

Green light for Third-Party Funding for International Arbitration in Asia



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On 14 June 2017 hot on the heels of Singapore, Hong Kong became the second jurisdiction in Asia to provide an express framework for third party funding in international arbitration.

In bringing these changes Singapore and Hong Kong have ensured that they can continue to compete with other leading arbitration jurisdictions such as the US and UK where third-party funding arrangements were already allowed.

Singapore

The Civil Law (Amendment) Act 2017 (the **Act**) and Civil Law (Third Party Funding) Regulations 2017 (the **Regulations**) came into force on 1 March 2017, together with the insertion of new rules into Singapore's Legal Profession Act (the **LPA**) and Legal Profession (Professional Conduct) Rules 2015 (the **LPCR**). These developments follow the Civil Law (Amendment) Bill which was passed on 10 January 2017.

Summary of legislative amendments

In summary, the Act provides that third party funding agreements with qualifying third-party funders will no longer be illegal and unenforceable under Singapore law as long as they relate to one of the specified categories of dispute resolution proceedings.

The Regulations set out detailed provisions regarding:

- The classes of "*Prescribed dispute resolution proceedings*" for which third party funding is permitted. At present, only third-party funding contracts in relation to international arbitration and related court or mediation proceedings are enforceable. This would include applications for stay of court proceedings in respect of matters

which are the subject of arbitration agreements, as well as the enforcement of arbitration awards.

- It is clear from the Regulations that only professional funders are permitted to enter into third-party funding arrangements in Singapore. Regulation 4 provides that a "qualifying Third-Party Funder" must (a) carry on the "principal business" of funding dispute resolution proceedings in Singapore or elsewhere, and (b) have a paid-up share capital of not less than SGD 5 million (or the equivalent amount in foreign currency)

Lawyers and Third-Party Funding

New rules applicable to third-party funding have also been inserted into the LPA and LPCR:

- Section 107(3A) of the LPA provides that lawyers may introduce or refer a third-party funder to their clients, as long as the lawyer does not receive a direct financial benefit from the introduction or referral. Lawyers may also advise on or draft a third-party funding contract for their clients and act for their clients in any dispute arising out of the third-party funding agreement.
- The amendments to the LPCR concern two key areas:

- Disclosure: Rule 49A imposes a duty on lawyers to disclose to the tribunal or court and every other party the existence of any third party funding their client is receiving, including the identity and address of the third-party funder.

This disclosure must be made at the date of commencement of dispute resolution proceedings (where the third-party funding contract was entered into before commencement of those proceedings) or as soon as practicable after the third-party funding contract is entered into (where the third party funding contract is entered into on or after the commencement of proceedings).

- Prohibition against financial interests: Rule 49B prohibits lawyers and law firms from holding directly or indirectly any shares or other interest in the Third-Party Funder (i) which the lawyer or law firm has introduced or referred to their clients; or (ii) which has a third-party funding contract with a client of the lawyer or law firm.

Hong Kong

On 14 June 2017, the long awaited Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (the **2016 Bill**) was finally passed in Hong Kong.

Whilst a Code of Practice for funders is being drawn up, it is expected that the 2016 Bill will take effect later this year.

Summary of Legislative Amendments

The 2016 Bill will amend the Arbitration Ordinance (Cap. 609, The Laws of Hong Kong) and the Mediation Ordinance (Cap. 620, The Laws of Hong Kong).

Under the new law:

- The doctrines of maintenance and champerty are expressly stated not to apply to third-party funding in arbitration proceedings and mediation, including proceedings before emergency arbitrators and ancillary court proceedings.

- The funded party must give notice in writing to each other party to the arbitration and the relevant arbitration body in relation to (i) the fact there is a funding agreement in place; (ii) the name of the third-party funder; and (iii) a stipulated end point of the funding agreement.

- The term 'third-party funder' has a broad meaning and unlike in Singapore it is not solely limited to professional funders. Anyone who does not have an interest in the arbitration proceedings can potentially be a third-party funder. As such, law firms and lawyers providing legal services in Hong Kong or elsewhere are allowed to provide third party funding provided that they are not involved in the same arbitration.

- Third-party funders will need to comply with a Code of Practice. An advisory body appointed by the Hong Kong Secretary for Justice will draw up such a code. The code is expected to cover provisions in areas such as confidentiality, conflicts of interest and internal procedures of third-party funders etc. and funders will be required to report annually on their compliance with the code.

Comments

These new third-party funding regimes are significant steps forward for Singapore and Hong Kong as leading international arbitration hubs, and the change is welcome news for the arbitration community.

Since the new third-party funding legislation does not generally apply to court litigation in Hong Kong or Singapore, some people believe that it will encourage parties with a Hong Kong or Singapore connection to opt for arbitration over litigation.

However Singapore's Senior Minister of State for Law has said that the current legislative amendments "...will serve as a testbed for third party funding. The categories may be broadened after a period of assessment". No time frame has been set for such further reform it is possible that third party funding may be

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extended to Singapore's International Commercial Court in the not so distant future. This would be another step towards cementing Singapore's position not just as a leading international arbitration hub, but also as a prime destination for international commercial dispute resolution.

In Hong Kong the new Bill is also timely given that Hong Kong is the "super conductor" in the PRC's rapidly developing Belt and Road initiative, which many are anticipating will generate more investments and trade which in turn is likely to lead to an increase in activity in the dispute resolution market in Hong Kong.

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