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The disputes funding landscape in the Asia Pacific region: legislative changes sweep Hong Kong and Singapore in 2022

In this June edition of Arbitration insights from Singapore, we examine the status of disputes funding in the Asia Pacific region, with a particular focus on the recent developments in Hong Kong with the Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022, and Singapore with the Legal Profession (Amendment) Act.

There is a growing demand for flexibility when it comes to funding disputes in the Asia Pacific region and the market has, accordingly, adapted to provide a wide range of solutions. Through use of dispute funding and/or outcome related fee structures, businesses are now able to rethink how they approach the financial risks of litigation.

Dispute funding and the abolition of champerty and maintenance

Dispute funding refers to the funding of legal proceedings by an entity unconnected to the dispute (a "**funder**") in return for financial gain, such as a share of the damages awarded or a share of the settlement sum.

Such financing is usually offered on a 'non-recourse' basis, meaning the funder has no recourse against the funded party to recover the funded amount if the case is unsuccessful. In a similar vein, lawyers in some jurisdictions offer outcome related fee structures ("**ORFS**"), which are effectively arrangements by which legal fees are reduced in return for an additional uplift fee should the client be successful.

Until relatively recently, common law jurisdictions have traditionally treated dispute funding with caution with such arrangements being held to be contrary to public policy and therefore unenforceable. The legal grounds for doing so, referred to as 'maintenance' and 'champerty', have been re-visited and abolished in many common law jurisdictions as dispute funding has gained traction.

This has been followed more recently by a similarly welcoming approach and access (in varying degrees) to ORFS, representing attempts by each jurisdiction to improve their prospects as global arbitration hubs.

Key features of modern dispute funding

Overview

For a funder to consider a potential opportunity, a prospective claim must demonstrate strong merits with a healthy, recoverable margin between the anticipated damages to be recovered and the anticipated budget for legal fees and costs. The facts, the merits, the parties, and their representatives all play an important role in this assessment.

It is to be noted, however, that most cases presented to a funder are rejected. It has been suggested that the rejection rate may be as high as 90%, although this rate may be changing as more funders enter the market and as the level of understanding among clients and their advisers of funding criteria improves.

Funder's rate of return

Contrary to popular belief, the most common reason for a potential opportunity to be rejected by a funder is not due to the legal merits of the case. Cases are more typically rejected due to concerns that the amount of the claim, or the funder's assessment of what may realistically be recovered, will not be sufficient to justify the level of investment required to finance the dispute budget.

As a rule of thumb, many funders require a minimum ratio between the amount of funding requested and a realistic claim value of 1:10. This ratio does not assume a ten-fold return on investment but implies that where a funder invests a dollar and the claimant recovers 10 dollars, the funder can recover its investment plus three-fold return, which will leave the funded party with 60% of the proceeds.

In conducting this assessment, funders will therefore scrutinise carefully the realistic value of a claim and the likely budget to realise a win in the dispute.

Return structures

A funder providing non-recourse dispute financing will generally expect to make a multiple return on the capital invested. This reflects both the high-risk nature of the investment and the internal rate of return expectations of funders.

From the claimant's perspective, a funding agreement may structure the funder's return in several different ways. Commonly, the return is structured as a multiple of the capital invested or as a percentage of the claim proceeds, or a combination of both. For example, one arrangement may be for the funder to recover the greater of 3 times the capital invested or 35% of the claimant's recovery.

The return may also be structured according to the duration of the case or to the amount of capital that has been drawn down. The funder's return is therefore lower if the case settles early but rises as the dispute proceeds. Such a structure incentivises early settlement for the claimant and provides for a rate of return that is more proportionate to the capital risk assumed.

A funding agreement may contain terms as to the priority of payments, sometimes referred to as a 'waterfall agreement', and how they will be divided among the funded party, the funder, the law firm acting for the funded party and other involved parties. In some jurisdictions it is common for the waterfall terms to be contained in a standalone document signed by all the stakeholders.

The terms of the funding agreements ought to be considered carefully and, where appropriate, legal advice on the terms should be sought.

