REPRINT

CD corporate disputes

THE CHANGING DYNAMICS OF THIRD-PARTY FUNDING OF CORPORATE DISPUTES IN ASIA

REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
JUL-SEP 2017 ISSUE

www.corporatedisputesmagazine.com

Visit the website to request a free copy of the full e-magazine

WOODSFORD
LITIGATION FUNDING

Published by Financier Worldwide Ltd
corporatedisputes@financierworldwide.com
© 2017 Financier Worldwide Ltd. All rights reserved.

PERSPECTIVES

THE CHANGING DYNAMICS OF THIRD-PARTY FUNDING OF CORPORATE DISPUTES IN ASIA

BY **STEVEN FRIEL AND CHARLIE MORRIS**
> WOODSFORD LITIGATION FUNDING

In recent years, a growing number of common law jurisdictions have reformed or abolished their longstanding rules of champerty and maintenance. These reforms have unlocked the door for parties involved in disputes to seek third-party funding (TPF) to support their meritorious claims.

In January, Singapore passed the Civil Law (Amendment) Act 2017. Following this reform, TPF can now be used to help fund international arbitrations (IAs) seated in Singapore. As recently as 14th June, Hong Kong became the latest jurisdiction to follow this trend by passing legislation to amend the Arbitration Ordinance (Cap. 609), enabling TPF of IAs. The amendment is likely to take effect later this year, giving time for a code of conduct for funders to be developed.

Both of these reforms effectively recognise that TPF is part of the modern commercial disputes landscape. However, in both jurisdictions, commercial pressures have also driven the reform agenda. Arbitral institutions in Singapore and Hong Kong, including for example the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Center (HKIAC), are commercial operations, which parties are free to use – or not. And, despite these venues both enjoying a growing reputation in recent times, it is clear that the prohibition on TPF of IAs was holding them back.

In short, jurisdictions that do not embrace TPF risk being left behind by the competition.

Time for a venue review?

With the barriers to TPF in Singapore and Hong Kong being dismantled, at least in respect of IAs, it is possible that the popularity of these arbitral venues will increase still further. Until now, an Asian-based corporate may have opted to have its IA heard in a venue where TPF has long been permitted, such as London or Paris. Now, thanks to the reforms in Asia, that same corporate may prefer to select Singapore or Hong Kong as its venue of choice.

Of course, this presupposes that parties and their representatives have some knowledge of the TPF market and have already ensured that their contractual dispute resolution venue clauses (DRVCs) specify that any IAs must take place in

a TPF-friendly jurisdiction. Realistically, that is probably not the case. When a business negotiated a deal several years ago, it was probably far more concerned with getting the deal over the line, rather than whether the DRVC specified a venue where TPF would be permitted.

However, in light of recent developments, it is arguable that more thought should be paid to the issue of TPF when parties are negotiating DRVCs, as it may impact future cashflow if it is required to fund its own disputes if and when they arise. For example, a Malaysian corporate which is contracting with an Indian corporate may be limiting its disputes funding options, and therefore causing itself to incur future cost unnecessarily, if arbitration is later required and a TPF-friendly venue has not been chosen. Equally, if the same company were not familiar with the changing TPF regimes in Singapore and Hong Kong, it may be setting itself up for unnecessary future expense by selecting a geographically less suitable venue, such as London or Paris. If you can select a highly-regarded IA venue closer to home – which also permits TPF – then why select one based on the other side of the world?

Greater awareness needed

On a positive note, the reforms underway in Singapore and Hong Kong, simply by taking place, have helped to raise awareness of the availability of TPF in Asia, particularly among disputes practitioners. But there is probably more to do. Awareness of TPF needs to spread outside the Asian legal disputes community, to also include transactional lawyers who negotiate and advise on deals containing DRVCs and the in-house counsel who sign those deals off. Greater awareness among contractual parties and their advisers will lead to a more informed approach to dispute venue selection and ultimately benefit those parties financially if a dispute arises. And, of course, the more Asia-focused arbitrations are heard in these venues, the more the TPF market will expand locally.

"A key benefit of TPF is access to justice: it allows claimants to pursue a claim that they would otherwise not be able to afford."

A key benefit of TPF is access to justice: it allows claimants to pursue a claim that they would otherwise not be able to afford. However, there is now a growing recognition internationally that

access to justice is not the only benefit of TPF. TPF can also allow organisations to free up cash flow, because they are not required to fund an IA from their own balance sheet. It also allows organisations to hedge their disputes risk by giving away some of the upside of winning a claim. And, from a tax and accounting perspective, TPF allows businesses to remove legal expenses from their balance sheet, positively impacting their bottom line.

Nevertheless, even when an IA is due to take place within a TPF-friendly Asian venue, whether TPF is suitable will depend on the facts of the case. In order to qualify for TPF, certain criteria must be met.

First, the party seeking funding must have a meritorious claim. Funders do not back claims that are unlikely to succeed or result in a recovery. Second, the dispute must result in the respondent paying compensation to the claimant, as a funder receives its return – usually a percentage or a fixed fee – from that compensation. Third, the value of the claim must be reasonably large. For example, some third-party funders will only support disputes worth in excess of $15m, although others are more flexible.

In light of the benefits of TPF outlined above, it is incumbent on legal advisers to advise their clients on their choice of venue for dispute resolution and TPF options generally, both in the here and now and as new markets open up to TPF. CD

Steven Friel
Chief Executive Officer
Woodsford Litigation Funding
T: +44 (0)20 7313 8071
E: sfriel@woodsfordlf.com

Charlie Morris
Senior Investment Officer
Woodsford Litigation Funding
T: +44 (0)20 7985 8412
E: cmorris@woodsfordlf.com