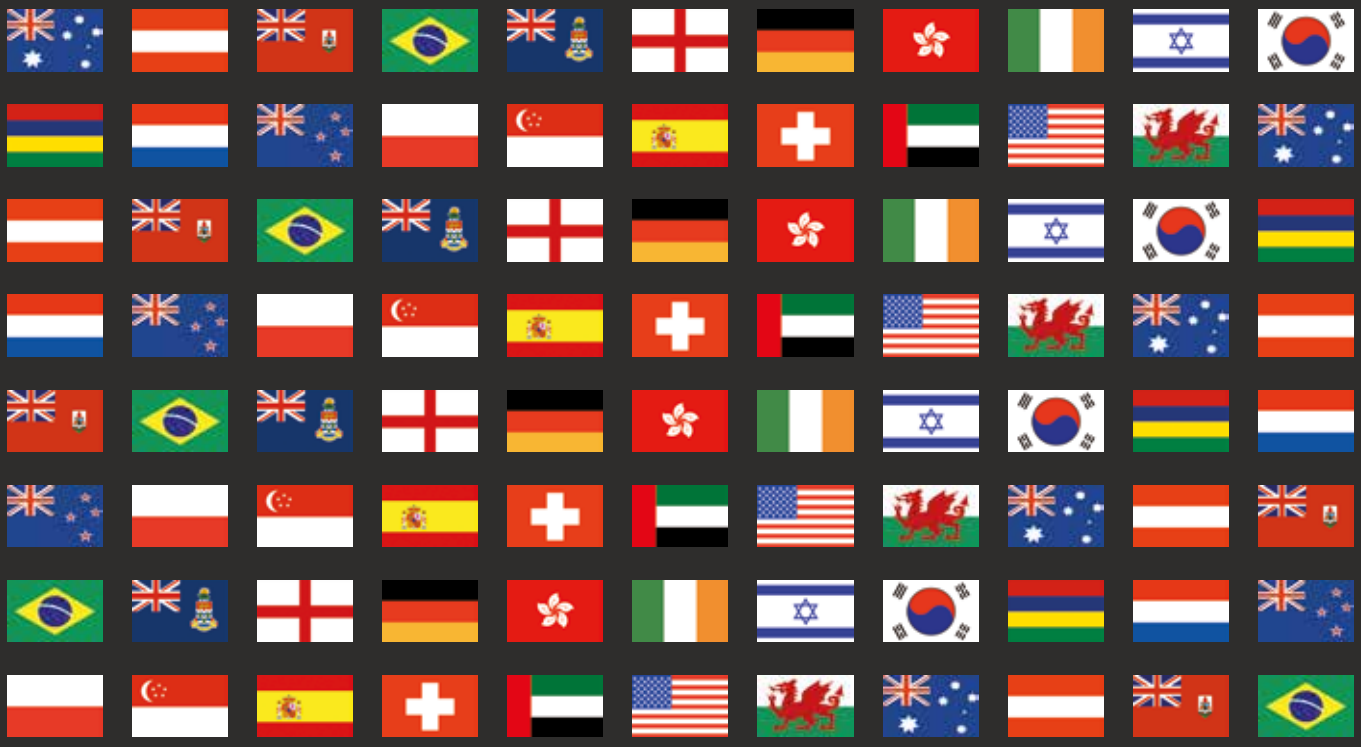
Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes



2019

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Litigation Funding 2019

Contributing editors
Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

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Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Litigation Funding*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, Spain and the United Arab Emirates and a new article on United States – other key jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
November 2018

Hong Kong

Dominic Geiser, Simon Chapman, Briana Young and Priya Aswani

Herbert Smith Freehills

1 Is third-party litigation funding permitted? Is it commonly used?

Third-party funding is not generally permitted for litigation in the Hong Kong courts. Such funding is considered to infringe the doctrines of champerty and maintenance, which prohibit any party without a legitimate interest in the action from assisting or encouraging a party to that action in return for a share in the proceeds if the claim succeeds. Champerty and maintenance are both torts under Hong Kong law. They are also indictable offences at common law, punishable under section 101I of the Criminal Procedure Ordinance by imprisonment and a fine.

