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“No-Win No-Fee” Arbitration: a Win-Win for Hong Kong and Singapore?

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While Hong Kong and Singapore legislated in 2017 to allow third party funding of arbitrations (“*TPF*”),[1] both jurisdictions presently still bar “No-Win, No-Fee” and other outcome related fee arrangements between parties to arbitration and their lawyers. This is out-of-step with many other jurisdictions where outcome related fee arrangements are allowed on the basis that, like TPF, they can enhance access to justice for parties as well as offering increased flexibility with respect to capital and risk management.

This post looks at the latest announcements in Hong Kong and Singapore of plans to relax restrictions on outcome related fee arrangements and considers how these reforms may operate in practice if implemented.

Announcements in Hong Kong and Singapore

Singapore’s Ministry of Law issued a Public Consultation Paper on Conditional Fee Agreements (the “*Singapore Paper*”) in August 2019 inviting feedback on its proposal to allow conditional fee agreements (“*CFAs*”) for arbitrations as well as certain Singapore International Commercial Court proceedings. (Singapore Paper, paragraphs 1, 7)

The Singapore Paper describes CFAs as agreements where a lawyer representing a client in pursuing a claim receives payment of his legal fees only if the claim is successful. (Singapore Paper, paragraph 2) Such payment may include an “uplift” or “success” fee, in addition to the lawyer’s standard legal fees.

The Ministry of Law’s proposal therefore encompasses No-Win, No-Fee CFAs where lawyers do not receive payment of *any* legal fees unless the claim succeeds. It is less clear whether the proposal includes No-Win, Low-Fee or hybrid CFAs where lawyers receive a reduced fee if the claim does not succeed.

Hong Kong’s Secretary of Justice announced during 2019 Hong Kong Arbitration Week that a sub-committee of the Law Reform Commission would consider the introduction of Outcome Related Fee Structures for Arbitration. The sub-committee’s task is to review the current position relating

to outcome related fee structures for arbitration, consider whether reform of the relevant law and regulatory framework is needed and, if so, make recommendations for reform.[2)]

The sub-committee's broad remit appears to encompass not only CFAs but also damages or contingency fee based arrangements ("*DBAs*") where lawyers share in an agreed percentage of the damages recovered by the client if the case succeeds. No-Win, No-Fee and No-Win, Low-Fee variants of both CFAs and DBAs may therefore be on the horizon in Hong Kong.

DBAs do not feature in the Singapore Ministry of Law's proposal. The Singapore Paper is silent on why this is so beyond noting that DBAs lead to lawyers receiving remuneration with "*no direct correlation to the work done*". (Singapore Paper, paragraph 2) Their exclusion may have been inspired by the 2007 Final Report of the Committee to Develop the Singapore Legal Sector, which favoured the adoption of CFAs over DBAs for domestic litigation.[3)]

Growing International Acceptance of Outcome Related Fee Arrangements

Hong Kong and Singapore's moves towards outcome related fee arrangements are welcome and, arguably, overdue.

International acceptance of outcome related fee arrangements has grown in recent years with increasing recognition of their ability to enhance access to justice by allowing parties to enforce their contractual or investment treaty rights through arbitration when they may otherwise be unable or unwilling to bear the cost of doing so. They can also promote greater efficiency and risk management between parties and their lawyers by more closely aligning their interests.

