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Eastern tigers embrace third party funding

A mighty roar or a minor rumble?

By Kiran Sanghera, Associate Director of Litigation Funding, Hong Kong

Two major Asian dispute resolution hubs, Hong Kong and Singapore, race to open up the market for third party funding ("TPF"). Hong Kong announced the change first but Singapore may cross the finishing line ahead, with the Ministry of Law having already submitted legislation to parliament. That said, on 30th December 2016, the Hong Kong Government gazetted the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, it is hoped to be enacted early 2017.

Arbitration is being described as the perfect platform for both jurisdictions to "test the waters". Further consideration would then be given to legalising the use of funding in domestic litigation beyond the current exceptions.

Given the pace of change, Harbour dedicates this edition to documenting the real developments in the Asia-Pacific region. In deciding whether these changes cause a mighty roar or are just a minor rumble, we bring you the reactions of key regional stakeholders, first hand.

Dennis Kwok, Member of the Hong Kong Legislative Council responsible for driving forward the political agenda in favour of TPF, explains why it is important in the fight for access to justice and how becoming a TPF-tolerant jurisdiction is crucial in maintaining a competitive edge in the global dispute resolution market.

Herbert Smith Freehills compare the proposed legislative changes in Hong Kong and Singapore in detail and we uncover what General Counsel of large corporates - Rio Tinto, China Agri-Industries, Hyundai and Halla Corporation - really think about TPF. Legal experts at law firms, barristers' chambers and arbitral institutions also offer their views.

Harbour then takes the hot seat in addressing some concerns about using funding which came to the fore during our discussions.

To round off, leading law firms and the Harbour team provide a snapshot of the funding regimes in the wider region and take you on a whistle-stop tour from the established funding jurisdictions - Australia and New Zealand - to the civil law jurisdictions - China, Japan and Korea - where funding is a relatively novel concept.

As change is afoot globally, we could not complete this edition without views on what Brexit may mean for UK litigation, provided by Simmons & Simmons.

Third party funding legislation
Developments in Hong Kong

By The Hon. Dennis Kwok
Member of the Legislative Council (Legal), HKSAR

"Gaining popularity in the last decade, various jurisdictions have embarked on legislative exercises to regulate third party funding ("TPF") for arbitrations. As one of the major centres of international arbitration in the region and in the world, Hong Kong is no exception and has done the same by taking initiative to liberalise its own funding regime through proposals to amend the local Arbitration Ordinance. I first pursued this topic at the Legislative Council three years ago by pushing the HKSAR Government to do more on this front, and am pleased to see the latest developments.

Legislating for TPF will further promote Hong Kong as an international arbitration centre. By removing uncertainty in the law, it will be easier for businesses to settle conflicts through arbitration. Most significantly, small and medium-sized businesses which often do not have sufficient funds to engage in drawn-out legal battles will be able to benefit from TPF arrangements, gaining an opportunity to reduce the financial risks associated with the pursuit of a legal claim. Strong claimants which would otherwise not have access to justice may also be better positioned to take on the opposing party's claims, especially in light of increasingly high costs of arbitration in some cases.

Commercial parties are increasingly seeking out venues for arbitration on the basis of whether the jurisdiction is arbitration friendly, rather than looking at actual links with the arbitration jurisdiction. In practice, being a TPF-tolerant jurisdiction has wide implications for issues such as whether the rights under the funding agreement can be enforced and whether the lawyers can be involved whilst subject to professional conduct rules. By keeping up with other jurisdictions, in particular the traditional arbitration venues of London and Paris, more commercial parties may come and choose Hong Kong as their arbitration seat and bring along with them business and legal work.

In Hong Kong, the legal doctrines of maintenance and champerty prevent the giving of assistance to a litigant by a person with no legitimate interest and the maintenance of an action in exchange for a share in the fruits of the proceedings. But such problems may be effectively dealt with by inserting regulatory provisions in the legislation to make room for limited exceptions. TPF may also have an impact on the arbitration process and outcome, affecting for instance, the amount of control the funder can wield over the proceedings and the amount of settlement. For that reason, TPF terms must be stated clearly and the parties ought to take great care when contracting with

funders. This is the part where the new legislation must come in and regulate such transactions to ensure that the arrangements are held to a particular professional and ethical standard. Rules on checks on the funder, confidentiality and disclosure of communications, for example, are only some of the many aspects that a legislative and regulatory framework (to be covered by way of a Code of Conduct) for TPF should ideally cover.

Seeing the development of TPF in Hong Kong, other jurisdictions in the region would act fast to embrace the idea of TPF in order to compete for the growing arbitration market. Being TPF-tolerant is an increasingly important aspect which commercial parties look for, and while arbitration can still be done in TPF-intolerant seats, having a comprehensive set of legislation and rules that provides for TPF will undoubtedly give the jurisdiction an edge in the arbitration scene.

I am delighted to see that Hong Kong is making good progress in this aspect since the establishment of the TPF for arbitration sub-committee in 2013, and it is envisioned that the necessary legislative amendments for TPF will be completed and passed before May-June 2017. I am eager to see the continued development of the TPF legislative framework and will continue to monitor the process closely in my capacity as a legislator.”

“Being TPF-tolerant is an increasingly important aspect which commercial parties look for…”

Hong Kong and Singapore
Chivalrous rivalry?

Briana Young, Herbert Smith Freehills, reviews the recently announced legislative changes proposed by Hong Kong and Singapore. What do they have in common, and more vitally, what are the differences?

Hong Kong and Singapore have long engaged in genial, but earnest, rivalry for the title "Asia's leading arbitral seat". At times, this has resembled nothing so much as a game of jurisdictional leapfrog. First Singapore, then Hong Kong, adopted the UNCITRAL Model Law. When HKIAC updated its arbitral rules to facilitate complex arbitrations, SIAC followed suit. In a 2015 survey, HKIAC was voted the world's "most improved arbitral institution", with SIAC a close second. The same survey ranked Singapore the world's "most improved arbitral seat" – followed by Hong Kong.

When it comes to the latest development in international arbitration, however, Hong Kong and Singapore are running neck-and-neck.

To be a regional leader, a seat must, above all, attract arbitrations. Parties favour both Hong Kong and Singapore for many reasons, including modern legislation, proactively supportive judiciaries, deep benches of expert counsel, and world-class hearing facilities.

Yet international arbitration is an expensive business, and parties are increasingly unwilling, or unable, to support the significant costs of arbitrating a claim. Instead, they are seeking ways to defray that cost, the bulk of which is counsel's fees. In most of the world's leading seats, litigation funding has emerged as an attractive solution. Not, however, in Singapore or Hong Kong, both of which prohibit such funding as contrary to the ancient doctrines of champerty and maintenance.

Change afoot

Happily, both Hong Kong and Singapore have recognised that this prohibition, if maintained, will dissuade parties from selecting them as seats of arbitration. With a number of other Asian countries actively competing for a slice of the market, and many more global seats presenting viable alternatives, neither Hong Kong nor Singapore could afford to assume that parties will continue to arbitrate there despite the ban on funding.

Consequently, both jurisdictions have proposed legislative changes that would disapply champerty and maintenance to arbitration and related court proceedings, opening the door to third party funding ("TPF") with amendments expected to come into force during the first half of 2017.

> **"While their overall aims are similar, there are some significant differences in the proposed laws of the two territories."**

Hong Kong

Arguably, TPF of arbitration is already permitted for arbitrations in Hong Kong. In *Cannonway Consultants Limited v Kenworth Engineering Ltd* (1995) 2 HKLR 475, Kaplan J (as he then was) held that champerty and maintenance do not apply to arbitration. However, the Hong Kong Court of Final Appeal subsequently cast doubt on the question in *Unruh v Seeberger* (2007) 10 HKCFAR 31. The position was sufficiently unclear to prompt a review, conducted by a sub-committee of Hong Kong's Law Reform Commission ("LRC"). The sub-committee's remit was "to review the current position relating to TPF for arbitration for the purposes of considering whether reform is needed, and if so, to make such recommendations for reform as appropriate."

The sub-committee held a public consultation, with responses indicating an overwhelming support for TPF. On 12 October 2016, the LRC published its final report, recommending that Hong Kong's Arbitration Ordinance (Cap. 609) be amended to permit funding for arbitrations and related proceedings in Hong Kong ("Report"). The Report attaches draft provisions to amend the Ordinance ("Draft Provisions").