Control and monitoring of claims by the funder

The extent to which the funder will assert control over a dispute and the claimant's decision-making process (for example, whether, when and at what level to settle the claim) is a concern sometimes expressed by claimants, lawyers, and regulators.

In some common law jurisdictions, it can also be an important issue in assessing the legality of the financing arrangement where doctrines of maintenance and champerty (referred to above) still exist. In reality, the vast majority of third-party funding arrangements are structured carefully to ensure that the funder does not have control over the case or the claimant.

Related to the issue of control is the question of how actively the funder wishes to monitor its investment. This varies from funder to funder, but it should be assumed that at a minimum, the funder will require reports about the progress of the case, the right to monitor fees and/or approve expenditure, notification

of any significant developments such as settlement offers, and direct access to the claimant's legal team.

Some clients regard the active involvement by a funder as part of the value proposition, in terms of budget management and the provision of legal, strategic or technical expertise, in addition to the simple provision of capital.

Preserving confidentiality and privilege

Securing funding necessarily requires the sharing of confidential, privileged and possibly highly sensitive information with prospective funders. Such confidential information must be protected, and any existing privilege must not be lost. A party looking for funding is strongly recommended to seek legal advice on these issues before approaching funders.

Most funders will provide standard non-disclosure agreements for execution before reviewing any information.

Outcome related fee structures ("ORFS")

Overview

ORFS offer alternative methods of financing disputes and allow companies the flexibility to seek legal recourse whilst avoiding significant upfront legal costs. Like dispute funding generally, they can be especially useful where companies are unable to pursue meritorious claim simply due to cashflow issues. ORFS can take one of several forms, however the three most common categories are as follows:

Conditional fee arrangements

A conditional fee arrangement ("**CFA**") is an agreement where a lawyer agrees with the client to be paid a success fee for the matter only in the event of a successful outcome. This could either be a flat fee or a calculated fee based on "benchmark" rates that the lawyer would have charged if there was no ORFS in place.

Damages-based agreements

A damages-based agreement ("**DBA**") is an agreement where a lawyer agrees with the client to be paid for the matter only if the client obtains a financial benefit (the "**DBA Payment**") in the matter. The DBA Payment is calculated by reference to the financial benefit (such as a percentage or proportion of the financial benefit) received by the client through a successful lawsuit.

Hybrid damages-based agreements

A hybrid DBA ("**HDBA**") is where the lawyer agrees with the client to be paid a DBA Payment (if a financial benefit is received), in addition to a fee, usually calculated at a discounted rate, for the legal services rendered by the lawyer for the client during the course of the matter.

In this arrangement, if the proceedings were to be unsuccessful, the lawyer would only be able to recover a proportion of the benchmark costs by way of the discounted rates.

Dispute funding developments in Singapore

In Singapore, dispute funding and ORFS are areas which have undergone expansion and development in recent years through legislative reform, signalling a modernization of the jurisdiction, and providing greater options and access to justice to potential claimants.

Legislative changes from 2017 to 2021

Prior to 2017, dispute funding was considered unlawful under the general principles of maintenance and champerty. However, through amendments to the Civil Law Act 1909 in 2017, lawmakers abolished the common law torts of maintenance and champerty and approved the use of third-party funding in limited situations[1].

From 28 June 2021, the Singapore Ministry of Law extended the third-party funding framework to cover a wider ambit of proceedings through the Civil Law (Third-Party Funding) (Amendment) Regulations 2021, including domestic arbitration proceedings and connected court proceedings, proceedings commenced and pursued in the Singapore International Commercial Court, proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act and related mediation proceedings[2].

[1] Section 5B(2), Civil Law Act 1909 (2020 Rev Ed)

[2] Section 3, Civil Law (Third-Party Funding) (Amendment) Regulations 2021

These offer commercial parties a greater number of options for funding meritorious claims, and further fortifies Singapore's position as an international commercial dispute resolution hub.