There are three – limited – exceptions to the general prohibition on litigation funding:

- 'common interest' cases, involving third parties with a legitimate interest in the outcome of the litigation;
- where 'access to justice considerations' apply; and
- a miscellaneous category, including insolvency litigation.

These exceptions were set out in *Unruh v Seeberger* [2007] 10 HKCFAR 31. Where one of the exceptions applies, litigation funding will be permitted.

Litigation funding is most commonly used in Hong Kong in respect of the third category: insolvency cases. Hong Kong courts will permit a funding agreement where it includes an assignment of a cause of action by a liquidator (*In re Cyberworks Audio Video Technology Ltd* [2010] 2 HKLRD 1137). The liquidator's right to assign causes of action is conferred by section 199(2)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, which empowers liquidators to 'sell the real and personal property and things in action of the company by public auction or private auction'. This includes a cause of action.

Section 199(2)(a) does not require the liquidator to seek the court's consent to the funding arrangement. In practice, however, the liquidator may choose to do so (eg, *Chu Chi Ho Ian v Yeung Ming Kwong* [2014] HKEC 1901).

Even where a claim falls outside the section 199(2)(a) exception to champerty and maintenance, Hong Kong courts have been willing to facilitate litigation funding in the insolvency context, as long as there is a 'legitimate commercial purpose' (*Jeffrey L Berman v SPF CDO I Ltd* [2011] 2 HKLRD 815; *In re Po Yuen (To's) Machine Factory Ltd* [2012] 2 HKLRD 752).

Until recently, it had been unclear whether champerty and maintenance applied to arbitration proceedings in Hong Kong. In *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 HKC 179, the Hong Kong Court of First Instance held that champerty and maintenance do not apply to arbitration proceedings, but are confined to the public justice system (ie, court litigation). However, a later decision of the Hong Kong Court of Final Appeal created confusion about the applicability of champerty and maintenance to arbitral proceedings. In *Unruh v Seeberger*, the Court of Final Appeal held that it had no objection to third-party funding of a claim that was arbitrated outside Hong Kong, in a jurisdiction (the Netherlands) that had no legal principle equivalent to champerty and maintenance. However, the Court left open whether champerty and maintenance applied to arbitrations in Hong Kong, because the question did not arise in that case. The judge indicated that it was for the Hong Kong legislature to clarify the position, should it so wish. The court in *Winnie Lo v HKSAR* [2012] 15 HKCFAR 16 made a similar statement.

Consequently, the Hong Kong Law Reform Commission formed a subcommittee (LRC Subcommittee) to conduct a public consultation on third-party funding of arbitration in Hong Kong. Following the consultation, the LRC Subcommittee recommended that the Arbitration Ordinance be amended to permit third-party funding for arbitrations taking place in Hong Kong. It also recommended that 'clear ethical and financial standards' be developed for third-party funders providing funding to parties to arbitrations in Hong Kong.

On 14 June 2017, Hong Kong's Legislative Council passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Funding Ordinance). The Funding Ordinance amends the Arbitration Ordinance to provide that third-party funding of arbitration and related mediation and court proceedings is not prohibited on grounds of champerty and maintenance. It makes similar amendments to the Mediation Ordinance.

As at September 2018, not all amendments are in force, but it is hoped that they will be effective soon. Sections 98E to 98J (definitions and interpretation) and 98P to 98X (code of practice) of the Arbitration Ordinance were gazetted on 23 June 2017 and are now in force. Sections 98K to 98O (third-party funding of arbitration not prohibited by champerty and maintenance; application to work done on arbitration outside Hong Kong and prohibition on lawyers funding arbitrations in which they act for any party) are not yet in force.

Hong Kong's Department of Justice recently issued a draft Code of Practice, which is subject to public consultation until 30 October 2018 (see question 5). It is hoped that the remaining provisions of the Funding Ordinance will be brought into force as soon as possible after the end of the consultation period.

As funding is only permitted in limited circumstances, it is not commonly used in Hong Kong. However, we are aware of some litigation funding activity, particularly for insolvency proceedings, and we expect this to increase significantly as soon as third-party funding of arbitration is permitted.

2 Are there limits on the fees and interest funders can charge?

Fees and interest are matters for agreement between the funder and the funded party. Hong Kong law does not impose specific limitations on the amounts that third-party funders can charge.