Under the Draft Provisions, champerty and maintenance (which remain both crimes and torts in Hong Kong) would not apply in relation to "third party funding of arbitration". For these purposes, "arbitration" includes emergency arbitration proceedings, as well as mediation and court proceedings under the Arbitration Ordinance.

The Draft Provisions would also allow funding for services provided in Hong Kong for arbitrations whose seat is outside Hong Kong. This would cover work done by Hong Kong based lawyers on arbitrations seated outside the territory, and is essential to ensuring that Hong Kong remains competitive as a centre of dispute resolution expertise (as opposed to an arbitral seat).

However, the proposed amendments carve out funding provided "directly or indirectly by a person practising law or providing legal services", expressly excluding funding in the form of contingency or conditional fee arrangements between a lawyer and client. The LRC considered allowing such fees a number of years ago, but decided then not to do so, and that remains the position.

The Report also suggests that clear "ethical and financial" standards be developed for third party funders operating in Hong Kong. This would take the form of "light touch" regulation for an initial three-year period. The Draft Provisions empower the Secretary of Justice to establish an "authorized body", which would issue a Code of Practice containing standards and practices with which funders are expected to comply. After three years, a separate body would review operation of the Code, and consider whether to establish a statutory or other regulatory body to supervise compliance by funders (s.98T).

Although no Code is yet published, s.98M of the Draft Provisions lists its suggested contents. These include capital adequacy requirements, as well as provisions on confidentiality, disclosure, privilege, conflicts of interest, curbs on control of the arbitration by the funder and grounds for termination. The Report also suggests that these issues should be covered in any funding agreement. Interestingly, it has also recommended that a funded party be required to notify the other parties and any arbitral institution that there is a funding agreement in place, and to provide the name of the funder. Likewise, notice must be given if a funding agreement is terminated.

The Code would not be subsidiary legislation (s.98N). Moreover, failure to comply would not, of itself, render the funder liable to "any judicial or other proceedings" (s.98O(1)). However, the Code would be admissible in court or arbitral proceedings, and the court or tribunal may take into account the funder's compliance, or failure to comply, with any provision of the Code if it is relevant to a question being decided.

The Draft Provisions also allow a party to share otherwise confidential information with a third party in order to seek funding or to communicate with an existing funder (s.98P).

It is expected that the Draft Provisions will go before Hong Kong's Legislative Council early next year, and come into force in or around June 2017.

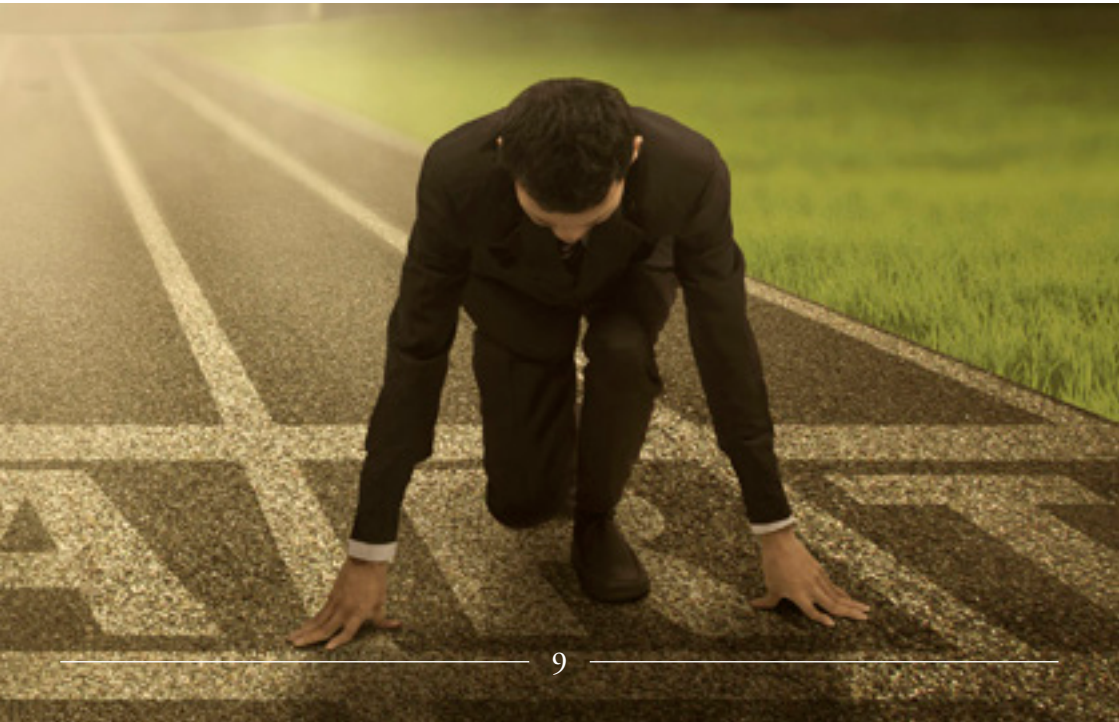
Singapore

In Singapore, champerty and maintenance apply to both litigation and arbitration proceedings (*Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR 989). Recognising the need to "consolidate Singapore's position as a key seat of arbitration in Asia", the Ministry of Law launched a public consultation in July 2016, before publishing the Civil Law (Amendment) Bill in October ("Funding Bill"). The Funding Bill received its first reading before Singapore's Parliament on 7 November 2016, and is expected to be in force by February 2017.

The Funding Bill abolishes the common law torts of champerty and maintenance (criminal liability had already been extinguished). It clarifies that TPF contracts between parties and "qualifying third party funders" for certain "prescribed" dispute resolution proceedings will not be illegal or contrary to public policy. As such, these agreements will be enforceable in Singapore (s.5B(2)).

The Funding Bill does not define "prescribed dispute resolution proceedings". However, the draft Civil Law (Third Party Funding) Regulations that were published for consultation in July 2016 ("Regulations") define them to include international arbitration proceedings, related court and mediation proceedings, as well as stay and enforcement proceedings under Singapore's International Arbitration Act. It appears that Singapore has stopped short of expressly allowing its lawyers to work on funded cases seated elsewhere.

The Funding Bill does not permit contingency fees or other alternative fee structures for dispute resolution work by Singaporean lawyers or foreign lawyers within Singapore. Such fee arrangements remain unlawful.



The Funding Bill also lays the groundwork for regulating third party funders. It empowers Singapore's Minister of Law to prescribe the criteria for "qualifying Third Party Funders", as well as the requirements with which such funders must comply, without setting out the details of such regulations. These are elaborated in the Regulations, and include that the funder must have sufficient funds to fund the proceedings in Singapore, and that such funds be immediately within the funder's control.

In addition, Singapore's definition of "third party funder" is limited to professional funders, making it narrower than Hong Kong's. Both the Regulations, and s.5B(10) of the Funding Bill, require the funder to be "a person *who carries on* the business of funding…", in or outside Singapore (emphasis added). Hong Kong's Draft Provisions are less restrictive in this respect, perhaps in recognition that there are a number of alternative funding methods being employed in the market. These include funding by parent companies, and third parties taking equity stakes in a claimant entity, in return for a share of the proceeds of the claim.

In one of the more striking divergences from the Hong Kong approach, the Funding Bill directly imposes sanctions on a funder that ceases to comply with the prescribed requirements, preventing it from enforcing its rights under the funding contract (s.5B(4)). Funders can apply to a court or tribunal for relief from such sanctions, e.g. if the failure to comply was inadvertent, or if it would otherwise be just and equitable to grant relief.

Finally, the Funding Bill amends Singapore's Legal Profession Act, to clarify that solicitors are entitled to introduce or refer their clients to a Third Party Funder, so long as the solicitor does not receive and "direct financial benefit" (other than the solicitor's fees and expenses for legal services) from the introduction. Solicitors may also draft or advise on the funding contract, and act for their clients in any dispute that arises out of the funding agreement.

If the Funding Bill is approved by Parliament following a second reading, Singapore's legal community anticipates that it will be enacted in early 2017.

In conclusion

Broadly, Hong Kong and Singapore have proposed similar changes, with the same aim. Inevitably, there are differences in the detail, but it remains to be seen whether any of these differences turns out to be significant. In the meantime, parties, lawyers and arbitrators, in Asia and beyond, will surely welcome the change as essential to both jurisdictions' ability to keep their places at the top of the arbitral tree.