The Legal Profession (Amendment) Act 2022 and ORFS

Until recently, all forms of ORFS had been prohibited in Singapore, although for example, in August 2019, the Ministry of Law conducted a public consultation on reforms to permit CFAs. This position changed on 4 May 2022 when the Legal Profession (Amendment) Act 2022 came into force, complementing the existing legal funding framework by legally permitting lawyers and their clients to enter CFAs in relation to arbitrations and certain court proceedings.

A CFA is explicitly defined as an agreement relating to the whole or any part of the remuneration and costs in respect of contentious proceedings (whether in Singapore or outside Singapore) conducted by a solicitor, a foreign lawyer or a law practice entity, which provides for the remuneration and costs or any part of them to be payable only in "*specified circumstances*", and may provide for an uplift fee[3].

Parties to CFAs may mutually agree that a client is only obligated to provide remuneration to its counsel upon the achievement of "*specified circumstances*". These "*specified circumstances*" can be defined in a CFA to include a range of foreseeable outcomes, such as where the client is successful in its claims or defence, or where other outcomes are achieved by the counsel. The CFA can also provide for the payment of a success fee or "*uplift*" on fees. These "*uplift fees*" are defined as fees higher than the remuneration or costs that would otherwise be payable by the client to its counsel if there were no conditional fee agreement.

This amendment marks a paradigm shift in Singapore, influenced by wide-sweeping CFA developments overseas and a strong desire to enhance and maintain Singapore's position as a premier global legal services and arbitration hub. These changes should improve funding options for clients (in addition to traditional fee arrangements and dispute funding), thereby enhancing access to justice and allowing greater flexibility and risk management for prospective claimants.

ORFS arrangements permitted - CFAs, specified circumstances and uplifted fees

As alluded to above, the new regime in Singapore has not opened the floodgates to all forms of ORFS entirely. Instead, only CFAs have been legalised, meaning DBAs and HDBAs will, for now, remain unavailable in the jurisdiction.

CFAs are also only permitted in "*prescribed proceedings*". These mirror the types of proceedings in which dispute funding is currently permitted and includes international and domestic arbitration proceedings, some proceedings in the Singapore International Commercial Court and related court and mediation proceedings[4]. However, under the new regime, 'no win, no fee' CFAs or 'no win, less fees' CFAs can be agreed.

Under a 'no win, **no** fee' CFA, lawyers and clients can agree that if the claim fails, the lawyer receives nothing but if the claim succeeds, the lawyer receives the actual fees incurred with an additional amount representing the uplift fee. Alternatively, under a 'no win, **less** fees' CFA, the client can agree to pay a certain percentage of their lawyer's fees and costs whatever the case outcome, however with a similarly inflated payout for the lawyer should the claim succeed.

Ultimately, the amount of payment due to the lawyer depending on the outcome of the case is contingent on what has been agreed upon between the lawyer and the client.

ORFS measures and safeguards

In order to protect against the perceived risks of ORFS, the Singapore government has enforced several safeguards on the use of CFAs through the Legal Profession (Conditional Fee Agreement) Regulations 2022.

For instance, before a CFA is executed, lawyers must give their clients certain information and the client

[3] Section 115A(1), Legal Profession Act 1966 (2020 Rev Ed) (**"LPA"**)

[4] Section 3, Legal Profession (Conditional Fee Agreement) Regulations 2022 (**"LPCFAR"**)

must sign and date an acknowledgement that he has received and understood that information[5]. This includes information about the nature and operation of the CFA (including its terms), the client's right to seek independent advice before entering the CFA, and the fact that any uplift fee is not recoverable from the losing party and that the client remains liable for any costs order a court or tribunal makes against them. Further, the CFA itself must include certain prescribed terms[6]. One such term is a 5-day cooling-off period following signature of the CFA, during which time it may be terminated.

Another notable safeguard is a prohibition on uplift fees being recoverable from the opposing party[7]. The intention behind this is to prevent satellite litigation in which there is a dispute initiated by the losing party as to the fee arrangement employed by the winning party. These safeguards and requirements are generally unrestrictive and are in line with what can be expected in other jurisdictions offering ORFS arrangements.

