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The Asian races—third party funding scorecards and recent developments in HK, Singapore and South Korea

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Arbitration Analysis: Yasmin Mohammad, senior counsel at Vannin Capital, dispute resolution funders, reports on progress towards the legalisation and regulation of third party funding in arbitration in Singapore, Hong Kong and South Korea and provides her own perspective on the developments at these seats

Singapore wins race by nose

On 10 January 2017, Singapore was the first arbitral seat to crystallise its plans to approve third party funding of disputes when the Amendment to the Civil Law permitting third party funding was passed (the Amendment).

Stepping back a couple of months, on 7 November 2016, Singapore's Ministry of Law submitted to Parliament a Bill amending the Civil Law permitting TPF of international arbitration. First and foremost, the Bill took the fundamental step of abolishing the common law tort of champerty and maintenance in Singapore for international arbitration proceedings.

The balancing act

The Amendment perfectly reflects the approach decided by the Singaporean Parliament: to adopt a light approach to the regulation of funding but only to the extent that reputable and professional funders are active on the market.

Subsequent implementing legislation will set out the criteria that funders will need to comply with but the Bill has given us insight to the issues to look for, such as the proof of capital adequacy. This is clearly the single most important attribute of a third party funder but readers would be shocked to know just how rarely a funder is asked to prove that it has the appropriate capital at its disposal.

Similarly, although some academic writers and arbitration conference speakers enjoy discussing issues of conflicts of interests (when this problem has never, to my knowledge, crystallised in reality), they often ignore the issue of capital adequacy which has been the source of the large majority of problems around funded cases.

Third parties which provide funding but do not comply with the qualifying criteria will not be able to enforce their rights under the third party funding agreement. However, they will still be required to perform their obligations.

Furthermore, Singapore is constituting working groups to elaborate industry-promulgated guidelines and best practices for third party funders, lawyers and arbitrators. These guidelines and best practices will address issues like confidentiality, conflicts of interest, control of proceedings and termination of the funding contract.

Finally, Singapore's Legal Profession Act (LPA) was also amended to (1) allow lawyers to introduce funders to their clients so long as the lawyers do not receive direct financial benefit from the introduction or referral and (2) impose a duty on lawyers to disclose to the tribunal or court and every other party the existence and identity of any third party funding their client is receiving. This includes the identity and address of the third party funder and ensures that there are no conflicts of interest.

It is important to note the great speed at which Singapore has made these amendments to its law and to highlight the clear commitment of the government to aid the remarkable arbitral community to continue to impose its importance on the global map of arbitral seats.

Hong Kong follows a rich and methodical process

On 30 December 2016, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill, which opened the way to the use of third party funding in Hong Kong, was officially published. The Bill received its second reading in the Legislative Council on 11 January 2017. Hong Kong is therefore coming to the end of a rich and methodical process of consultation leading to the preparation of the Bill.

By way of background, on 12 October 2016, the Final Report of the Hong Kong Law Reform Commission Sub-Committee (the Commission) on Third Party Funding was issued delivering to the government and to the legal community the results of a full consultation with all stakeholders. This process started in June 2013 when a Sub-Committee was set up to review the position relating to third party funding in the context of arbitration proceedings. It was mandated to consider whether reform was needed, and if so, to make recommendations for reform as required.

The legal community was unanimous:

As set out in the 12 October 2016 Final Report, 97% of the participants in the consultation process including arbitrators, users, government bodies, solicitors/barristers and arbitral institutions, expressed their clear desire to see Hong Kong lift any ambiguities as to the legality of third party funding in their legal framework.

Light touch regulation:

As a preliminary point, and perhaps the most interesting, the Commission advised the Ministry not to regulate the industry of third party funding strictly for an initial period. It was agreed to observe the conduct of various participants and to decide at a later stage whether formal regulation was really needed and to what extent. This was an excellent decision in our view (however admittedly and understandably biased) as most criticisms and calls for regulation usually stem from purely academic examination and only too rarely from a truly informed vantage point.

