

THIRD-PARTY FUNDING HONG KONG & SINGAPORE

- Matthew

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The legal landscape is changing in South East Asia for third-party funding of international arbitration. Third-party funding – by which a commercial fund finances a case in exchange for a share of the damages – has historically been confronted by suspicion or silence in the region. Now, the future looks very different. In Singapore, the consultation period closes today for draft legislation legalizing third-party funding for international arbitration. In Hong Kong, the Law Reform Commission has also recommended legislative reform to develop this market. Although not unforeseen, these are important developments for dispute resolution in Asia. Parties, funds and lawyers alike should prepare for changes to come.

What is third-party funding?

Third-party funding, also known as 'litigation finance', represents an alternative means to fund your claim. In simple terms, a commercial fund with no prior connection to the case – the 'third party' – finances the costs of the proceedings in return for a share of any damages awarded. By contrast, the traditional way for a party to fund its claim is simply for that party, or a related company, to pay for its costs.

Over the last decade, however, third-party funding has become increasingly prevalent in many jurisdictions in Europe, Australia and the United States. At its best, third-party funding provides access to justice by enabling a party to enforce its rights that would otherwise be unaffordable. Even for solvent parties, there is the further question of how best to access justice: third-party funding opens up

commercial choices to allocate risk, collateralise the claim, and apply capital profitably that might otherwise be tied up in the dispute.

The past – fear of third party funding in Hong Kong & Singapore

For centuries in common law jurisdictions, funding another party's claim was a crime. The public policy fear was that the third party funder "might be tempted, for his own personal gain, to inflame the damages, to suppress evidence or even to suborn witnesses."¹ In other words, "an agreement to share in the spoils of litigation may encourage the perversion of justice and endanger the integrity of judicial processes", not least because "it involves a stranger to the litigation in 'trafficking' or 'gambling' in the outcome of the litigation."²

England abolished the common law crime in 1967. However, in Singapore and Hong Kong – heirs in many ways to England's legal tradition – funding another party's claim generally remains unlawful and a crime (with certain exceptions as we explain below).

Reform – a long-time coming?

In recent years, reform has often been a subject of discussion, but also a source of controversy in Hong Kong and Singapore. Yet, in many other jurisdictions, a consensus has developed that the public policy for outlawing third-party funding has turned "full circle":

"Originally their prohibition was justifiable as a means to help secure the development of an inclusive, pluralist society governed by the rule

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of law. Now, it might be said, the exact reverse of the prohibition is justified for the same reason."³

By contrast, in 2012, Hong Kong's Law Reform Commission found that "the community at large does not accept the idea of funding litigation for profit."⁴ Likewise, in Singapore, the old adage remains that "he who pays the piper often calls the tune"⁵, and, despite speculation, the 2012 amendments to Singapore's arbitration acts left the issue untouched.

Nevertheless, the judiciary in both jurisdictions has started to chip away at the old common law prohibition. In Hong Kong, for instance, third party funding may be used by liquidators to pursue claims on behalf of insolvent companies,⁶ and the Court of Final Appeal has expressly left open the question of whether it is permitted for arbitrations.⁷ Conversely, in Singapore, the Court of Appeal has decided that the ban applies to arbitration.⁸ However, it has been recently suggested that third party funding might be possible in certain situations – for example, where the funder has a legitimate interest in the outcome of the litigation, or where it is clear that the administration of justice would not be perverted.⁹

Keeping up with the West

Our 2015 International Arbitration Survey, conducted with Queen Mary University London (QMUL), revealed that Hong Kong and Singapore are now the third and fourth most preferred venues for international arbitration behind the traditional domination of London and Paris.¹⁰ Both Asian jurisdictions are alive to the need to keep that momentum if they are

not to lose the ground they have worked hard to gain.¹¹ As early as 2013, Secretary for Justice, Rimsy Yuen, spoke of third party funding as an area of possible reform as part of Hong Kong's commitment to "spare no effort" to remain "an arbitration friendly jurisdiction".¹²

Hence, while Singapore still recognises the traditional concern "to protect vulnerable litigants, prevent the judicial system from becoming a site for speculative business ventures and to guard against potential abuse of court processes", it is also keenly aware that third party funding is flowing into other major arbitration centres around the world:

"Singapore is cognisant of the practices and business requirements of commercial parties, many of whom choose to arbitrate in Singapore despite their dispute having no connection to the jurisdiction."¹³

Likewise, it is no coincidence that the Hong Kong's Law Reform Commission listed "[p] reserving and promoting Hong Kong's competitiveness as an arbitration centre" as the first benefit of third-party funding.¹⁴ Ultimately, the desire to stay ahead may trump all else.