"… neither Hong Kong nor Singapore could afford to assume that parties will continue to arbitrate there despite the ban on funding."

We polled the views of our network resulting in a frank and open exchange of views.

Third party funding in the Asia Pacific
Evolution or revolution?

Hot on the heels of the news that legislative changes on third party funding ("TPF") are on the horizon for Hong Kong and Singapore, we polled the views of associations, institutions, law firms, barristers and corporates across Hong Kong, Singapore, mainland China and South Korea. We received an amazing response and the result is a frank and open exchange of views. These are the highlights.

With huge thanks to our contributors from CIETAC, HKIAC, ICC, Baker & McKenzie. Wong & Leow, Bird & Bird, Essex Court Chambers, China Agri-Industries Holdings, Hyundai Heavy Industries, Halla Corporation and Rio Tinto.

The institutions

- Brad Wang, Managing Counsel, CIETAC Hong Kong Arbitration Center and CMAC Hong Kong Arbitration Center
- Pui-Ki Emmanuelle Ta, Counsel of the ICC International Court of Arbitration, Asia Office in Hong Kong
- Karen Tan, Business Development Director, Hong Kong International Arbitration Centre (HKIAC)

Do you think there could be a wider appetite for funding in Asia in light of the new developments in Hong Kong and Singapore?

Pui-Ki Emmanuelle Ta: Yes, for various reasons: 1) a party's lack of financial resources to pay the costs and expenses associated with an arbitration which may be high, 2) the pressure on companies to wisely allocate their funds to a competing range of activities making TPF a potentially useful financial management tool, and 3) the non-recourse nature of TPF (where the funder only receives compensation for the funding it has provided if the claim is successful).

Brad Wang: We noted through our recent TPF – focused mock arbitration in the Chinese mainland, a significant interest from practitioners and in-house counsel. The pro-TPF developments in Hong Kong can be very helpful in serving the need of funding in arbitration in Asia and maintaining Hong Kong as a leading hub in cross-border dispute resolution in the region.

Karen Tan: Yes, there will be a wider appetite in Asia. Funding provides access to justice and will level the playing field for settlement discussions.

How do you see the use of TPF benefiting businesses operating in Asia?

Pui-Ki Emmanuelle Ta: TPF provides another source of financing, and another financial management tool for businesses. Using TPF, well-capitalized companies might be in a position to invest their funds in their business and manage their cash-flow, while pursuing their claims and shifting the risk of the cost of pursuing their claims to the funder.

Brad Wang: We understand sometimes arbitration may not be cheap for parties. If used properly, TPF may be that "timely help" for parties in Asia who have cash flow concerns. With contemporary concepts in corporate risk management, a growing number of Asian businesses now seek new and varied models in keeping the costs in dispute resolution at a reasonable level, in which scenario, TPF may well be the "the icing on the cake".

Karen Tan: With the recent announcement of the Belt and Road Initiative, which will build and improve the land, sea and air infrastructure and network of China's trading partners in over 65 different jurisdictions, the opening up of TPF in Hong Kong could not have been more timely. Recent trends reveal Hong Kong and the HKIAC as a top choice for international parties to resolve disputes in Chinese related contracts. Once proper legislation and guidelines are put in place to regulate TPF, it will enhance Hong Kong's attractiveness as the ideal seat of arbitration and encourage more businesses to Asia.

What do you think the concerns are, if any, in relation to the use of TPF in the region?

Karen Tan: The international arbitration TPF market has always operated without mandatory regulation. Given the increase in funded cases and the globalization of the industry, there have been some discussions on mandatory regulation. Since Hong Kong is at a relatively early stage of development, it is unclear how TPF will be regulated here. Other concerns are 1) the possible impact on the independence of arbitrators, 2) non-disclosure of funding, 3) potential conflicts of interest, 4) the impact of TPF on security for costs and 5) whether the use of TPF may increase the number of cases, particularly frivolous claims. HKIAC has set up a specialist Task Force on TPF to consider the possible impact of these concerns in Hong Kong and Asia. It will also take an active role in the reform process and ensure consistent standards are applied to TPF.

Pui-Ki Emmanuelle Ta: The issue of disclosure of funding seems to be an area of concern, particularly the timing and scope of disclosure of TPF to the other party, and the arbitral tribunal to assist management of conflicts and to enable the other party to address any concerns arising from the potential lack of capacity of the funded party to pay any adverse costs orders. The ICC's guidance note for the disclosure of conflicts by arbitrators includes a reference to TPF. It provides that arbitrators should consider "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award", when evaluating whether to make disclosures. This assumes that the funded party has disclosed to the other party and the arbitrators, the involvement of the third party funder in the proceedings.

How do you think the business and legal landscape will be affected by the legislative amendments to permit funding in arbitration in Hong Kong and Singapore?

Brad Wang: It is exciting news for Hong Kong because it is commonly recognised that such amendment(s) may further enhance Hong Kong as a regional dispute resolution centre.

Karen Tan: Assuming that the recommendations are passed through Hong Kong's legislative council, the reform will have a significant impact

in the business and legal landscape in Hong Kong and we envisage that these developments will create massive demand for high-end cross-border legal and dispute resolution services and professionals in Asia. Accessibility to TPF has the potential to exponentially increase the number of claims brought in arbitration, particularly meritorious claims that might not have been possible without funding support. It will also encourage other funders to enter the market in Asia.

Pui-Ki Emmanuelle Ta: An alternative source of financing will be available to international businesses. By allowing the use of TPF for international arbitration, Hong Kong and Singapore may become regional hubs for funding of arbitration.

How quickly do you think disputing parties in your jurisdiction will embrace TPF?

Karen Tan: 97% of those who engaged in the TPF consultation process favoured legislative amendments. Such overwhelming support shows that Hong Kong is very much ready to embrace TPF. The groundwork is already in place: global funders have set up base in Hong Kong and parties have begun familiarising themselves with the benefits of funding in anticipation of likely reform. It is therefore only a matter of how quickly these principles are properly put into legislation that we can start to embrace TPF in Hong Kong.

Pui-Ki Emmanuelle Ta: Quickly.

Brad Wang: We think the first step is to make more parties aware and get them to learn more about such option.

Do you think the opening up of the funding market in Asia is "revolutionary"?

Pui-Ki Emmanuelle Ta: No, it is not "revolutionary" but another source of financing for international arbitration involving less risk, but greater potential costs for the parties.

Karen Tan: The proliferation in TPF in many jurisdictions worldwide meant that it was only a matter of time for Hong Kong to consider TPF as an area of reform as part of its commitment to remain a leading arbitration seat in Asia. Therefore, the opening up of the funding market in Asia is not revolutionary. What makes it "revolutionary" will probably be the progressive measures Hong Kong will take to regulate TPF and to ensure that it remains at the forefront of international development and to maintain Hong Kong's status as the leading arbitration hub in Asia.

> **"...Asian businesses now seek new and varied models in keeping the costs in dispute resolution at a reasonable level, in which scenario, TPF may well be the 'the icing on the cake'."**

The law firms and chambers

- Leng Sun Chan SC, Prinicipal, heads the Dispute Resolution practice in Baker & McKenzie. Wong & Leow in Singapore and is Baker & McKenzie's Global Head of International Arbitration
- Robert Rhoda, Partner, Bird & Bird in China and Hong Kong
- Jern-Fei Ng, Barrister, Essex Court Chambers in London and Singapore

Do you think there could be a wider appetite for funding in Asia in light of the new developments in Hong Kong and Singapore?

Robert Rhoda: Yes, I do. One has only to look at how quickly Singapore reacted to recommendations in Hong Kong - by proposing its own legislative amendments - to see how acceptance of TPF is perceived as a competitive advantage in the region. It follows that other jurisdictions in the region with designs on being major international arbitration hubs ought to be considering similar initiatives.

Jern-Fei Ng: Yes, definitely. There has always been an underlying appetite for funding which it has not always been possible or feasible to satiate because of the legislative regime. Recent developments mean that it looks like that need can be met. I am cautiously optimistic the changes will lead to an increased demand for funding, as people will be more aware of the possibility of funding in the region.

How do you see the use of TPF benefiting businesses operating in Asia?

