



# Arbitration and Litigation Funding in Singapore and Hong Kong

Woodsford Litigation Funding Insight

# The use of litigation funding is expanding rapidly across the legal world.

This trend has accelerated as the key actors in dispute resolution proceedings become familiar with litigation funding and its many advantages. Sophisticated claimants appreciate how funding can help them manage costs and offset legal risk; entrepreneurial lawyers recognise how third-party funding can help them expand their practice and offer clients flexibility on fees; and forward-thinking judges and arbitrators acknowledge the positive role that litigation funding plays in ‘unlocking’ meritorious claims and fostering access to justice.

Until recently, use of litigation funding was largely confined to certain common law jurisdictions such as the United Kingdom, Australia and the United States, but in the last few years there has been rapid expansion in its use. This growth trend, though not entirely countercyclical, is largely uncorrelated to wider macroeconomic activity, which has led the litigation funding industry to develop from a niche product allowing access-to-justice for capital-constrained claimants, to a more encompassing risk hedging device attractive to well-resourced businesses.

Litigation funding is now increasingly being used in disputes in continental Europe, Latin America, various offshore jurisdictions and, importantly, Asia. In recent times, Singapore and Hong Kong have built on their reputation as well-established arbitral seats, making significant investments in their international arbitration ‘infrastructure’, and establishing themselves as ‘go to’ venues for arbitration in Asia. These jurisdictions have also benefitted from the growth of emerging markets in Asia, where West-to-East capital flow, often to fund mega-infrastructure and energy projects has not only generated capital, but also increased the number of Asian parties involved in high-stakes disputes in the region.

To remain competitive on the global arbitration stage, however, Hong Kong and Singapore have been playing catch-up when it comes to litigation funding, but encouragingly they have indicated a willingness to embrace it. Recent changes in the law in Hong Kong and Singapore have demonstrated that the region is adept at embracing fast-paced change and shedding the historical constraints that made it less attractive and competitive as a disputes venue.

Woodsford Litigation Funding is excited by the opportunities presented by these changes and is looking forward to doing business in the region.

# What is litigation funding?

Litigation funding, also known as ‘litigation finance’ or ‘third party funding’, is simply an alternative means for a claimant to fund the costs of a legal dispute, including litigation and arbitration. A third-party funder, otherwise unconnected to the dispute, usually enters into an agreement with a prospective claimant or law firm to provide funds for the claimant’s legal costs, in return for a share of the award in the event that the claim is successful. The investment by the funder is typically non-recourse which means that if the claim is lost, the claimant is not liable to

reimburse the funder’s investment. In essence, the third-party funder can shoulder the costs risk in a dispute rather than the claimant.

Since its inception, litigation funding has developed from case-by-case funding for impecunious claimants into portfolio financing for both well-resourced corporates and law firms. In essence, litigation funders have capital to deploy into any contentious situation which, in time, may generate a return.

# What are the advantages of litigation funding?

Aside from enabling an impecunious claimant to advance a claim which might otherwise be stymied due to lack of resource, or allowing a well-resourced company to hedge its legal costs risk, litigation funding can also have substantial strategic benefits and change the dynamic of a dispute. For example, a funded claimant will often be able to achieve a better settlement outcome more quickly than an unfunded claimant. This is principally because the defendant, upon becoming aware of the claimant’s funding, will appreciate that the common defendant tactic of depleting a claimant’s resources to stifle a claim would likely fail. A funded claimant is also less likely to feel any financial pressure to accept a ‘lowball’ settlement offer.

Further, the support of a sophisticated professional funder, such as Woodsford, signals to a tribunal and the defendant that

an objective third party with substantial expertise and experience in disputes, is willing to risk its own capital because of the merits of the underlying claim and the prospects of making a recovery. Although the conduct and control of a funded claim rests firmly in the hands of the claimant (and its lawyers), a litigation funder like Woodsford, which is staffed by expert litigators with decades of international law firm experience, can also be a valuable resource to the claimant team throughout the life of the claim. For example, Woodsford often assists the claimant’s legal team with key strategic decisions and, if required, can attend mediations or other settlement discussions, which often helps the claimant to demonstrate its financial strength and that its stomach for what may become a lengthy dispute.

# What are the recent changes in Asia?

## Singapore

For some time, third-party funding of litigation and arbitration has been prohibited in Singapore (save for certain exceptions) by the common-law doctrines of champerty and maintenance. However, in January 2017, in an important step towards reinforcing the region's position as a leading international dispute resolution hub, Singapore's Parliament passed the Civil Law Amendment Act and the Civil Law (Third Party Funding) Regulations 2017, which together form the framework for third party funding in Singapore. The Act effectively abolishes the common law tort of champerty and maintenance and permits third party funding in respect of international arbitration and associated proceedings (for example, enforcement proceedings in the Singapore Courts and mediation proceedings in connection with international arbitration), although funders will be required to meet certain criteria, such as demonstrating their capital adequacy, to operate in the region. In due course, the key arbitral institutions in Singapore, such as SiArb and SIAC, are also likely to publish guidelines with which funders will likely also have to comply if they are to fund arbitrations heard pursuant to the rules of those institutions.