The introduction of this third-party funding framework in Singapore has been received positively by funders and the business, legal and arbitration communities alike. More funders now have a presence in Singapore, and businesses have shown increasing interest in additional options for financing litigation.

Dispute funding developments in Hong Kong

In Hong Kong, lawyers in Hong Kong are currently prohibited from charging fees conditional upon the outcome of contentious proceedings, including arbitration.

Legislative proposals in 2022

Acting on the recommendations made by the Law Reform Commission of Hong Kong (the "**Commission**") for a regulatory regime governing ORFSs (the "**ORFS Regime**"), the government has introduced the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 (the "**Bill**"). The Bill was gazetted on 25 March 2022 and will make its way through the legislative process this year.

Under the Bill, CFAs, DBAs, and HDBAs will be permitted[8]. In relation to CFAs, the Commission has recommended that the success fee shall be capped at 100% of benchmark costs for both solicitors and barristers[9]. In relation to DBAs, DBA Payments are recommended by the Commission to be capped at 50% of the financial benefit and may or may not include barristers' fees[10].

ORFS measures, safeguards and costs

The Bill includes various measures to aid the operation of the ORFS Regime. This includes measures to allow the communication of confidential information relating to arbitral proceedings to a person for the purpose of entering into an ORFS agreement[11] and various disclosure requirements for lawyers who have entered into an ORFS agreement to the relevant arbitration body and to other parties to the arbitration[12].

Furthermore, the Commission recommends that the Secretary of Justice be empowered to appoint both an advisory body and an authorized body to, among conducting other supervisory roles, issue a code of practice which shall set out the practices and standards with which lawyers who enter into ORFS agreements are ordinarily expected to comply.

The Commission further also recommends the implementation of subsidiary legislation which will contain a more detailed regulatory framework as to the implementation of safeguards for ORFS agreements[13]. Whilst the precise scope of the subsidiary legislation is yet to be seen, the Commission has recommended the inclusion of safeguards including but not limited to:

- setting appropriate caps (as mentioned above) on lawyers' fees obtained under different types of ORFS agreements;

[5] Section 4, LPCFAR
[6] Section 5, LPCFAR
[7] Section 115C(1), LPA
[8] Section 98ZB(1), Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 (**"Bill"**)
[9] Recommendation 3, The Law Reform Commission Of Hong Kong Report on Outcome Related Fee Structures For Arbitration (**"LRC Report"**)
[10] Recommendation 7, LRC Report
[11] Section 98ZP, Bill
[12] Section 98ZQ, Bill
[13] Annex 2, LRC Report

- ORFS agreements must be in writing and signed by the clients, with clear terms as to the circumstances in which the ORFS agreement may be terminated before the conclusion of arbitration and the charging basis in event of termination for the work already done by the lawyer;
- obligating lawyers to inform clients of their right to take independent legal advice; and
- ORFS agreements should be subject to a minimum cooling-off period of seven days during which the client, by written notice, can terminate the ORFS agreement.

In terms of award of costs by the arbitral tribunal, the Bill makes provisions to prohibit the winning party from recovering its success fee and/or legal expense insurance premium from the losing party (save for exceptional circumstances as determined by the arbitral tribunal)[14].

Conclusion

When compared to Hong Kong's ORFS Regime, Singapore's CFA regime is more restrictive and affords less flexibility to commercial parties. One of the key differences being that the Singapore CFA regime does not permit any form of DBA. Nonetheless, the Singapore CFA regime is an important milestone in offering businesses with flexibility when it comes to funding arbitration proceedings in Singapore.

There is a growing demand for flexibility when it comes to funding disputes in the Asia Pacific region and the market has, accordingly, adapted to provide a wide range of solutions. Through use of dispute funding and/or outcome related fee structures, businesses are now able to rethink how they approach the financial risks of litigation.

This demand for options has not gone unnoticed by those jurisdictions seeking to promote themselves as premiere locations for dispute resolution, and regulatory landscapes are now shifting to match the market. Hong Kong and Singapore are leading the way.

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[14] Section 98ZU(3), Bill

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