Leng Sun Chan SC: There are two categories that might use TPF. The first are the businesses with limited resources to meet the costs of litigation or arbitration - bearing in mind that currently, the doors opened in HK and Singapore are for arbitration. They will benefit from being able to pursue or defend claims they otherwise are unable to finance, regardless of merits. The second category are businesses that could draw on their resources, but for planning and cost management purpose, would prefer to isolate their arbitration costs from operating budget.

Robert Rhoda: Asian clients I have spoken to, not always familiar with these types of commercial funding arrangement, have been quick to recognize the advantages; particularly, the ability to share the financial risks associated with arbitral proceedings and to keep legal spend off the balance sheet. It's a powerful proposition for GCs to be able to present to the wider board.

Jern-Fei Ng: TPF will benefit businesses in various ways, not just those companies who are unable to fund their disputes, but also those who are able to self-fund but wish to spread their risk in doing so. This is likely to be true in international arbitration and investor state arbitration, because of the usual imbalance between the access to funds by claimant, private investors on the one hand, versus well-funded states on the other.

What do you think the concerns are, if any, in relation to the use of TPF in the region?

Jern-Fei Ng: The answer depends on whether you look at it from the perspective of the litigant, the regulator, or the funder. From the perspective of litigants, concerns relate to the extent to which they will cede control to the funder; and the extent they will have to share the proceeds. Perhaps these concerns are due to unfamiliarity with TPF, a new concept in Asia, which will improve over time as litigants and their advisers get accustomed to the concept and practicalities of funding. From the point of view of regulators - and I can speak to this only in light of having participated in the debates in Singapore and the HK reform process - they will also be concerned with the more extreme scenarios being that

cases which would otherwise have not run will be given a new lease on life, or that there may be an increase in the aggression with which some cases are pursued because of the perceived need to deliver a return for the funder.

Leng Sun Chan SC: Concerns have their roots in the moral hazards of maintenance and champerty i.e. that the administration of justice is taken out of the hands of the direct disputants and its course determined instead by financiers who trade legal resources as a commodity. There is fear of an increase in the perversion of justice, as decisions and tactics are no longer determined by what is right in the case but what the third party financier might get out of the legal process.

Robert Rhoda: The two criticisms most cited in my experience are 1) the encouragement of unmeritorious claims and 2) the risk of funders pulling out or becoming insolvent during the proceedings, thereby jeopardising their integrity. These fears ought to be laid to rest however by those jurisdictions, such as Hong Kong, which intend to operate a code of practice for funders, as well as by the funders themselves who have been commendably transparent in disclosing how they operate, including how they decide which claims to fund.

How do you think the business and legal landscape will be affected by the legislative amendments to permit funding in arbitration in Hong Kong and Singapore?

Leng Sun Chan SC: The change would probably be evolutionary. It is unlikely that we will see a sudden deluge of third party funded cases. The increase is likely to be incremental, but will eventually lead to acceptance of this practice as something normal. Hopefully, we will see more cases with merit running their course rather than being abandoned or conceded due to lack of funds.

Jern-Fei Ng: I expect there will be an increase in contested disputes, those that go the whole nine yards, as well as those that wouldn't get off the ground at all. I expect there will be an increased willingness to litigate and arbitrate disputes in the region because of the ability to offset the risk.

What do you think the developments will mean for the wider region?

Leng Sun Chan SC: As many emerging markets are looking to build up their arbitration ecosystem, with Singapore and HK being role models, it is possible that they may begin to look at permitting TPF in their jurisdictions as well.

How quickly do you think disputing parties in your jurisdiction will embrace TPF?

Robert Rhoda: In my view, it should be the responsibility of any claimant's advocate to draw their client's attention to the possibility of TPF regardless of their client's solvency. Assuming lawyers in Hong Kong do start doing this as soon as the legislative amendments take effect, I would expect the uptake to be immediate.

Leng Sun Chan SC: Those who need funds will probably be quite open to the idea of TPF. It may take longer for financially stable companies to work this into a budget management policy.

Jernn-Fei Ng: I think it will initially be a slow burn – only because at the outset there is a deficit of knowledge and experience of funding. Once there have been success stories I expect there will be a rapid period of growth of funding opportunities and the popularity of funding will increase considerably.

Do you think the opening up of the funding market in Asia is "revolutionary"?

Leng Sun Chan SC: It is only revolutionary in the sense of it being new and newly permitted. As

mentioned above, its effect on the business and legal landscape will be gradual.

Robert Rhoda: Depends what you mean. As matters stand now, I would probably say no. Although it will allow some meritorious claims to proceed, which otherwise would not have seen the light of day, its main achievement is helping maintain the competitiveness of those jurisdictions which embrace it.

Jern-Fei Ng: Yes – and that is a good thing. Often there can be a negative perception around the idea of revolution, but not here. We shouldn't recoil from revolution. There will undoubtedly be examples of excesses, but no system is ever perfect. The answer lies in better regulation and the overall approaches taken by HK and Singapore, although they are different, of allowing funding to occur in a regulated context is a positive and correct step.

> "The increase is likely to be incremental, but will eventually lead to acceptance of this practice as something normal."

The corporates

- Cameron Ford, Corporate Counsel, Rio Tinto in Singapore
- Cathy Liu, General Counsel, China Agri-Industries Holdings in Hong Kong and Mainland China
- Joseph Kim, General Manager and Corporate Legal Counsel, Halla Corporation in South Korea
- Jun Hee Kim, General Counsel and Executive VP, and Kellie Yi, Senior In-House Counsel, Hyundai Heavy Industries in South Korea

Do you think there could be a wider appetite for funding in Asia in light of the new developments in Hong Kong and Singapore?

Cameron Ford: I have no doubt that Singapore and Hong Kong effectively giving funding their imprimatur, will legitimise and regularise funding in the eyes of many in the region. I think it also sends the subtle or implied message that funding is no longer only for distressed companies. It indicates an acceptance that it is a legitimate tool in dispute resolution.

Jun Hee Kim, Kellie Yi: These reforms will most likely serve as a benchmark for other Asian nations, including South Korea. South Korea ranks as the 5th largest export economy and the 9th largest importer in the world, according to the 'Economic Complexity Index' (Alexander Simoes, 16 Nov 2016). It is unavoidable that Korean companies' involvement in complex international business transactions leads to disputes. Many Korean companies tend to be more conservative when forced to pursue claims in unfamiliar foreign jurisdictions and arbitration venues, and litigation funding is still a relatively new concept in Korea. As Hong Kong and Singapore are one of the top 5 exporting destinations for Korean companies, the Korean legal industry and corporations will need to embrace new legal mechanisms that may affect the commercial dynamic of dealing with these nations. Thus the legal developments in these jurisdictions will likely have a spill-over effect in Korea. Additional promotion and education will further expedite this.

How do you see the use of TPF benefiting businesses operating in Asia?

Cathy Liu: TPF may help companies get the justice when they do not have the ability themselves, especially when they are lacking financial capability.

Jun Hee Kim, Kellie Yi: There are clear benefits to TPF also known as litigation finance for businesses in Asia, mainly increasing access to justice and the ability to share the financial risk and commercial burden of a legal battle. Businesses could also benefit from having legal expenditure taken off their books to level out their accounting balance sheets. TPF may also help strengthen claims through funding additional resources, i.e. experts, consultants, and barristers, which may further increase the likelihood of success of the claims.

Cameron Ford: It's no secret that times are tougher at the moment and that companies are looking to extract value from every dollar. Where, in better times, companies might have depended on future transactions to make up losses, it seems that they do not have that luxury now. At the same time, budgets are generally more constrained. Companies therefore need the full value from transactions but do not always have the funds to pursue that value. Often I think redress is not pursued because the injured party does not have or want to commit the funds to what could be a risky "investment", that is, proceedings. Being able to share that risk with a funder will give parties the opportunity of obtaining full value from the transaction without worsening the situation.

Joseph Kim: Use of TPF will help preserve the bottom line for companies trying to manage expenditures, especially for costly arbitrations where large claim amounts and protracted proceedings are anticipated. Preliminary assessment by the third party funder of potential claims, prior to its decision to fund, can serve to re-affirm the strength of the company's claims. The notion of sharing the risk of loss - at least for the legal fees and arbitration costs - can be appealing to a claimant. Where the war coffers of two antagonists are exceedingly disparate, TPF can provide the resources for a fair fight for the little guy. Although the fundamental principles of TPF dictate that the third party funder has no right to control the decision-making during the arbitration, it might be better for an inexperienced claimant to have the backing and support of a "professional arbitrating" funder on its side.