## Hong Kong

In 2013, Hong Kong's Law Reform Commission launched a public consultation on whether to permit third-party funding for international arbitration seated in Hong Kong. That process culminated in October 2016 with a recommendation to allow it, subject to developing an appropriate regulatory regime within the first three years of it being permitted. On 14 June 2017, following approval of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2017, a new Part 10A (ss.98E – 98W) was added to the Arbitration Ordinance, and a new s.7A to the Mediation Ordinance. These new provisions of the Arbitration Ordinance, like the amendments in Singapore, provide that the doctrines of champerty and maintenance no longer apply to third party funding of arbitration or related court or mediation proceedings. Interestingly, unlike in Singapore, no distinction is made in Hong Kong between domestic and international arbitration; funding is now permitted in both. The arbitration order also provides for the introduction, in due course, of a Code of Practice for funders, which is likely to address matters such as capital adequacy requirements and measures to avoid conflicts of interest arising.

## Regulation

Both Hong Kong and Singapore have given preliminary indications that they will adopt a 'light touch' towards the regulation of the third-party funding industry. In England and Wales, the 'home' of litigation funding, the most reputable funders are self-regulated through their membership of the Association of Litigation Funders, which prescribes a Code of Conduct for its members. Woodsford considers this level of

'regulation' to be appropriate for the industry, as litigation funders already operate in a 'hyper-regulated' environment: the more reputable funders are often staffed by lawyers who themselves are professionally qualified and subject to the regulatory regime for lawyers in the jurisdiction of their qualification; funders fund lawyers who are themselves regulated by their professional bodies; and, above all,

funded cases proceed before judges and arbitrators who have significant oversight of the conduct of funders in relation to any given matter.

As a result of this ‘hyper-regulated environment’, there have been remarkably few reported cases where a funder and a funded party have ended up in dispute. Where a dispute has occurred, it has typically resulted from a claimant doing a deal with a ‘less reputable or inexperienced’

funder or where the claimant itself has breached its obligations under a funding agreement. There is therefore unlikely to be any need for a formal regulatory regime, but it remains to be seen how the authorities in Hong Kong and Singapore will tackle this issue. In the meantime, and in any event, claimants and their lawyers should ensure that they do business with reputable professional funders with significant experience, like Woodsford, to avoid any potential pitfalls.

## Is further change required?

Notwithstanding the positive developments in respect of the funding of arbitration, for some the reforms in Hong Kong and Singapore did not go far enough. In particular, neither jurisdiction has yet taken any steps towards liberalising the funding regime for domestic court litigation in the way that it has done for arbitration.

As matters stand in Hong Kong, third-party funding is generally not permitted in relation to domestic litigation (which is unrelated to arbitration proceedings). There are three limited exceptions to this general prohibition, namely (1) ‘common interest’ cases, involving third parties with a legitimate interest in the outcome of the litigation; (2) where ‘access to justice’ considerations apply; and (3) a miscellaneous category, including insolvency litigation, which were set out in the case of *Unruh v Seeberger* in 2007. Although the second of these three exceptions could, in theory, apply to a number of potentially fundable cases, where the claimant is impecunious and unable to afford its own legal representation without the assistance of third party funding, there appears to be a paucity of Hong Kong case law where this exception has been tested even though the exception has existed for over 10 years. Further, if and when this exception is ultimately tested, many local practitioners expect the court to apply it in a very conservative manner and in very limited circumstances. The third exception

insolvency cases – is where funding has been most commonly used to date, but this is of little assistance to solvent claimants which need funding owing to their impecuniosity or cash flow issues.

Similarly, in Singapore, in the case of *Re Vanguard Energy* in the Singapore High Court in 2015, the sale by a liquidator of a cause of action to a third party was held to be permitted under the statutory insolvency regime of Singapore and not in contravention the doctrines of champerty and maintenance. Although *Re Vanguard Energy* was only a first instance decision, it signaled a significant shift in Singapore’s approach to third-party funding. That being said, the approach of the domestic courts has not been developed further since then and there remain significant question marks over the status of third-party funding in domestic litigation in Singapore. Those questions are only likely to be answered if further legislation is introduced.

In addition to the prohibitions on third-party funding of domestic litigation in both Hong Kong and Singapore, the lawyers based there are presently prevented from acting for clients on a contingent basis, i.e. where the lawyer agrees to forgo payment of some or all of its fees in return for payment of those fees and an uplift or a percentage of the damages (a ‘success fee’) if the claim ultimately succeeds. Funders are often attracted to claims where the claimant’s

lawyer demonstrates their belief in the merits of the case by also ‘investing’ in the claim in this way. Lawyers’ contingency fee structures also ensure that their interests are aligned with their client’s (and the funder’s) and serve as a further layer of due diligence for the claimant’s case, which in turn ensures that only meritorious cases are brought.

