Third-Party Disputes Finance - Global Survey of Key Markets
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INTRODUCTION

Despite its global creep, Third-Party Disputes Finance (TPDF) largely remains a nascent, unregulated and unsupervised industry. Policy-makers in Australia, Hong Kong, the U.K. and Canada have taken initial steps to put down minimal standards for the industry, but remain the exception to the rule. While the financial industry and the legal profession remain strictly regulated around the world, TPDF has largely been allowed to dance in the margins of these two pillars of modern society with precious little oversight.

This paper contains a survey of the status of TPDF in key global markets; namely Brazil, China, Hong Kong and Portugal. Contributors to the survey include Ariel Ye of King & Wood Mallesons (Hong Kong & Shenzhen, China), Eliana Baraldi of Souto Correa Cea Lummertz & Amaral Advogados (Sâo Paulo, Brazil) and Duarte Henriques of BCH Advogados (Lisbon, Portugal).

1. Is Third-Party disputes finance a growing trend in your jurisdiction?

Brazil: TPDF is a growing trend in Brazilian jurisdiction in judicial or arbitration litigation. Arbitration tends to gather more valuable amounts than in judicial proceedings. A Brazilian company named Leste has recently been established specializing in TPDF with a considerable amount invested in TPDF.

China: At present, the research on and use of third-party funding in mainland China is still in its early stages of infancy and legal regulation is non-existent. To date, a few companies such as Bangying of Beijing, Weand of Shanghai and Dingsong Legal Capital of Shenzhen have been provided financing services for clients' litigation or arbitration cases. The new business model recently emerged from 2016.

With regards to their business development status, take Dingsong Legal Capital for example, it has invested in more than 400 domestic litigations, involving litigations which amount to more than 2 billion RMB and actual investment exceeds 12 million RMB, since its establishment in 2016. It entered into cooperation agreements with several well-known law firms throughout the country, and also with insurance and asset management companies. It has entered into cooperation agreements with famous international legal capital companies, such as Burford listed on the London Stock Exchange, Omni Bridgeway of Netherlands, Woodsford of UK and IMF Bentham listed on the Sydney Stock Exchange.

Hong Kong (SAR): The two pioneering Asian jurisdictions in the eyes of third party funders are Singapore and Hong Kong, both with a common law system having a volume of insolvency and arbitration proceedings Indeed, Hong Kong and Singapore are the first countries to explicitly regulate third party funding in international arbitration on a state level.

Portugal: No yet. It is a topic that people are increasingly speaking about but there are no substantial players in the market so far. In Duarte Henriques' practice, he has assisted clients in getting funding for their cases and successfully has concluded five funded engagements for clients (2 domestic and 3 international).

2. If this is a growing trend, what are the reasons for its growth in your jurisdiction?

Brazil: Major infrastructure projects and cross border transactions are increasing in proportion, amount and number. Considering that companies (i) may not be willing to disburse significant amounts to bear the costs of an arbitration proceeding; (ii) may not be in a financial situation that allow them to bear such costs without compromising its working capital, TPF has become one of the most interesting paths to be taken either by local or foreign companies, regardless the magnitude or nature of the business the arbitral proceeding refers to.

Portugal: While nascent, there is a huge appetite in learning more about TPDFl. Last October, an event in Lisbon was organized by Duarte Henrique to discuss with local lawyers and members of the ICCA / QMUL Task Force on TPDF its draft report, which has proven to be very well attended, with people engaged in discussions and sharing views during a full day.

This initial appetite comes, firstly, from the fact that this is an untapped phenomenon, and, secondly, from a (perhaps misguided) notion that TPDF can bring business to locals (either as a "counsel to assess cases" or arbitrators that allegedly are appointed by TPDFs). Some people, however, have already realized that this is fundamental tool in getting new cases. Further, there is a slight (timid I should say, but nevertheless) growth in awareness of this model by local businesses. It is predicted that this funding model will become a current financing tool for small-medium companies in a 4-5 year timespan.

3. Is there any public government oversight of TPDF in your jurisdiction and, if so, what governmental entity is responsible for such oversight?

Brazil: No rules exist at the present time to regulate the activity of TPDF. There is no apparent pending legislation either. So far no governmental entity is in charge of oversight of the specific activity of TPDF. However, the funds of financial institutions are bound by general regulations of the specific sector they belong to (either the Brazilian Securities Exchange Commissions' rules or the Central Bank of Brazil, among others).

China: There are no prohibitive regulations or laws on TPDF in mainland China. Therefore, theoretically, third-party funders in the region are free to negotiate and charge a portion of the proceeds from the funded person depending on the complexity of the case and their financial situation.

Aside from third-party funding, there is the previously accepted practices concerning the use of contingency fees which share certain traits with TPDF. On April 13, 2006, "The Measures for the Administration of Lawyers' Fees" issued jointly by the National Development and Reform Commission and the Ministry of Justice explicitly confirmed the legality, applicable

conditions, and restrictions of contingency fees. Articles 11, 12, and 13 of "the Measures for the Administration of Lawyers' Fees" involve contingency fees, and stipulate respectively: 1) the types of lawsuits that prohibit the use of contingency fees; 2) the procedural requirements of contingency fees; and 3) the upper limit (30%) on the proceeds.

It will be interesting to observe the development of TPDF in China because in practice, the majority of domestic litigation and arbitration matters are already financed through contingency fee arrangements, by the same Chinese law firms that represent the case in question.