3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

Once the amendments enacted by the Funding Ordinance come into force, Part 10A of the Arbitration Ordinance will permit third-party funding of arbitration and related court and mediation proceedings in Hong Kong, as well as funding of work done in Hong Kong on arbitrations and related proceedings outside Hong Kong.

Third-party funding of mediations that are not related to an arbitration will be permitted under Part 7A of the Mediation Ordinance.

Law firms are prevented from funding cases by the Legal Practitioners' Ordinance and by professional conduct rules (see question 11). Section 98NA of the Arbitration Ordinance (once in force) will expressly prohibit lawyers and law firms from funding cases in which they act for any party in relation to the arbitration.

4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

Professional conduct rules prevent Hong Kong lawyers and registered foreign lawyers from entering into conditional or contingency fee arrangements to act in contentious business. This prevents lawyers themselves, or their firms, from funding clients' claims in litigation or arbitration through such fee arrangements (see question 11). However, we are not aware of any rules that prevent lawyers from advising their clients on using third-party litigation, selecting funders or working with the funders during the proceedings.

5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?

Sections 98P and 98X of the Arbitration Ordinance (introduced by the Funding Ordinance) empower the Secretary for Justice to appoint an 'authorised body', which may issue a 'code of practice setting out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration'. Section 98Q sets out a number of criteria that the code of practice might include.

The same sections authorise the Secretary for Justice to appoint an 'advisory body' to monitor and review the operation of the Funding Ordinance, including the Code of Practice.

On 18 May 2018, Hong Kong's Department of Justice appointed Ms Teresa Cheng SC, Secretary for Justice, as the authorised body, with a remit to draw up the code of practice. On 30 August 2018, the Secretary for Justice issued a draft code of practice for public consultation. The consultation period will end on 30 October 2018.

On 24 August 2018, the advisory body was appointed. It comprises three senior, Hong Kong-based lawyers, Anthony Chow, Robert Pang SC and Victor Dawes SC.

In addition, to the extent that funders raise capital in Hong Kong, those activities could arguably be regulated by the Securities and Futures Commission, if the sources of funds amount to a 'collective investment scheme' under the Securities and Futures Ordinance. If the funds provided by a funder are considered a loan, the funder might be considered a 'money lender' under the Money Lenders' Ordinance and require a licence to conduct business with the funded party. However, most of the funding structures of which we are aware are unlikely to be considered a loan.

Where funders operating in Hong Kong, but based elsewhere, belong to regulatory bodies such as the UK's Association of Litigation Funders, they will typically adhere to that regulator's requirements when funding proceedings in Hong Kong.

6 May third-party funders insist on their choice of counsel?

In practice, yes, through their decision whether to fund the claim. Funders may decline to offer funding for a number of reasons, including that they are not happy with the party's choice of counsel. Where the funder is involved in the case before counsel is selected, the funder will generally be involved in the selection process.

Whether a funder is entitled to terminate funding during proceedings because it is dissatisfied with counsel will depend on the terms of the funding agreement.

7 May funders attend or participate in hearings and settlement proceedings?

Funders of arbitration proceedings may attend hearings, if the tribunal and all parties agree. Court hearings in Hong Kong are generally open to the public (apart from arbitration-related proceedings, which are not open to the public, unless the party applying for it to be heard in open court can satisfy the court that there is good reason), meaning that representatives of a funder may attend if they wish. In neither case is it usual for funders' representatives to take an active part in the proceedings.

Funders may attend mediation or other settlement negotiations if the parties (and any mediator or other third-party facilitator) agree.

8 Do funders have veto rights in respect of settlements?

A funder's rights to approve or reject a proposed settlement will depend on the terms of the funding agreement. In practice, the funded party will be guided by the terms of the funding agreement in deciding what to accept in settlement negotiations. This is because any settlement must allow the funded party to pay the funder its agreed share of the settlement amount or percentage of the funding amount (depending on the terms of the funding agreement).