What do you think the concerns are, if any, in relation to the use of TPF in the region?

Jun Hee Kim, Kellie Yi: First, conflict of interests needs to be carefully addressed. This is particularly concerning in the context of settlement negotiations and agreements. Each player may have their own motivations, and the funder's interest may conflict with the party receiving funds. This issue should be properly addressed to ensure professional ethics and to safeguard a lawyer's professional duties to its client. Secondly, confidentiality and legal professional privilege issue seem potentially unsettling. Funders will conduct a thorough independent investigation of a claim and may require access to privileged, sensitive, and confidential information and documents. On a practical note, a full extensive disclosure may be a deterrent as it opens accessibility to not only legal documents but also financial, internal reports, and other sensitive materials. This could be addressed by putting in place a confidentiality clause with appropriate extent and scope.

Cameron Ford: Those less familiar with funding sometimes express the concern that it will spawn nuisance, unmeritorious claims and that companies will spend a lot of money defending claims that should never be brought. From having been involved in quite a few applications for funding when in private practice, I know that funders examine claims thoroughly and do not accept ones which don't appear to have a decent chance of success. In fact, my memory is that more applications on behalf of clients were refused than were granted, even when we felt or later proved that the claim was good. Neither do I think there will be a litigation explosion or that the flood gates will burst asunder. Experience indicates that there will simply be greater access to redress for deserving claimants. In *Excalibur Ventures LLC v Texas Keystone Inc and others* [2016] FICR 28; [2016] EWCA Civ 1144, the Court of Appeal held "commercial" third party funders liable for a defendant's indemnity costs to the limit of the amount they funder the litigation. This liability for indemnity costs will provide an added incentive for funders to scrutinise cases and their management more closely. Concerns could also be over the varying types of funding and the different practices of funders. There are a number of ways of funding and funders can have different portfolios, so one concern could well be keeping up with all of the possibilities.

Joseph Kim: Negotiating the percentage of sharing the award amount would be a major commercial concern. Possible conflicts arising out of decision making - whether to stop or go - especially if the company's decision might run contrary to the goals of the third party funder, i.e. maximising the award amount. Running afoul of existing local laws prohibiting similar "assignment" of claims to a third party claimant who otherwise would have no privity or interest in the claim, if the award is challenged on these grounds.

Cathy Liu: TPF needs to be managed very carefully so that frivolous suits would not be encouraged. TPF may impede parties from settling cases when possible. Also, TPF should be highly regulated to avoid conspiracy between

a third party funder and an arbitrator. For example, TPF needs to be fully disclosed and arbitrators will also need to disclose if he or she has any relationship with a third party funder, as this may adversely affect the fairness of an arbitration award.

How do you think the business and legal landscape will be affected by the legislative amendments to permit funding in arbitration in Hong Kong and Singapore?

Jun Hee Kim, Kellie Yi: It is difficult to predict at this stage what impact TPF legislative amendment will have in the business and legal sector. We could see a rise in number of arbitration/litigation in these regions which could drive up the revenue earnings by legal services. Improved accessibility to file claims should increase the number of arbitrations and litigations filed in these jurisdictions and have a trickle-down effect on other related business sectors such as such as accommodation, hearing facilities, translation/interpretation services etc. As Hong Kong and Singapore remain regional leaders in these sectors, these jurisdictions will likely continue to be a favoured choice for arbitrations for the time being.

Cameron Ford: I would have thought that funding will increase the claims made by Singapore companies or in Singapore courts and arbitration. Companies in the region which otherwise might have chosen a foreign seat for arbitration or a foreign court because of the unavailability of funding in Singapore and Hong Kong, might now choose local seats or courts. As to the business landscape, it is only enhanced in the long run when parties are held accountable for a breach. The innocent party suffers, and the guilty party can develop a reputation for that behavior and others can be chary of working with them. In countries where no effective redress for breaches in business is accepted at least two things happen. External companies will look to other countries to do business with, and it will adversely affect the prices because purchasers will want to factor the risk of not being able to recover if something goes wrong into the price, and pay less.

What do you think the developments will mean for the wider region?

Jun Hee Kim, Kellie Yi: As we have historically seen, the East tiger nations frequently follow the footsteps of Western nations, and in certain respects Hong Kong and Singapore are walking on paved roads set by Australia, England and Wales, various European jurisdictions and the United States for TPF. This new development in the arbitration hubs of Asia will set an example for other Asian nations, including Korea to potentially follow.

Cameron Ford: I think more legal work will be attracted to Singapore and Hong Kong with the result that there might be a slight lessening of work in the wider region where funding is either not available, or has been available and the country has benefited from its unavailability in Singapore and Hong Kong. Overall I think the effect will be that there is an increase in the number of claims being made generally with the consequence, hopefully, that parties will be held to their bargains.

How quickly do you think disputing parties in your jurisdiction will embrace TPF?

Joseph Kim: It depends on the particular industry, and its current market conditions. In the local construction industry, which is losing revenues, facing shrinking markets, and is confronted by non-payment disputes with existing project owners, having such an option such as TPF would be very appealing, however, the pros and cons set forth above would be key to determining whether such an option is feasible.

Cameron Ford: Lawyers are now well aware of TPF and its availability. They will be anxious to let their clients know and pursue claims they

formerly could not. It is very frustrating for a lawyer to have a good claim and not be able to pursue it because of client's lack of ability to commit funds. This is not from the cynical point of view of the lawyer making money, but of the innate desire to prosecute worthy claims and to see justice done. I think lawyers would already be suggesting to some clients that they consider funding and are probably revisiting some older claims that were not made because of lack of funding. I think funding will be embraced quickly.

Cathy Liu: I think disputing parties who are having financial difficulties will embrace TPF very quickly. Parties who have sufficient funds to pursue their claims may remain indifferent to TPF or even become hostile to TPF because they do not want their opposing party to be supported by TPF.

Jun Hee Kim, Kellie Yi: There is no law or regulation that specifically prohibits funding of legal proceedings by a third party in South Korea. One caveat is a provision of the Korean Attorney-at-Law Act, which prohibits a lawyer becoming an assignee of any right in dispute. In addition, there is some scepticism of this new mechanism and a general concern of the unknown. As such, South Korea will most likely keep a keen eye to see how it is implemented and utilized in Hong Kong and Singapore. The level of success there will likely be a major factor in whether South Korea will embrace or discard TPF.

Do you think the opening up of the funding market in Asia is "revolutionary"?

Jun Hee Kim, Kellie Yi: Not, necessarily. As mentioned above, TPF is common in Australia, England and Wales, various European jurisdictions and the United States. It was bound to open up in Asian market as well and thus perhaps it is more evolutionary than revolutionary.

Cameron Ford: Champerty and maintenance have been part of the common law for hundreds of years. Anything that sweeps away such an institution must be called revolutionary, even though such revolutions have occurred elsewhere already. I distinctly recall the feeling of horror I had on hearing of funding for the first time as a young lawyer, with it seeming to go against all that we had learned of the evils of champerty and maintenance. It felt revolutionary then and the feeling has only diminished because of the passage of time. I can well imagine the feelings of lawyers who have defended the bastion until now.

If your company has not yet used TPF, is it something you would consider? Why / Why not?

Cathy Liu: We never used TPF but it is something we would consider. A simple reason is that TPF helps the company to share the risks of shouldering large amount of legal fees without obtaining a satisfactory award in the end.

Joseph Kim: We never used it, but are very interested. A claim we had encompassed both appealing and unappealing aspects, such as a straightforward nonpayment claim for a large contract amount, but also the likelihood of difficulty in enforcement of an arbitral award resulting in the funders not funding our claim.

Cameron Ford: I am not aware we have used it, but it would be considered as one of the possibilities when determining if and how to fund a potential claim for the reasons given above.

Jun Hee Kim, Kellie Yi: We have not used TPF. Given the size of our company we have not faced issues where outside funding is needed. Nevertheless, we are a diverse company and different business divisions have different priorities and budgets. As such we have and will continue to consider this as a potential option. Certainly, if there is a mechanism to decrease burden of legal costs and sharing of risks, it could be viewed favourably. That being said, the concerns above, in particular, disclosure issues would need to be sufficiently addressed and dealt with.

Harbour in the hot seat

During our conversations about TPF in the Asia Pacific region, some concerns were raised. With new inexperienced funders entering the litigation funding market it is - more than ever - important to work with professional funders. Kiran Sanghera takes the hot seat to alleviate these concerns.