Jurisdictions that already allow CFAs include Australia, China and England & Wales while Canada, England & Wales and the United States all permit DBAs.[4)] The Australian state of Victoria controversially passed legislation on 18 June 2020 permitting DBAs for class action litigations.[5)]

Arbitration users have exhibited demand for both CFAs and DBAs. A 2013 global survey of in-house counsel showed, of the respondents using flexible fee structures in arbitration, 27% had used No-Win, Low-Fee DBAs, 22% had used No-Win, Low-Fee CFAs, and 10% had used No-Win, No-Fee DBAs.[6)]

A common objection to CFAs and DBAs in the past has been that they incentivise lawyers to pursue vexatious claims. In reality, such arrangements are more likely to encourage lawyers to pursue cases with good prospects of success since their fees rely on a successful outcome.[7)]

Targeted regulation can help to address related objections to CFAs and DBAs that they create conflicts of interest between lawyers and their clients and encourage unethical behavior. The Singapore Paper, for example, sensibly proposes reinforcing lawyers' duty to act in the best interests of their client, with clients retaining control over the conduct of the arbitration and the decision whether to settle, when CFAs are in place. (Singapore Paper, paragraph 15(b))

A more difficult issue is whether there are benefits to introducing both CFAs and DBAs. While an

argument exists that DBAs are unnecessary if CFAs are available and vice-versa,[8] the more compelling view is that CFAs and DBAs each provide a valid method for funding arbitrations when properly regulated.[9]

Lawyers and their clients should therefore be free to enter into CFAs or DBAs if they so wish or, indeed, opt for a combination of these arrangements with TPF.

Implementing Outcome Related Fee Arrangements in Hong Kong and Singapore

Hong Kong and Singapore will need to address several important policy issues to introduce outcome related fee arrangements successfully. Three key issues are considered below.

First, implementing a framework for outcome related fee arrangements that enables parties and their lawyers to share the risks and rewards of arbitrations in a mutually beneficial manner.

Rigid arrangements that do not give parties and their lawyers the ability to tailor the risk-reward allocation to suit the specific circumstances of the case are of limited use in the real world. On the other hand, regulators may consider it necessary to cap the financial returns lawyers can realise to, among other things, protect parties from unfair arrangements. Indeed, the Singapore Paper requests feedback on whether to cap CFA success fees. (Singapore Paper, paragraph 14(a))

Alongside caps, another important consideration in creating a workable framework for outcome related fee arrangements is whether to permit No-Win, Low-Fee arrangements, which allow for greater flexibility than No-Win, No-Fee arrangements. England & Wales, for example, allows:

- No-Win, No-Fee and No-Win, Low-Fee CFAs with success fees capped at 100% of lawyers' normal fees;[10] and
- No-Win, No-Fee DBAs with the lawyer's share of damages capped at 50% of the sums ultimately recovered by the client.[11]

The "*illogical*" unavailability of No-Win, Low-Fee DBAs has widely been blamed for the limited uptake of DBAs in England & Wales.[12] The 2019 DBA Reform Project therefore proposes allowing No-Win, Low-Fee DBAs to enable lawyers to receive payment, albeit at a discounted rate, as long-running cases progress.[13] This proposed reform could encourage a significant increase in the use of DBAs in England & Wales by providing clients and their lawyers with more flexibility in allocating risk.

Second, should the costs of outcome related fee arrangements be recoverable from the unsuccessful party to the arbitration?

The Singapore Paper proposes excluding CFA success fees from costs orders. (Singapore Paper, paragraph 17) This has the significant advantage of not burdening losing parties with excessive and disproportionate costs as well as encouraging efficiency in the arbitral process.[14]

On the other hand, it may be equitable for tribunals to award such costs where, for example, the

reprehensible conduct of the respondent forced the claimant to enter into a CFA or DBA.[15)] In addition, preventing costs recovery may have negative access for justice implications. Impecunious respondents could find themselves unable to access CFAs since, in the absence of cost recovery, they would be unable to pay the CFA success fee due if their lawyers successfully defended the case.

Allowing tribunals discretion to award costs of CFAs and DBAs, subject to a rebuttable presumption that such costs are not recoverable, may help to balance these competing considerations.

Third, should lawyers or their clients be obliged to disclose the existence of outcome related fee arrangements to the tribunal and parties to the proceedings?