The recommendations made by the Final Report have been very closely followed as we have seen from the Bill and the draft Code of Practice published accompanying the Bill.

One binding obligation, disclosure:

Within the Bill itself, there is only one binding obligation on the practice of third party funding which is for parties to disclose the existence of a funding agreement and the identity of the funder.

This recommendation is finding its way in other rules and documents as the remedy to potential conflicts of interests between third party funders and arbitrators in particular. This concern is prevalent in conversations about third party funding even though such conflicts with a tribunal have not to date arisen in practice (to our knowledge) because funders take much care to avoid creating a situation of conflict that would endanger their investment.

The requirement to disclose, however, gives rise to another danger as such disclosure encourages automatic security for costs applications simply because a funder is present in a dispute. A security for costs application, or the knowledge that such an application is sure to be made, thus increases the cost of funding for a claimant when ATE insurance then needs to be provided. Costs is the biggest criticism of arbitration, so implementing a requirement that has the effect of driving up the costs of that litigation or arbitration with systematic provisions of ATE insurance is not rendering a public service, especially not for impecunious claimants.

That being said, the possibility for a claimant to reclaim from the respondent the cost of funding (i.e., the funder's premium) is now an interesting incentive for the claimant (impecunious or well capitalised) to disclose in any event that it is being funded.

Ignoring costs implications, as a professional third party funder, we are as a general rule, favourable for the fact of funding and our identity to be disclosed. Whether and when the fact of funding and our identity is disclosed normally comes down to a strategic decision made by the claimant and their lawyers. Therefore, the jurisdictions that preserve this strategic option will no doubt obtain (or maintain) a competitive edge.

Soft law, the Code of Practice:

Second, the Bill has requested the preparation and issuance of a Code of Practice ensuring ethical, financial and professional conduct towards users. The Code of Practice would not have any judicial or legislative authority but any breach of it would be persuasive evidence in judicial or arbitral proceedings against a third party funder. This is notably similar to the approach of the Association of Litigation Funders (ALF) of which Vannin Capital is one of only seven members.

We are in full support of this decision. It will ensure that only professional, reputable funders are invited to provide services in Hong Kong.

More specifically, the Bill and the draft code suggest that the Code of Practice addresses:

- the capital adequacy of the funder
- conflicts of interest
- costs and adverse costs
- control of the arbitration by the funder
- grounds for termination of the funding, and
- that each of these matters are also dealt with clearly in any funding agreement

South Korea, the Dark Horse?

South Korea is catching up rapidly as an attractive arbitral centre. The ambition of the South Korean market is also apparent from their approach to third party funding. The civil law background of this flourishing jurisdiction has certainly facilitated the conversation as there are no concepts of champerty and maintenance to overcome. Therefore, the examination of third party funding has started directly with a commercial analysis of the benefits for the parties to arbitrations as opposed to hypothetical legal or ethical impediments. For this reason, among others having to do with the great quality of the local counsel and the clear desire to promote international arbitration, it is unmistakable to all commentators that South Korea will no doubt compete seriously with Singapore and Hong Kong in a very near future as another very attractive arbitral centre in the region.

Next steps

There has not been any announcement as to when the implementing legislation and Code of Practice will be in force in Singapore and similarly, in Hong Kong, it is unclear when the final reading of the Bill will take place or when the consultation on the draft code of practice will commence. This being said, seeing the very recent noticeable multiplication of inquiries for funding for disputes linked to Singapore and Hong Kong, it is clear that there is full confidence on the ground that the reforms will be fully implemented in no time.

Yasmin Mohammad will be discussing the developments in Singapore and answering questions about the funding market globally at the next Litigation Conference organised by the Law Society of Singapore on 20 & 21 April 2017.

This analysis is adapted from an article originally published in Vannin Capital's [Funding in Focus] 4.