9 In what circumstances may a funder terminate funding?

The circumstances in which a funder may terminate funding are a matter for agreement between the funder and the funded party, and should be recorded in the relevant funding agreement. Examples include the assessment of the merits becoming significantly worse during the case or the funder becoming aware of wrongdoing by the funded party.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Section 98Q of the Arbitration Ordinance provides that Hong Kong's code of practice for funders may require funding agreements to set out their key features, including 'the degree of control that third-party funders will have in relation to an arbitration'. While the code of practice is not yet in force (see question 5), the consultation draft prohibits funders from seeking to influence the funded party, or its lawyers, 'to give control or conduct of the arbitration or mediation to the third-party funder except to the extent permitted by law'. It also requires the funder not to take steps that cause, or are likely to cause, the funded party's legal representatives to breach their professional duties (see paragraph 2.9 of the Code).

In practice, some funders take a much more active role than others. At minimum, funders generally require regular updates from counsel on the progress of the case. They may also ask for updates on an ad-hoc basis, or when there is a significant development in the case. Funders may also advise counsel and the funded party on aspects of the case. In England and Wales, it is generally accepted that funders must not control the conduct of the case; such control remains with the litigant. Funders in other jurisdictions, notably Australia, exercise a higher degree of control. For example, some funders are known to have placed a representative within the counsel team for the duration of the case.

11 May litigation lawyers enter into conditional or contingency fee agreements?

No. Hong Kong solicitors and barristers may not enter into conditional or contingency fee arrangements for acting in contentious business. The same restriction applies to foreign lawyers who are registered to practice in Hong Kong.

The restriction derives from section 64(1) of the Legal Practitioners Ordinance, Principle 4.17 Solicitors Guide to Professional Conduct, paragraph 124 of the Bar Association Code of Conduct, and the common law. This is confirmed by section 98NA of the Arbitration Ordinance (see question 3). These restrictions prevent law firms from acting as funders in Hong Kong, other than where they are providing third-party funding at arm's length in relation to a matter in which they do not act for any party.

12 What other funding options are available to litigants?

Litigants may fund proceedings using a bank loan, obtained on an arm's-length basis. However, a significant number of claimants who seek funding are impecunious, and may have difficulty obtaining a loan.

There is anecdotal evidence in Hong Kong of third parties who wish to fund a litigation, in which they have no legitimate interest, acquiring shares in the claimant entity, in order to create an interest and avoid liability for champerty and maintenance.

13 How long does a commercial claim usually take to reach a decision at first instance?

According to statistics released by the Judiciary of Hong Kong in February 2016 covering the period from April 2009 to March 2015, commercial claims at first instance take an average of two to two and a half years from commencement to trial. Anecdotal evidence suggests that it can take anywhere from three to six months before judgment is handed down after trial.

14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

It is common for decisions to be appealed from Masters to the Court of First Instance (in respect of interlocutory decisions).

However, data from the Hong Kong Judiciary Annual Report 2017 (the Report) shows that a very small proportion of first instance judgments under the civil jurisdiction are appealed to the Court of Appeal, despite the fact that leave is not required (apart from certain limited circumstances) to make an appeal from the Court of First Instance to the Court of Appeal. According to the Report, only an estimated 1.6 per cent of first instance civil judgments were appealed to the Court of Appeal. The Report recorded 89 days (ie, three months) as the average waiting time for civil cases at the Court of Appeal from application to hearing date in 2017, which represents a 21 per cent improvement from the time reported in 2015 (ie, 112 days).

15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

These statistics are not available. Whether or not a judgment may easily be enforced in Hong Kong depends on various factors, including the following:

- the availability of assets within the jurisdiction;
- the accessibility of assets that may be available;
- the type of judgment being enforced;
- whether a party is seeking to enforce a domestic or a foreign judgment; and
- in the case of a foreign judgment, whether there is a reciprocal enforcement arrangement between that country and Hong Kong.

16 Are class actions or group actions permitted? May they be funded by third parties?

At present, there is no class action regime in Hong Kong. The only avenue that is currently available for multiparty litigation is by way of a 'representative action' brought by a party on behalf of a group of others who have the same interest in the proceedings. The 'representative action' framework, however, is inadequate for dealing with large-scale multiparty situations, and courts in Hong Kong have had to proceed on an ad-hoc basis without rules designed to deal specifically with group litigation. Representative actions are not common in Hong Kong. Where they do occur, third-party funding is, in principle, permitted, where one of the recognised exceptions to champerty and maintenance applies (see question 1).