The Singapore Paper proposes lawyers being obliged to disclose the existence of CFAs on the basis that the TPF regime in Singapore also requires disclosure. (Singapore Paper, paragraph 15(a)) Unlike TPF, however, there is no potential conflict of interest arising from the involvement of a third party (the funder) warranting disclosure since a CFA or DBA is strictly between the lawyers and their client.

Moreover, if CFA costs are not recoverable from the unsuccessful party as per the current proposal in the Singapore Paper, it is difficult to see why disclosure is necessary. Disclosure is not required in England & Wales for this reason.[16)]

Conclusion

Arbitration users should welcome Hong Kong and Singapore's shifts towards allowing outcome related fee arrangements. No-Win, No-Fee and, in particular, No-Win, Low-Fee arrangements would give parties the freedom to share the risk and reward of arbitrations with their lawyers if they wish to do so and enhance access to justice.

With Singapore's proposal presently limited to CFAs, Hong Kong has an opportunity to differentiate itself as a seat of arbitration by allowing both CFAs and DBAs. It will be interesting to see whether the Hong Kong sub-committee recommends this course of action.

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uncover potential conflicts of interest.

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References

?1 In Hong Kong, the amendments to the Arbitration Ordinance (Cap. 609) ultimately took effect in February 2019.

?2 Website of the Law Reform Commission of Hong Kong.

?3 Report of the Committee to Develop the Singapore Legal Sector: Final Report (September 2007), paragraphs 3.22-3.23. A sub-committee of the Law Reform Commission of Hong Kong adopted a similar position in 2005 when it recommended that CFAs be allowed for litigation while DBAs remain prohibited as being contrary to public policy. *See* Law Reform Commission of Hong Kong, Conditional Fees Sub-Committee, Consultation Paper (September 2005), paragraph 7.41 and Recommendation 10.

?4 Singapore Paper, paragraph 5; Lord Justice Jackson Law Society Speech "Commercial Litigation: The Post-Jackson World", paragraphs 3.10, 3.17.

?5 Part 2, Justice Legislation Miscellaneous Amendments Act 2020; *see also* Victorian Law Reform Commission, Access to Justice— Litigation Funding and Group Proceedings: Report (March 2018), page 63 (Recommendation 7).

?6 2013 International Arbitration Survey: Corporate Choices in International Arbitration – Industry Perspectives (Queen Mary-PWC), page 19.

?7 *See* Report of the Committee to Develop the Singapore Legal Sector: Final Report (September 2007), paragraph 3.23.

?8 Victoria Law Reform, Access to Justice— Litigation Funding and Group Proceedings: Consultation Paper (July 2017), paragraph 8.17.

?9 For a strong endorsement of DBAs, and hybrid / No-Win, Low-Fee DBAs in particular, see Lord Justice Jackson Law Society Speech "Commercial Litigation: The Post-Jackson World", paragraphs 3.1-3.20.

?10 Courts and Legal Services Act 1990, Section 58(2); The Conditional Fee Agreements Order 2013, Article 3.

?11 Courts and Legal Services Act 1990, Section 58AA; The Damages-Based Agreements Regulations 2013, Section 4(3).

?12 Lord Justice Jackson Law Society Speech “Commercial Litigation: The Post-Jackson World”, paragraphs 3.2, 31.13; Civil Justice Council, The Damages-Based Agreements Reform Project: Drafting and Policy Issues (August 2015), page 77.

?13 The 2019 DBA Reform Project: Explanatory Memorandum (October 2019), pages 14-15.

?14 Lord Justice Jackson’s Response to Ministry of Justice Consultation Paper CP 13/10 (29 November 2010), paragraphs 2.1-2.15.

?15 For an example of such a situation in the context of TPF, see *The Essar Oilfields* [2016] EWHC 2361 (Comm). *See* Final Report of the Committee to Develop the Singapore Legal Sector (September 2007), paragraph 3.27(f).

?16 Civil Justice Council, The Damages-Based Agreements Reform Project: Drafting and Policy Issues (August 2015), pages 100-102.

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