiveness as a centre of arbitration for disputes about transactions involving China. We can look forward to an increase in the volume and scope of arbitrations which will be heard, taking into account also arbitrations which might not otherwise have moved forward without third party funding.

The LegCo report specifies that the bill will not apply to litigation in Hong Kong courts, where funding by third parties will generally remain prohibited, except for any court proceedings which specifically relate to arbitration - such as enforcement and challenges. Longer term, this development will be monitored as part of the process of considering the potential extension of third-party funding of court proceedings - assuming that LegCo deems such further reform to be desirable.

Third party funding has the potential to have a significant impact on the local dispute resolution market in Hong Kong. Third party funding is becoming the norm in other common law jurisdictions, and has really taken root in the London market by way of example, for litigation as well as arbitration. Judging by the recent experience of London, we have seen claims being advanced, using the help of funders, which would not previously have been possible. This applies especially to group litigation against large institutions, with a combination of claimants coming together to advance proceedings. It is hard to imagine these sorts of cases being maintained without funding. Even parties which are experienced in handling, and in a position to fund, their own litigation are increasingly considering third party funding as an attractive option.

Over time, it will be interesting to see what progress can be made in Hong Kong

towards the wider admission of litigation funders to fund domestic commercial litigation - particularly in the context of securities litigation. Given the very active local securities markets in Hong Kong, there would be some interesting angles for litigation funders to assemble group actions of the type which are becoming more prevalent in Europe. If that path were to open up, it would require some adjustment by the Hong Kong legal profession, since the involvement of litigation funders fundamentally changes the approach to case management.


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