In May 2012, the Law Reform Commission published a report recommending the introduction of class actions in Hong Kong with a number of key features, including:

- the regime is implemented on an incremental basis, beginning with consumer cases (ie, tort and contract claims by consumers);
- such actions may only proceed with certification by the court;
- one of the criteria of the certification should be a representative plaintiff's financial ability to satisfy an adverse costs order, which should also be required to prove to the court's satisfaction that suitable funding and costs-protection arrangements are in place at the certification stage;
- an 'opt-out' approach be adopted as the default position for local parties and an 'opt-in' approach be adopted for overseas parties; and
- a general class actions fund be established in the long term to help fund eligible impecunious plaintiffs to pursue class actions, and the Consumer Legal Action Fund be expanded in the short term to fund class actions arising from consumer claims.

The Department of Justice, in response to the report, established a working group to consider the details of the proposed regime and make recommendations to the government. No reports have been published by the working group to date.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B of the High Court Ordinance empower the Hong Kong courts to order costs for or against any party to the proceedings, or a non-party, including a third-party funder. This is usually referred to as an 'adverse costs order'. The courts also have the discretion to order the extent to which the costs are to be paid. Usually the courts order that costs 'follow the event' (ie, that the unsuccessful party must pay to the successful party costs that were necessary to pursue or defend the action). It is exceptionally rare for a successful party to recover all of its costs in litigation. In practice, a party can expect to recover about half of the actual costs incurred by the litigant. It is not clear whether Hong Kong courts will be willing to order an unsuccessful litigant to pay the funding costs of its successful counterparty. English law is no longer binding on Hong Kong courts, although it is persuasive. Hence, it is at least possible that the Hong Kong courts might make such an order in appropriate circumstances, following the English case of *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm).

Arbitral tribunals sitting in Hong Kong have broad discretion to allocate the costs of the arbitration as they see fit. Section 74(2) of the Arbitration Ordinance provides that the tribunal may direct in its award 'to whom and by whom and in what manner the costs [of the arbitral proceedings] are to be paid'. However, the tribunal must only allow costs that are 'reasonable in all the circumstances' (section 74(7)(a) of the Arbitration Ordinance). It is most usual for Hong Kong tribunals to order that costs follow the event, but there is no universal practice.

In arbitration-related court proceedings in Hong Kong, the courts have developed a practice of ordering costs on a higher basis (known as the 'indemnity' basis) against a party that fails in an arbitration-related application. This has been applied in applications to challenge arbitral agreements, set aside arbitral awards, and resist enforcement of awards (among others). On the ordinary basis, the unsuccessful party will generally pay 50 to 75 per cent of the other side's actual expenditure. An indemnity costs order will require the unsuccessful party to pay all of the successful party's costs, except where they are unreasonable in amount or have been unreasonably incurred (Order 62, Rule 28(4A) of the Rules of the High Court).

18 Can a third-party litigation funder be held liable for adverse costs?

In Hong Kong litigation, Order 62, Rule 6A of the Rules of the High Court and sections 52A and 52B of the High Court Ordinance empower the courts to order any third party, including a third-party funder, to pay costs. The court's order is known as an 'adverse costs order'.

In arbitration, the funder is generally not a party to the arbitration agreement. As a result, the tribunal lacks jurisdiction over the funder and cannot order it to pay adverse costs. Instead, the tribunal may make the adverse costs order against the funded party. Whether the funder will fund (or reimburse) the funded party in respect of any adverse costs paid will depend on the terms of the funding agreement. Section 98P of the Arbitration Ordinance provides that the code of practice may require funders to ensure that the funding agreement stipulates whether, and to what extent, the funder will be liable to the funded party for adverse costs orders made against the funded party. Funders' practice with respect to accepting liability for adverse costs varies. The consultation draft contains such a requirement.

19 May the courts order a claimant or a third party to provide security for costs?

Order 23, Rule 1 of the Rules of the High Court provides that the court can order security for costs against the plaintiff only. The court has no power to order security for costs against a third-party funder. However, the funding agreement can provide for the funder to reimburse the plaintiff for any amount paid into court in compliance with a security for costs order. This is a matter for agreement between the funder and the funded party.

