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Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?

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Readers of this blog will need no reminding that, in the *Queen Mary-White & Case 2015 International Arbitration Survey*, the seats of Hong Kong and Singapore were amongst the top five most preferred and widely used seats by respondents to that survey. Both jurisdictions are known for adopting competitive and innovative arbitration laws to promote themselves as leading seats of arbitration. Recently, both jurisdictions have made significant steps towards formally permitting the use of third party funding ("TPF") for international arbitration in their municipal arbitration laws.

Rocky road for TPF in Singapore and Hong Kong

TPF has traditionally assisted parties with the costs of litigation and arbitration where they would not otherwise have had the resources to protect their rights under a contract.

That paradigm is changing: users of TPF now include parties with significant means who view TPF as a financing tool or, in some circumstances, as an opportunity to bring on board a party with substantial expertise in the tracing and recovery of assets, thereby adding value to the litigation or arbitration process. Although TPF is gaining momentum for parties to litigation and arbitration in jurisdictions such as England & Wales, Australia, the United States, and various EU States, it is yet to find a solid footing in Singapore and Hong Kong.

Indeed, until recently, Singapore went so far as to prohibit TPF for international arbitration proceedings, and Hong Kong did not expressly permit it. In both cases, this was largely because TPF was considered to offend the age-old English doctrines of maintenance and champerty, which sought to prevent *"…gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy…"* (The Hong Kong Consultation Paper, referring to *Ram Coomar Coondoo v Chunder Canto Mookerjee* [1876] 2 App Cas 186, at 210).

In Singapore, the doctrine of champerty applied to both public litigation and private arbitration, so as to prohibit the use of TPF in Singapore (see *Otech Pakistan Pvt Ltd v Clough Engineering Ltd & Anor* [2007] 1 SLR(R) 989). Similarly, in Hong Kong, whilst the decision of Mr Justice Neil Kaplan (as he was then) in *Cannoway Consultants Limited v Kenworth Engineering Limited* [1995] 1 HKC 179 found that champerty did not apply to arbitration, the later Court of Final Appeal

decision in *Siegfried Adalbert Unruh v Hans-Joerg Seeberger* [2007] HKCU 246 expressly left open this question.

Importantly, however, the Ministry of Law (the "Ministry") in Singapore and the Law Reform Commission of Hong Kong (the "Commission") have both recently taken steps towards the introduction of TPF for international arbitration into their respective laws.

Developments in Hong Kong

In Hong Kong, the Commission issued two reports after consultations, in October 2015 and October 2016, which culminated in proposed legislative amendments to Hong Kong's Arbitration Ordinance (the "AO"), as well as proposed amendments to associated regulations.

Most notably:

• The doctrines of maintenance and champerty (both as crimes and civil torts) no longer apply to arbitration (including emergency arbitrations), mediation and court proceedings envisaged under the AO, whether domestic or international. Similar amendments have been proposed for the Mediation Ordinance.

• The amendments are proposed to apply to funding agreements made on or after the amendments come into effect, as well as to international arbitrations which are seated outside of Hong Kong, where the funder is providing funding from within Hong Kong.

• Within 15 days of a TPF agreement, a funded party must give written notice of the existence of a funding agreement, which also identifies the funder, to each other party to the arbitration and to the arbitral institution and tribunal.

• The Commission envisaged the need to deal with a third party funder's right to be heard in the arbitral proceedings, its rights of equal treatment and to due process. Further, the Commission suggested that rules of procedure be adopted for TPF, and to address the consequences of non-participation by a third party funder in any costs application.

• The proposals seek to develop certain standards for TPF, such as by amending professional conduct rules (applicable to barristers, solicitors and foreign registered lawyers) to direct how a lawyer must act when its party's case is funded by a TPF agreement, and introducing clear ethical and financial standards. Further, in keeping with its *"light touch"* approach to TPF regulation, the Commission envisaged a *'Third Party Funding for Arbitration Code of Practice'* to apply as a tester code of rules for the first three years after the amendments pass. The funder must comply with the code, which would also regulate funding agreements and the content of TPF promotional materials.

• A party that fails to comply with the proposed amendments will not generally be liable before a court or tribunal. However, non-compliance may be taken into question in future proceedings before that court or tribunal. The non-compliant party may also be open to complaint under its governing professional body if it fails to comply with the proposed regulatory frameworks.

• As to costs, the Commission paused before amending the AO to permit a tribunal to award costs against a funder. This is partly because the AO, which is based on the Model Law, applies only to the parties to an arbitration agreement i.e. not a funder. The Commission has invited further

consultation on this issue.

Developments in Singapore

In Singapore, the consultations carried out by the Ministry culminated in two proposed draft instruments: *The Civil Law (Amendment) Bill 2016* (the "Bill") and *the Civil Law (Third Party Funding) Regulations 2016* (the "Regulations").

Singapore's proposed legal and regulatory amendments are similar to those in Hong Kong:

• No person will be liable in tort for any conduct on account of it being maintenance or champerty as known to the common law (proposed Section 5A of the Bill).