TPF encourages unmeritorious claims.

This is a misconception we hear often, but we don't back cases we don't think will win. If a case is unsuccessful, we lose our investment and therefore it is not in our interest to fund cases that we don't think will win. The merits of the case need to be supported by strong legal opinions and the litigation or arbitration needs to be led by experienced lawyers who are specialist in the practice area(s) required to win the case.

There is a risk that funders pull out or become insolvent during the proceedings.

It is important to work with funders who can demonstrate experience in both funding as well as litigation. The Harbour team's track record in both enables Harbour to deal with issues as and when they arise - as they inevitably do in the unpredictable world of litigation. This offers the claimant and their lawyers peace of mind. In addition, the Harbour Funds have over £400m of committed capital, and as soon as funding has been approved, the entire budget is immediately set aside and protected from day one. Harbour is also a founding member of the Association of Litigation Funders, the UK regulatory body responsible for litigation funding, and abides by its Code of Conduct which regulates the limited circumstances where a funding agreement can be terminated and requires funders to maintain a certain level of capital adequacy.

The administration of justice is taken out of the hands of the claimants and its course determined instead by financiers who trade legal claims as commodities.

Once funding has been agreed Harbour does not control the litigation: the claimant and its lawyers will run it in the same way as they would without funding. Once the investment agreement has been signed, we are committed to the claim.

Cases which would otherwise have not run will be given a new lease on life.

The Harbour Funds can give a case a new lease of life in the sense that the claimant(s) did not have the money to pay for the legal costs and through funding get(s) access to justice, but only after we thoroughly examine the case and believe it will succeed.

The aggression with which some cases are pursued because of the perceived need to deliver a return for the funder.

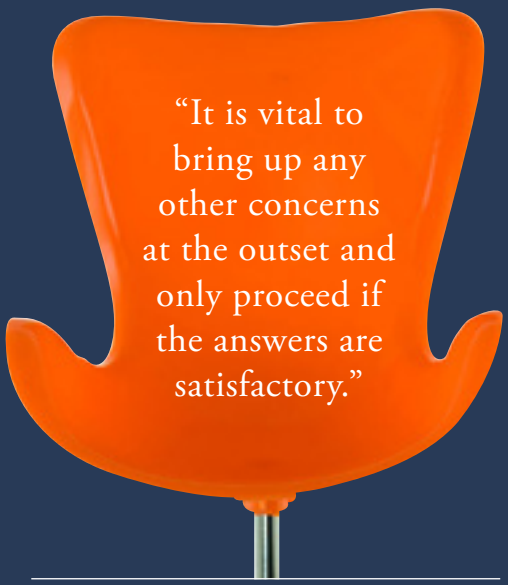
We agree the return beforehand and do not interfere with how the litigation is run.

Conflict of interest: settle or proceed?

Harbour is of the view that settlement should be considered at all times if it is in the best interest of the claimant, not necessarily just before trial or as a tick box exercise. Our pricing process, agreed upfront with the claimant, includes discussions regarding their settlement expectations. The pricing is set out clearly in the funding agreement, so the claimant can easily calculate its return at any stage of the proceedings. Ultimately the decision whether to settle or proceed rests with the claimant and its legal team.

Negotiating the percentage share of proceeds would be a major commercial concern.

We agree the cost of funding based on the risks, the size and length of the case before the case is signed up. From the claimant's perspective: (s)he will have to assess the share of proceeds element versus the benefit of being able to run the litigation at all and not having to repay our investment if the case is lost.



Competing interests may have undue influence on the case and arbitration proceedings.

The Harbour Funds only pay the costs of legal representation for a case. The claimant retains control and is permitted to run the litigation in exactly the same way as if they were paying the bills. While we are happy to provide input from our considerable funding and litigation experience, we are not the decision-maker.

The funder gets access to privileged, sensitive and confidential. Is that OK?

We sign a confidentiality and common interest agreement with the claimant before any documents are shared, any discussions prior to this would be on a strict no names basis. We adopt the same approach to confidentiality as a lawyer with his client.

Disclosure of TPF.

Where disclosure is discretionary, it remains a decision of the funded party but we usually recommend disclosure of the name and involvement of the funder.

Any advice?

We understand why the concerns raised above play on people's mind, especially if they have not worked with funders yet. We recommend that any party interested in obtaining funding talks to professional funders and ask key questions: have you got the funds already, how and when will you pay legal costs, do you interfere with litigation? It is vital to bring up any other concerns at the outset and only proceed if the answers are satisfactory.

Third party funding across the Asia Pacific
What next?

We invited legal experts across the region and at Harbour to summarise the state of play when it comes to third party litigation funding ("TPF") in key countries within the Asia Pacific region, other than Singapore and Hong Kong. TPF refers to the funding of claims in arbitration or litigation in return for a share of the proceeds recovered in those proceedings, by an entity that does not otherwise have an interest in those proceedings.

Australia

By Stephen O'Dowd, Harbour Litigation Funding

Australia has arguably the world's most established TPF market. In 2006, Australia's highest court acknowledged the importance of TPF in promoting access to justice. Less than a decade later, TPF is prevalent in a number of cases, most notable in class actions. A recent study highlighted that almost 50% of all new class actions filed in Australia are being funded by a third party litigation funder.

Between 1992 and 2003, TPF was used predominantly in insolvency disputes. Insolvency practitioners found themselves with meritorious claims, and no funds to bring them. In 2003, the TPF market expanded into class actions when a professional funder backed the *Aristocrat* shareholder class action. *Dorajay Pty Limited v Aristocrat Leisure Limited* [2005] FCA 1483 was eventually settled in 2008 for AU$144.5 million, the largest class action settlement in Australian legal history at the time.

In 2006, the Australian High Court gave the TPF market a substantial boost through its landmark decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 which abolished the last vestiges of champerty and maintenance in Australia, and acknowledged the importance of TPF in promoting access to justice.

Since *Fostif*, the TPF market in Australia has expanded rapidly. A number of privately funded actions have been successfully concluded,

particularly in the class actions arena. Vince Morabito's extensive report studying Australia's class action regimes over 24 years, claims that 92% of funded class actions have settled in Australia, compared to 48.9% of unfunded actions.

TPF is now partially regulated in Australia pursuant to the Corporations Amendment Regulation 2012 (No. 6), which came into force in July 2012 with a focus on managing conflicts of interest to provide protection for funded claimants.

What next? Critics of the regulatory regime suggest that it does not go far enough, calling for capital adequacy requirements, similar to those in the UK, and even commission rates for funders set by statute.

There is a compelling case to argue that TPF has helped to level the playing field in Australia and has provided a market-based solution to access to justice for meritorious claims. Although the regulatory debate persists, professional funders understand the pitfalls of backing disputes without conducting extensive due diligence. Each case requires a significant financial commitment, often over several years, and results are unpredictable even in apparently strong claims. A poorly assessed claim is more likely to fail, leading to a funder writing off its investment and being liable for the defendant's costs.

China (mainland)

By Helen Tang, Senior Associate, Herbert Smith Freehills, Shanghai

There are currently no laws or regulations in mainland China regulating or prohibiting third party funding for litigation or arbitration. As mainland China is not a common law jurisdiction, there is no principle akin to "champerty and maintenance".

Despite the absence of any statutory prohibition, there are currently no reported cases of third party funding in mainland China. The Law Reform Commission of Hong Kong's "Consultation Report - Third Party Funding for Arbitration" of October 2015, section 4.126, also observed that no known active funders are operating in the jurisdiction.

Reasons for the absence of TPF might include the relatively low cost of Chinese legal process compared to common law jurisdictions; the lower success rate of judgement enforcement; and the fact that the Chinese disputes market is relatively young. Many Chinese companies are relatively new to arbitration, as is the concept of TPF.

However, it is very common in mainland China for lawyers to enter into contingency fee arrangements with their clients, usually in the form of a "no win no fee" arrangement or a success fee. In 2006, the PRC Ministry of Justice promulgated the Measures on Lawyers' Fees ("2006 Measures"), which set out specific regulations on contingency fee arrangements.