Unless the parties agree otherwise, arbitral tribunals sitting in Hong Kong can order security for costs against a party to the arbitration (section 56(1)(a) of the Arbitration Ordinance). The tribunal has no jurisdiction to make such an order against a third-party funder. However, funding agreements will typically provide that a funder will pay any security for costs order, because, if such order is not paid, the claim will not proceed. Section 98P of the Arbitration Ordinance provides that the code of practice may require funders to ensure that the funding agreement stipulates whether, and to what extent, the funder will be liable to the funded party for security for costs orders made against the funded party. The consultation draft contains such a requirement.

20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

As far as we are aware, this question has not arisen in funded litigations in Hong Kong. Arbitral tribunals sitting in Hong Kong may order the claimant to give security for the costs of the arbitration. However, they may not make such an order only on the grounds that the claimant is not based in Hong Kong (section 56(2) of the Arbitration Ordinance). These decisions are usually confidential, so it is not possible to say whether a tribunal is likely to be influenced by the existence of third-party funding in deciding whether to order security for costs.

21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

There is no legislative or regulatory prohibition on ATE insurance in Hong Kong. However, third-party funding is a nascent market in Hong Kong. We are not aware that ATE or any other type of insurance are commonly used at present, but this is likely to change.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Where the funded party voluntarily seeks the court's approval of the funding arrangement, the court and other party will become aware that the arrangement exists and (possibly) learn the funder's identity. However, there is no general obligation on a funded litigant to seek the court's approval of the funding arrangement, nor is there a general obligation to disclose details of the funding arrangement to the court or the opposing party.

In June 2016, a Hong Kong court ordered plaintiffs to disclose details of the court's earlier approval of their litigation funding arrangements, where these were contained in evidence filed in support of the plaintiffs' ex parte applications to extend time for service of legal proceedings (*Enrich Future Ltd v Deloitte Touche Tohmatsu* HCCL 10/2011, 22 June 2016). The judge acknowledged that disclosure of the funding arrangement might put the defendant at an advantage, in particular by giving it an understanding of the plaintiffs' litigation 'war chest'. However, he considered that the principle of open justice prevailed over any concern about giving one party a tactical advantage. In accordance with that principle, the plaintiffs were entitled to know in full the evidence that had been presented to the court to obtain ex parte relief against them, including the evidence regarding the funding arrangements.

Section 98U of the Arbitration Ordinance (once in effect) will require a funded party to give written notice of the fact that a funding agreement has been made, as well as the name of the funder. The notice must be given to each other party to the arbitration, and to the arbitral tribunal, court or mediator (as appropriate). The funded party must also give notice if the funding agreement ends, other than because the arbitration has ended.

23 Are communications between litigants or their lawyers and funders protected by privilege?

The right to assert legal professional privilege is enshrined in Hong Kong's Basic Law. Article 35 provides that Hong Kong residents shall have the right to 'confidential legal advice'.

To maintain privilege in any communication under Hong Kong law, the communication must remain confidential. Assuming that communications between a funder and the funded party are confidential (either pursuant to a confidentiality agreement or otherwise), they should be protected by litigation privilege. Litigation privilege protects communications between a lawyer, the lawyer's client and any third party, where litigation is pending or in reasonable contemplation, and the communications are made for the 'sole or dominant' purpose of preparing for or dealing with the litigation. (For the purposes of this test, 'litigation' includes both litigation and arbitration proceedings.)

In the context of arbitration, section 98T of the Arbitration Ordinance will permit a party to disclose information relating to the arbitration to a person without losing confidentiality in the information, for the purpose of having or obtaining third-party funding from the person. However, the person to whom the information is disclosed may not communicate it further, subject to certain exceptions.

Common interest privilege may also apply between the funder and the funded party, since they will have a common interest in the outcome of the proceedings. For common interest privilege to apply, the purpose of the communication must be for the parties to inform each other of the facts, issues or advice received in respect of a legal issue, or to obtain or share legal advice in respect of contemplated or pending litigation.

24 Have there been any reported disputes between litigants and their funders?

We are not aware of any such disputes.

25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

There are no other issues.

Dominic Geiser **dominic.geiser@hsf.com**
Simon Chapman **simon.chapman@hsf.com**
Briana Young **briana.young@hsf.com**
Priya Aswani **priya.aswani@hsf.com**

23/F Gloucester Tower
15 Queen's Road Central
Hong Kong

Tel: +852 2845 6639
Fax: +852 2845 9099
www.herbertsmithfreehills.com

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