Now – a cautious race to reform?

For Singapore, this reform would be achieved by two main amendments. The first provision would abolish the common law restrictions on third party funding.¹⁵ The second provision would apply specifically to third party funding in international arbitration proceedings and related court and mediation proceedings, including enforcement of awards.¹⁶ It would expressly provide that third-party funding

contracts in these situations would not be "contrary to public policy or otherwise illegal".¹⁷ Lawyers will be able to recommend third party funders and negotiate funding agreements provided they themselves do not receive any direct financial benefit.

The legal significance of such reform should not be under-estimated. Funded parties would normally face certain risks if they were to arbitrate at a seat where third party funding is illegal. As well as potential criminal sanctions, the funded party may be sued in tort. The funded party may also be denied the assistance of the courts. Even if the funded party is successful in obtaining an award, the award may be set aside at the seat of arbitration, on the ground that it is offensive to public policy. In practice, the risk of an unenforceable funding agreement is sufficient to stall the development of the market for would-be funders.

By publishing its draft legislation, Singapore may appear to have leap frogged ahead of Hong Kong for now, but not for long. Hong Kong's Law Reform Commission issued its consultation paper on third party funding for arbitration in October last year and the consultation period ended in February. Draft

Hong Kong legislation is expected at the end of this year.

The future – the devil in the details

These are welcome, albeit long anticipated, developments for international arbitration in Asia. Nothing, however, has changed for now. Change is coming, but the nature of that change is not yet clear. Last year saw major funds launch pioneer offices in Hong Kong. We can expect the same in Singapore. However, we do not yet know how third party funding will be regulated in either jurisdiction. For example, Singapore is expected to impose a duty to disclose the existence and identity of a third party funder, which is in line with the preference of the majority of respondents to White & Case and QMUL's 2015 survey.¹⁸ On the other hand, while Singapore is alive to the "light touch" approach to regulation adopted elsewhere, it remains to be seen how light its touch will be.

Currently, the law is holding the market back. When this barrier is released, we will see how fast the market gains momentum. However, this much is certain: neither jurisdiction is going to permit a flood.

Endnotes

1. Lord Denning in *Re Trepca Mines Ltd (No.2)* [1963] Ch. 199 at [220].
2. *Ribeiro PJ in Unruh v Seeberger* [2007] 2 HKLRD 414 at [101].
3. Lord Neuberger, 'From Barretery, Maintenance and Champerty to Litigation Funding', 2013, para. 48.
4. The Law Reform Commission of Hong Kong, 'Class Actions', 2012.
5. Menon CJ, 'Some Cautionary Notes for an Age of Opportunity', 2013.
6. See, e.g., *Re Co A* [2015] HKEC 2089 (approving a funding agreement between liquidators in a compulsory liquidation and a Cayman incorporated closed-end fund, where the funding agreement was solely an investment for the funder). Hong Kong's permitted exceptions also include where third parties have a legitimate interest in the outcome of the case or where "access to justice considerations" apply, but both only with the court's approval.
7. *Unruh v Seeberger* [2007] 2 HKLRD 414.
8. *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another* [2006] SGCA 26.
9. *Re Vanguard Energy Pte Ltd* [2015] SGHC 156.
10. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration conducted by Queen Mary University of London in partnership with White & Case.
11. See also White & Case partner Matthew Secomb's Insight, 'The Ascent of Asia: How the East is gaining on the West in international arbitration'.

Endnotes cont...

12. Rimsky Yuen, 'Keynote speech by Secretary for Justice at Arbitration Week', 2013.
13. Singapore's Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016.
14. The Law Reform Commission of Hong Kong, Third Party Funding for Arbitration Sub-Committee, Consultation Paper, 2015.
15. Draft Civil Law (Amendment) Bill 2016, cl. 2 (insertion of section 5A in the Civil Law Act).
16. Draft Civil Law (Amendment) Bill 2016, cl. 2 (insertion of section 5B in the Civil Law Act); Draft Civil Law (Third Party Funding) Regulations 2016, cl. 3.
17. Draft Civil Law (Amendment) Bill 2016, cl. 2 (insertion of section 5B(2) in the Civil Law Act).
18. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration conducted by Queen Mary University of London in partnership with White & Case.

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