It has been suggested in some quarters that third-party funding and lawyers’ contingency fees can promote and encourage the filing of unmeritorious or frivolous claims, but there is little, if any, evidence to support this contention. In fact, the opposite is often true and is the view

more commonly held by experienced practitioners. Just last year, international law firm Freshfields commented:

*“To our ears, the concern sometimes expressed that funding breathes life into unmeritorious claims rings false. On the contrary, the involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigour in risk and cost-benefit assessments. In fact, it is not uncommon for one firm to advise the funder on the merits of the case and another to run the claim. This brings with it greater objectivity that would, if anything, tend to weed out less meritorious cases.”*

We at Woodsford could not agree more.

## What does the future hold for funding in Asia?

Hong Kong and Singapore are already two of the five most preferred arbitral seats globally. Since 2010, the number of arbitrations filed at the HKIAC, being Hong Kong’s premier arbitral institution, has remained steady (between 250 and 300 each year). In the same period, the number of cases commenced at the SIAC has increased gradually from approximately 200 a year to almost 350 last year. It is likely that the recent legislative changes will lead to a significant boost in these numbers over the coming years, as the availability of funding enhances the appeal of both jurisdictions. Asian-based corporates which may previously have nominated London, Paris or Geneva as the seat for dispute resolution under their commercial contracts may now be encouraged to nominate somewhere closer to home, namely Hong Kong or Singapore, in light of the new funding-friendly regimes. That said, it will likely take some time for those contracts to become the subject of disputes.

Aside from being better equipped to compete on the international arbitration stage, the recent changes in Hong Kong and Singapore have demonstrated a

commitment to the principle of party autonomy and ‘access to justice’ in arbitration and raised the profile of the judicial system in both jurisdictions. Practitioners are also likely to benefit significantly, as caseloads increase and the size of the disputes being litigated in the area grows. This in turn should have a positive impact on the legal services industry in those jurisdictions and the economy generally. However, in order to truly push forward and become leading hubs for dispute resolution – competing with the likes of New York, Paris and London – Singapore and Hong Kong are likely to have to broaden the list of ‘permitted proceedings’.

Funding is bound, in time, to be permitted in the domestic courts of Hong Kong and Singapore. It is a question of when and not if. As both jurisdictions become more comfortable with the industry through the ‘guinea pig’ of arbitration, it is likely that they will once again be competing to effect the anticipated changes sooner than the other. It may also not be long before local lawyers adjust to the concept of funding and begin to lobby to be allowed to act for their

clients on a contingency fee basis. An increasingly relaxed attitude towards funding may also, in time, lead to specific class-action regimes being implemented, as has been the case in Australia, the US and

The UK. All such systems are aimed at making the justice system accessible to companies and individuals alike, irrespective of their financial status.

## Practical tips for lawyers and their firms

When a lawyer's client requires or may otherwise benefit from funding for its claim, it is incumbent upon the lawyer not only to advise the client as to the availability of funding, but also to provide a useful steer as to which funders to use and to avoid. In this regard, lawyers should select only established funders, which are familiar with the practice of dispute resolution.

In terms of obtaining funding, most reputable funders' processes are similar. The process usually starts with a submission of key documents which provide the funder with an overview of the factual background, a legal analysis of the arguments likely to be advanced by the parties and the prospects of those arguments succeeding, an analysis of

the likely quantum of the claim and a costs estimate demonstrating the amount of funding required to take the case to conclusion. That information will allow the funder to undertake a preliminary risk assessment and, if it is interested in the case, put forward some indicative commercial terms. Woodsford aims to do this within 72 hours of receiving the above information.

If the indicative terms can be agreed with the claimant, most funders will then seek a period of exclusivity, ordinarily 4 – 6 weeks, to carry out more thorough due diligence, occasionally with the assistance of external counsel, and conclude a funding agreement.

## Conclusion

With a small number of exceptions, litigation funding is permitted, if not encouraged, around the world. Where barriers do continue to exist, they are gradually being dismantled and replaced with funding-friendly regimes. While most common law jurisdictions have historically prohibited litigation funding, those prohibitions continue to be lifted. The traditional centre for the common law, the courts of England and Wales, now positively embrace litigation funding as a tool promoting access to justice, as do their contemporaries in the United States, Australia and New Zealand. While, for the time being at least, certain prohibitions

remain in respect of domestic litigation in Singapore and Hong Kong, they are not expected to last much longer.

Woodsford, as a global litigation funder, is excited about the recent changes in Hong Kong and Singapore and the opportunities that they present – for funders, lawyers and claimants alike, and of course for the jurisdictions themselves. Woodsford is looking forward to working with lawyers and arbitrators in the region and we stand ready, willing and able to contribute to access to justice in the region through the funding of meritorious claims.

## About the authors

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## About Woodsford Litigation Funding

Founded in 2010, with offices in London and Philadelphia Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford Litigation Funding is a founder member of the Association of Litigation Funders of England and Wales.

Woodsford's role in supporting claimants in David versus Goliath litigation was highlighted in a landmark ruling of the English High Court: *Essar Oilfields Services Limited v Norscott Rig Management PVT Limited* [2016] EWHC 2361 (Comm)

For further information, visit [www.woodsfordlitigationfunding.com](http://www.woodsfordlitigationfunding.com) or email **Steven Savage** at [ssavage@woodsfordlf.com](mailto:ssavage@woodsfordlf.com)