Article 11 of the 2006 Measures prohibits contingency fee arrangements in matrimonial cases, estate cases, criminal cases, administrative actions against the government, class actions, and actions for state compensation or social insurance compensation. For other cases, where contingency fees are permitted, the 2006 Measures impose a ceiling on the success fee charged. Article 12 of the 2006 Measures provides that the success fee to be charged by the lawyers for the successful party shall not exceed 30% of the proceeds of the litigation or arbitration.

While Hong Kong is mainland China's nearest hub of international arbitration, some mainland Chinese parties are hesitant to agree to arbitration seated in Hong Kong, including because of a perception that legal costs for arbitration seated in Hong Kong are generally higher.

What next? The potential introduction of TPF for arbitration in Hong Kong may encourage more Chinese parties to choose Hong Kong as their arbitration seat to resolve commercial disputes. Further, as Chinese companies become more familiar with arbitration and adopt increasingly sophisticated dispute resolution strategies, awareness of TPF is likely to grow.

Japan

By Nicholas Lingard, Partner, and Seri Takahashi, Associate, Freshfields Bruckhaus Deringer, Singapore and Tokyo

There is no rule of Japanese law that squarely addresses third party litigation funding. There are, however, rules that govern analogous situations and that shed light on the likely approach of the Japanese courts and regulators to TPF. Subject to appropriate structuring, typical TPF arrangements are unlikely to violate those rules. There are three rules of note.

Article 73 of the Attorney Act provides that no person shall engage in the business of obtaining the rights of others by assignment and enforcing such rights through legal proceedings. On its face, that provision plausibly could be interpreted as prohibiting TPF. The provision aims to prevent (a) the acquisition of claims, and (b) the subsequent pursuit of those claims by the acquirer.

Even though a third party funder might be said to have acquired a consequential or derivative percentage interest in a claim, it is difficult to characterise the funder as having "acquired"

the claim. Under Japanese law, one essential feature of a claim is the right to pursue it. A third party funder does not, at least typically, acquire the claimant's right to pursue its claim against the respondent. Even assuming that a funder acquires the claim, the funder does not itself pursue it. TPF arrangements generally leave actual control over the conduct of the suit in the hands of the party receiving funding (and, of course, in the investment treaty context, that will be critical to protect jurisdiction based on the identity of the investor). Counsel will continue to take instructions from the party, not the funder.

Furthermore, the Japanese Supreme Court ruled that an act that might facially fall foul of Article 73 would not be regarded as violating the provision if there is no risk of harmful impacts on people's livelihood caused by the transfer of claims.

Article 11 of the Basic Codes of Professional Conduct for Attorneys forbids an attorney from, among other things, utilising the services of a person who is in violation of the prohibition against the conduct of "legal business" by non-lawyers. A litigation funder reviews case materials and decides whether or not to fund a case. The funder's "go" or "no-go" decision on funding could, at least theoretically, be interpreted as a communication to the litigant about the legal merits of the litigant's case. Doing so could be found to violate the above prohibition, presenting at least theoretical risks to law firms working with a funder. Again, this seems an unnatural reading of the provision given the primary nature of TPF as a financial service, rather than legal business.

Finally, it is remotely possible that TPF could be understood as a form of non-recourse lending. Assuming a TPF arrangement is considered to be a loan, regulations against usury apply and the funder could be sanctioned if the rate of the secured interest exceeds the statutory limit. Commonly used litigation funding agreements tend to describe a transaction whereby the funder receives a portion of the anticipated proceeds. Unless the claimant promises to pay a certain amount of money to the funder irrespective of the outcome of the dispute, it would be difficult to discern the agreement to "repay" the funds by the claimant, an essential element of a loan agreement under Japanese law. TPF therefore is likely to be regarded as lacking a core attribute of lending—it would not, therefore, implicate the rules around usury.

New Zealand

By Frances Emerson, Harbour Litigation Funding

Third party funding is steadily increasing in New Zealand. A number of high profile representative actions over the past ten years have served to de-mystify TPF and shown it to be a positive tool for access to justice. In recognition of the increasing cost of litigation, the doctrines of maintenance and champerty, although not technically abolished, are now considered insufficient by themselves to substantiate abuse of process claims in New Zealand, with the Courts taking a cautiously permissive approach to TPF and a nuanced approach in determining the validity of funding agreements.

In 2008, proposals were made to regulate TPF in class actions. However, the Class Actions Bill and associated draft High Court Amendment (Class Actions) Rules 2008 never made it into law and TPF continues to be regulated through the 'representative action' procedure in the existing High Court Rules and through decisions of the courts.

There are two key cases determining the approach of the New Zealand Courts towards TPF.

In 2011, the High Court was asked to consider the level of disclosure a defendant was entitled to in respect of a funding agreement in *Houghton v Saunders* [2011] HC Christchurch CIV-2008-409-000348. The Court held that the defendants' interests were sufficiently protected by disclosure of documents to the Court only (not the opponent), stating that neither the draft Class Actions Bill nor draft High Court Rules amendments contemplated full disclosure of commercially sensitive information. In *Saunders v Houghton* [2012] NZCA 545 the Court of Appeal held that the Judge at first instance had been correct in her approval of the litigation funding arrangement. The Court noted that the funding agreement complied with the UK Code of Conduct for Litigation Funders and suggested that the involvement of a litigation funder should provide reassurance for the other side. The Supreme Court dismissed a further appeal.

In *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399, the Court of Appeal confirmed that the court has a function in overseeing TPF in all types of proceedings, and articulated general requirements about disclosure of funding agreements. These included giving formal notice to the court and the non-funded party that a litigation funder is involved and providing the non-funded party with certain key details of the funding agreement, including the identity and location of the funder; and the funder's financial standing. In *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89 the Supreme Court decided differently. It agreed that parties should disclose the use of litigation funders, the identity and location of that funder, and whether that funder is subject to the jurisdiction of the New Zealand Courts. However, it ruled that the Courts have no general role in regulating litigation funding agreements and that there was no automatic requirement for the funded party to provide security for costs. It also found that there is no requirement to disclose the financial means of the funder, or the terms upon which funding can be withdrawn.

What next? It is clear that the Courts view TPF as a means to level the playing field and providing access to justice, and they have set out the parameters within which the Courts would expect TPF to function. It remains to be seen whether any legislation will be enacted to govern TPF in class actions in view of the growing market.

South Korea

Matthew Janssen Christensen, Senior Foreign Attorney, Bae Kim and Lee, Seoul

In Korea, TPF remains an elusive concept. While there are no explicit prohibitions under Korean law analogous to common law doctrines of

champerty and maintenance, there is also no established legal framework for TPF, no specific legislation or court judgments in this area, and no known instances of its use in litigations or arbitrations based in Korea.

Yet in many respects, Korea could be a promising market for funders. It is, after all, home to giant conglomerates with complex business activities worldwide giving rise to disputes. Many Korean corporates, are likely to find the option of TPF attractive, either because they cannot fund their own claims or because they prefer to use resources for other purposes. Korea has long punched above its weight in international arbitration, with ICC statistics showing Korean parties to be among the most active users of ICC arbitration in Asia and the arbitration community working tirelessly to elevate Seoul's profile as a safe seat of arbitration. Finally, investment treaty arbitration is now a significant feature of the Korean arbitral landscape, with three such arbitrations having been filed against the Korean government, and at least two Korean corporates having brought treaty-based claims against foreign states. Other treaty-based claims will inevitably follow, and claimants may want the option of TPF.

At the same time, there are a number of reasons why opportunities for third party funders in Korean civil litigation could be limited. First, Korean courts are known for dispensing civil justice quickly and cheaply. Additionally, punitive damages are not permitted under Korean law; contingency fee arrangements - typically a retainer deposit plus a success fee - are legal and widely available; and the recovery of legal fees by the prevailing party is severely limited under applicable court rules.

More generally, legal uncertainty is a basic impediment to the growth of TPF in Korea. Although there is no existing specific prohibition, per se, it is widely believed that TPF arrangements, depending on their structure, could potentially violate other existing laws.

First, Korean law prohibits so-called trusts for the purpose of litigation. To the extent that a TPF arrangement involves the assignment of claims to funders – as opposed to the mere funding of claims – it may constitute a violation of that prohibition. Second, the Attorney at Law Act prohibits the sharing with non-lawyers of fees and profits earned through services that may be provided only by attorneys licensed in Korea. This is frequently cited as posing a potential challenge to TPF arrangements depending on how they are structured. Third, the Attorney at Law Act also requires lawyers to exercise independent judgment on behalf of their clients. Attempts by funders to exercise control over funded litigation or arbitration proceedings are likely to raise issues under this Act. Fourth, Korean courts have repeatedly held that consumer protections against unfair transactions can also be applied to sophisticated corporate commercial entities. Therefore, to the extent that the terms and conditions of a TPF agreement are found to be conspicuously unfair to the funded party, they could be unenforceable, even where the funded party is a large and sophisticated corporation.

