Third-party Funding of International Arbitration in Asia

In July this year, we released an article on the developments in investment treaty arbitration in Asia. As part of a follow-on from the broad issues discussed in that paper, this article looks to the trend in third-party funding (**TPF**) of international arbitration in Asia.

Third-party Funding

TPF is an alternative method of funding legal proceedings whereby a third party, not affiliated with the dispute, agrees to finance a disputing party, affiliate or law firm representing that party. The aim of TPF is to provide support or finance for part or all of the cost of the proceedings, in return for remuneration or reimbursement wholly or partially dependent upon the outcome of the dispute.

Traditionally, parties opted to use TPF because they would not otherwise have the funds to pursue or defend proceedings. We are seeing an increasing number of well-resourced commercial entities opting to have their arbitral proceedings funded by third parties as a way of:

- Regulating cash flow
- Apportioning risk
- Encouraging an additional layer of due diligence on the merits of their case

Since its inception in Australia and the UK less than a decade ago, dispute funding has emerged from the shadows to take centre stage in the global commercial litigation and arbitration markets.

Asia

Historically, TPF in South East Asia was met with suspicion or silence. However, in recent years, driven by commercial pressures, a growing number of jurisdictions in the region have reformed or abolished their longstanding rules of champerty and maintenance.

Singapore's signing into law of the Civil Law (Amendment) Bill 2016[1] and Hong Kong's passing of the Arbitration and Mediation Legislation (Third Party Funding) Amendment Bill 2016[2] have since opened the door to parties involved in disputes seated in those jurisdictions to seek TPF to support their meritorious claims.

With the International Investment Arbitration Rules of the China International Economic and Trade Commission (**CIETAC**) coming into force on 1 October 2017,[3] the permanency of the trend indicating an increase in TPF in international arbitration is now firmly established.

To that end, we await the Australian Law Reform Commission's Report to the Attorney-General,[4] which is to consider whether and to what extent Commonwealth regulation ought to apply to third-party funders.

This "opening" of Asia to alternative means of funding a claim is indicative of the push for arbitration centres in Asia to modernise their arbitration mechanisms in an effort to attract investors and states involved in the widely funded and promoted "Belt and Road Initiative".

Risks

There are inherent risks involved in TPF. Some of those perceived (and real) risks stem from public policy fears that by "gambling" on the outcome of the dispute, an agreement to share in the spoils may encourage the perversion of justice and endanger the integrity of judicial processes.

The potential risks of TPF to parties involved in arbitrations include:

High Cost

If a party is successful, funders are likely to expect to recoup the sum funded plus a substantial fee. This fee is often calculated as a percentage, as a factor of the amount advanced, or a combination of both.

The upfront cost of running due diligence on (and engaging) funders can also be significant.

Conflicts of Interest

The involvement of a third party via TPF may result in undisclosed conflicts of interest. This includes prior relationships between funder and party or law firm involved in the proceedings. This has the potential to generate costly satellite disputes.

Confidentiality

Given the variety in rules and approaches to privilege across jurisdictions, parties should enter into confidentiality or non-disclosure agreements with prospective funders.

Improper Influence

As funders have a direct financial interest in the outcome of a dispute, there is a risk that it might seek to interfere with the conduct of the proceedings.

1 10 January 2017.

2 14 June 2017.

3 CIETAC's rules are the first investment arbitration rules ever promulgated by a Chinese arbitration institution.

4 Due 21 December 2018.

Tensions may also arise where, for example, a funder wishes to pressure a party to settle, even if it is not in the party's best interest.

The funder may also wield excessive control by placing contingencies on, or unreasonably withdrawing, funding.

Recovery of Costs Against Funders

We note that there may be circumstances where a funded party is unsuccessful at arbitration, yet the tribunal is unlikely to have jurisdiction to make a costs award against a funder. That being so, if an unsuccessful party cannot meet an adverse costs order, the successful party may find itself unable to recover the full amount.

In those circumstances, parties will need to consider making applications for security for its costs as early as possible.

Conclusion

We expect the rapid growth in TPF in international arbitration to continue.

In the interim, conscientious due diligence on funders and disputants, as well as bespoke drafting of funding and confidentiality agreements by experienced practitioners, may assist in alleviating some of the risks associated with TPF in international arbitration.

Recently ranked 23rd in *Global Arbitration Review*'s annual rankings of the top 30 international arbitration firms in the world, we are particularly experienced in preparing parties and funders for arbitrations involving TPF. For more information on TPF or anything raised in this publication, please contact one of our lawyers listed below.

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