• A funding agreement under which funding is provided by a "qualifying" third party funder for "prescribed" dispute resolution proceedings (which includes international arbitration proceedings, as well as related court or mediation proceedings, and applications for a stay or for enforcement of a foreign award under Singapore's International Arbitration Act (Regulation 3)) is no longer contrary to public policy in Singapore, or otherwise illegal under maintenance or champerty (proposed Section 5B(2) of the Bill).

• In the proposed Regulations, a qualifying third party funder must:

* carry on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which it is not a party;
* have access to funds immediately within its control, including within a parent corporation or the third party funder's subsidiary, sufficient to fund the dispute resolution proceedings in Singapore; and
* those funds must be invested, pursuant to a third-party funding contract, to enable a funded party to meet the costs (including pre-action costs) of prescribed dispute resolution proceedings.

• Further, the third party funder must comply with the newly proposed regulations for TPF before it is able to enforce its rights under a TPF contract. The Bill permits the third party funder to apply for relief, where it can show that its non-compliance was accidental or inadvertent, or because it would otherwise be just and equitable to grant relief on other grounds.

• The Bill proposes amending Singapore's Legal Profession Act to permit a solicitor to introduce or refer a third party funder to the solicitor's client *"…so long as the solicitor does not receive any direct financial benefit from the introduction or referral"*, to advise or draft a TPF contract, or negotiate the contract on behalf of a client, and to act on behalf of the solicitor's client in any dispute arising out of the TPF contract.

• Finally, under the proposed amended Legal Profession (Professional Conduct) Rules 2015, legal practitioners would be required under the proposals to disclose the existence of a TPF contract and the identity of the funder to the court or tribunal and to every other party to the proceedings, as soon as is practicable.

Comparison

Although the proposed changes by the Ministry in Singapore and the Commission in Hong Kong do not necessarily mirror each other perfectly, the general purpose of them is the same. That is,

they both seek to abolish laws which may render TPF agreements invalid; to ensure that parties who are seeking funding are adequately protected; and to ensure that the TPF industry, including its ethical, financial and procedural elements, are appropriately regulated.

Contrast the developments in Singapore and Hong Kong with the position in England & Wales, where TPF is permitted and almost entirely self-regulated, by the Association of Litigation Funders. The courts in England & Wales are seen to be supportive of TPF, demonstrated in part by the recent decision of *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) (15 September 2016), in which the High Court enforced an ICC arbitral tribunal's award of costs in favour of Norscot, including its costs incurred as a result of TPF. It is said that Parliament is yet to impose statutory regulation on the industry for fears that doing so may stifle the industry's growth, and because of the belief that the English legal system is sufficiently robust so as to withstand the risk of abuse of process by those who *"trafficked in litigation"*.(*Giles v Thompson* [1994] 1 AC 142, at 153)

However, regulation may be required if the funding industry in England and Wales continues to grow. (Hong Kong Consultation Paper, page 67; Parliamentary Debates, United Kingdom House of Lords, 1 February 2012, Column 1596 (Lord Davies of Stamford)) For example, whereas both Singapore and Hong Kong have proposed mandatory disclosure of the existence of third party funding, the voluntary Code of Conduct of the Association of Litigation Funders does not presently include this requirement – this may be considered to be one of the areas which is suitable for regulation. It is interesting to note that 71% of respondents to the *Queen Mary-White & Case 2015 International Arbitration Survey* were of the view that TPF is an area which requires regulation.

When will the legislative developments in Hong Kong and Singapore come into effect?

The sub-committee of the Commission in Hong Kong was set up in June 2013, and worked steadily towards the issue of its first report in October 2015 recommending that TPF for arbitration taking place in Hong Kong should be permitted under Hong Kong law. It then invited comments on the issues discussed in the first report and took these into account in its second report issued in October 2016, which proposed legislative amendments to the AO to expressly permit TPF in Hong Kong. The authors are not aware that the proposed amendments to the AO have actually been put before the Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China.

By contrast, the Ministry in Singapore has been carefully considering the issue of TPF for years, with what many practitioners assumed was a fair degree of reticence. The first time it became clear that TPF would likely be permitted in Singapore for international arbitration was when the Ministry released the draft legislation and regulations in early July 2016 for a one-month consultation, after what many would consider a lengthy incubation period. Less than six months later, and the relevant Bill is in Parliament. It is expected that the legislation will come into effect at the beginning of 2017.

It may be some time before both Singapore and Hong Kong adopt amendments to their respective arbitration acts to incorporate provisions relating to TPF, and before each jurisdiction's relevant codes and regulations are amended to dovetail with the letter and purpose of the legislation. Once the proposed amendments are passed, however, Singapore and Hong Kong will have two of the most sophisticated legal frameworks in respect of TPF for international arbitration, and will undoubtedly become an example for other jurisdictions thinking of moving in the same direction.

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