What next? Essentially, TPF is still non-existent in Korea and there are fundamental questions concerning its permissibility under Korean law. But with Korean parties and their lawyers becoming more aware of its existence in other jurisdictions, and funders becoming more visible in Korea, it is only a matter of time before the legal uncertainty surrounding TPF in Korea is resolved, one way or another.

Brexit

Does Brexit mean "exit" for UK Litigation?

Ed Crosse, disputes partner at Simmons & Simmons LLP and President of the London Solicitors Litigation Association, reflects on the implications of Brexit for UK civil justice and offers practical advice on how practitioners can limit some of the uncertainty Brexit creates. This article is based on **the in-depth note** recently published by the LSLA.

The outcome of the referendum of 23 June 2016 creates uncertainties that could threaten London as a global centre for litigation unless they are proactively addressed by the UK Government in its Brexit negotiations with the EU.

The reasons why so many international litigants choose to have their disputes resolved in London are numerous and remain almost entirely unaffected by Brexit. The English Courts' record of impartiality, the world's best commercial judiciary, a large pool of legal talent and a legal system attuned to the realities of international commerce and finance will continue to attract court users. Similarly, English contract law is largely unaffected by Brexit and likely to continue to be widely used.

But the more uncertainty there is about whether the remaining Member State Courts will continue to recognise and enforce English jurisdiction clauses and any resulting judgments, the more likely it is that clients will become nervous about choosing these options. That, in turn, could lead to a gradual decline in workflows for the Courts of England and Wales.

There is too much at stake to be complacent. What are the legal challenges presented by Brexit for UK civil justice? How should the UK Government address these in its negotiations with the EU? How can lawyers best mitigate the uncertainty created by Brexit when negotiating new commercial agreements with EU counterparties?

The position pre and post Brexit

Under the Brussels I Regulation Recast (EU) No 1215/2012 ("the Recast Regulation") there are uniform rules governing jurisdiction and enforcement, as between Member State Courts. The UK will no longer benefit from these arrangements post Brexit unless they are replaced with another governing instrument. EU Member State Courts will no longer be obliged to stay proceedings commenced in breach of an exclusive jurisdiction clause in favour of the UK Courts. Similarly, UK judgments will no longer benefit from automatic recognition and enforcement across the EU.

Service Regulation 1393/2007 will also cease to be effective (vis-à-vis the UK). This regulation has provided a uniform methodology for serving legal process within the EU and its removal will certainly add complexity and delay for UK litigation where an overseas party is involved.

The position is more straightforward in relation to governing law clauses; the Rome I and II Regulations will continue to apply to EU Member States, regardless of whether or not the chosen law is that of a third country, such as the USA or England. However, since these regulations will no longer bind the UK Courts, to ensure continuity the UK Government will need to legislate to create a domestic law mirroring their terms.

What steps can the Government take to seek to avoid these outcomes?

Follow the Denmark Model

To protect the jurisdiction of the UK Courts, the most preferable option is for the UK Government to conclude a treaty with the EU and with Denmark, which tracks the provisions of the Recast Regulation, using the jurisdiction agreement between the EU and Denmark (i.e. [2005] OJ L/299/62) as a precedent. This agreement is often referred to as the "Denmark Model". This would provide certainty and continuity for all parties, as the same rules for the allocation of jurisdiction and the mutual recognition and enforcement of judgments would continue to apply. The only deviation necessary from that precedent would be a provision that the UK, as a non-EU Member State, would pay due account to (rather than be bound by) decisions of the CJEU interpreting the equivalent provisions in the Recast Regulation. There is a similar agreement in place between the EU and Denmark in relation to the Service Regulation, which the UK could seek to follow.

Sign and ratify the Lugano II Convention

The UK should also sign and ratify the 2007 Lugano II Convention in order to preserve the present position with the EFTA Member States of Norway, Iceland and Switzerland, who are not part of the Recast Regulation.

Both the Denmark Model and Lugano II Convention require EU consent before the UK can re-sign up to their terms. It is unclear whether the EU will agree to this. Recent speeches of President Juncker suggest that this will be a challenge.

Sign and ratify the 2005 Hague Convention on Choice of Court Agreements

One step that the UK Government can take without requiring the consent of the EU Member States is to sign and ratify the 2005 Hague Convention on Choice of Court Agreements. This convention came into force in 2015 and has to date been ratified by the EU, Mexico and Singapore. It is likely that it will be ratified by a large number of other states over time.

It provides for the recognition and enforcement of exclusive jurisdiction agreements and of judgments resulting from proceedings based on such agreements. It would serve as an important fall-back measure to ensure the enforceability of exclusive jurisdiction agreements in favour of the English Courts, should negotiations over a UK/EU Treaty prove difficult.

> **"...there are clear legal routes that can be pursued to maintain the status quo provided the political goodwill exists on both sides..."**

What practical steps should practitioners take in the meantime?

It remains unclear whether the UK Government will be able to persuade the EU to allow the UK to re-sign up to the Recast Regulation, Service Regulation and the Lugano II Convention. However, it is highly likely that the UK will sign and ratify the Hague Convention. If, therefore, you wish to have your disputes resolved by the Courts of England and Wales, the following are some practical steps which you can to take to help ensure this happens:

1. Include an exclusive jurisdiction clause in favour of the English Courts. These will be recognised and enforced by Convention States under the Hague Convention. So too will any final judgments.

2. If a dispute arises post Brexit, and you are concerned that the other side may ignore your exclusive jurisdiction clause by starting proceedings other than in your chosen court, make sure you are the first to issue proceedings; you will stand a better chance of persuading other Member State Courts to stay secondary proceedings under Articles 33 and 34 of the Recast Regulation.

3. Appoint an agent for the service of process within the UK. This will avoid any delay in effecting service on a counterparty domiciled outside the UK.

4. No action is required in relation to choice of law clauses, other than to ensure that you use them!

5. Finally, if despite the above, you are still concerned about enforcement, then for appropriate cases, consider arbitration since it will be unaffected by Brexit.

Will Brexit cause a revolution for UK litigation, as so many predict?

Other Member States have been quick to suggest that it will. There is little doubt that Brexit will present challenges in the longer term unless the steps recommended above are taken by the UK Government. However, there are clear legal routes that can be pursued to maintain the status quo, provided the political goodwill exists on both sides (the UK and EU) to achieve this.

Even without the EU's cooperation, there are some "quick wins", which will address many of the practical issues identified; such as signing up to the Hague Convention and enacting the provisions of Rome I and Rome II into domestic legislation. Critically, neither requires the consent of the remaining EU Member States.

Harbour news

At the beginning of October, Mary Jordan joined the Harbour Team from Simmons & Simmons LLP. She brings her experience of complex financial markets litigation, a mix of regulatory and criminal investigations as well as investment funds and banking disputes to the team.

The Harbour team continued to travel, meet contacts worldwide and speak about third party funding globally. Between October and December, they spoke at summits and conferences in Dubai, Hong Kong, London, Seoul, Singapore, Sydney, Tokyo and Venice and attended events in Paris and Geneva.

Our litigation funding specialists are often invited to comment on key developments related to dispute resolution finance. Below are the most recent highlights with links to the blogs and articles in case you missed them.

- Lucy Pert on **Third party funding: a 'nice to have' or a necessity?** in the Barrister Magazine
- Rocco Pirozzolo on **Monetising officeholder claims: all change** for International Corporate Rescue.
- Susan Dunn on **the Excalibur judgment** which appeared in CDR Magazine and Law Society Gazette and an interview with the Barrister Magazine.
- Ruth Stackpool-Moore on **A new seat at the mediation table** a blog by Kluwer and on **Singapore's third party funding bill** in an article by GAR.
- Stephen O'Dowd on the **Money Max** decision for CDR and his own view in **A watershed moment for class action funding? A funder's perspective**.

If you wish to find out more about the information in the materials published, please contact Silvia Van den Bruel on +44 (0)20 3829 9336.

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Featuring topical articles by guest authors and the Harbour Team.

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