Hong Kong: (SAR): Hong Kong has traditionally been hostile to third party funding, largely due to concerns over the doctrines of maintenance and champerty.

The term "access to justice" was used by the Hong Kong Court of Final Appeal to categorize a type of exception to the doctrine of maintenance and champerty in *Siegfried Adalbert Unruh v Hans-Joerg Seeberger and Another*. It vividly expresses the primary public policy behind the statutory permission of TPDF. If a party has a perfectly good claim in law, maintenance or champerty should not be a sufficient excuse to deprive of the pursuit of such claim. This public policy rationale is consistent with the fact that third party funding is more relaxed in the cases of insolvency and international arbitration, which either involves poor parties or huge costs.

On 12 October 2016, the Law Reform Commission released a report recommending clarifying the law concerning third party funding of arbitration and associated proceedings under the Hong Kong Arbitration Ordinance. This report followed a study by the Law Reform Commission's Third Party Funding for Arbitration Sub-committee and a consultation paper that was issued in October 20152.

On 14 June 2017, the Arbitration and Mediation Legislation (Third Party Funding) Bill 2016 was passed. It amended the Arbitration Ordinance (CAP 609) and the Mediation Ordinance (CAP 620), to permit third party funding of arbitration and mediation proceedings, as well as related proceedings such as Court proceedings and emergency arbitrations seated in Hong Kong.

The doctrines of maintenance and champerty are abolished by virtue of the new legislation. The scope of the new legislation allows third party funding not only in Hong Kong-seated arbitration proceedings including emergency arbitration procedures, but also related court proceedings and mediation.

Parties are permitted to disclose information about their arbitration or potential arbitration for the purpose of "having or seeking" third party funding. The new legislation does not include mandatory regulations that third party funders must adhere although a code of practice is intended to be drawn up and issued.

Portugal: Not currently, but it is expected to occur within the next four to five years.

4. Is there any private organizational oversight of TPDF that regulate third-party disputes finance?

Brazil: Not yet.

Hong Kong (SAR) & China: On 31 August 2017, the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center (CIETAC) released its Guidelines on Third Party Funding in Arbitration. These guidelines set out certain principles of practice and conduct which parties and arbitrators are encouraged to observe in respect of actual or anticipated arbitration proceedings administered by CIETAC in which there is or may be an element of third party funding.

Portugal: Not yet.

5. Is disclosure of TPDF by a party typically required by arbitrators in your jurisdiction?

Brazil: – it is a delicate matter, as TPF in Brazil is relatively new. There is a trend in the sense that parties should disclose the existence of a TPDF for purposes of checking of conflict of interests.

Standards and extent of disclosure may vary. Although the IBA Rules on Conflict of Interest in International Arbitration equates the funder to a party, some people understand that it is worth asking whether or not the funder's agreement is related to the likelihood of success of the arbitral proceeding (in such event one may understand that the party receiving those funds does not need to disclose the existence or identity of the funder – not all TPDF funding engagements share the risk of the arbitral proceeding). Besides, sometimes the funder is involved in the arbitral proceeding on a later stage and disclosure may adversely affect the proceedings. Parties however tend to disclose the existence of the funder if (i) they are called for presenting security for costs, as a defense; (ii) when they intend to recover from the adversary party the costs on having retained a third party to fund litigation.

The trend, however, is to disclose the existence of the funder at the very first opportunity for purposes of ensuring impartiality of the arbitral tribunal.

6. In your experience, is production of the third-party disputes finance agreement or correspondence from the financier and the party required in arbitration?

Brazil: The funders' agreement is not a required document for production, but evidence of its existence is. An exception obtains when the party claims reimbursement of the fees incurred with the funder.

Portugal: No. Most arbitral tribunals / arbitral institutions that regulate TPDF provide only for the obligation to disclose the existence and identity details of the funder. Very rarely does the TPDF agreement itself comes to light.

7. What general trends do you see concerning TPDF?

Brazil & Portugal: Substantial funders like Burford are now repeatedly speaking about "portfolio financing", which they claim is a financing structure where the assessment of risk / financing terms & conditions is shifted from the "single case" analysis to the "portfolio" of the law firm at question. They claim this to be a simpler way of funding cases (because due diligence is required on the law firm instead of each single case). The accuracy of this description is questionable. Experience concerning portfolio funding demonstrates that TPDF funders fund a larger number of cases but in any event they do a due diligence for each one of the funded cases in that portfolio (and a thorough one …) so all that we can speak about is of a "multiplied case funding".

This new "line of financing" can be considered even more dangerous regarding conflicts of interest because it simply multiplies the risk (by clients and in turn by clients' cases) and condenses it in a single law firm. On top of that, clients may not know that their claims are used as a collateral to bankroll the law firm (exponentially increasing the risk of conflicts of interest).

There is another trend in TPDF in which funders' recourse is calculated according to the "assets" of the borrower (in this case, according to the value and outcome of the claim as an asset). This seems to be a regular bankrolling with variable rates according to the success of the case

Another trend is the increasing volume of funded cases in South America (Brazilian "Lest" funder claims to have now 13 cases funded in its portfolio). Peruvian "Lex Finance" has also started to cover a few Latin-American countries and claims to have started to fund States in investment arbitration cases brought against them. These funding experiences, however, are not documented.

Finally, the "Disclosure" trend is here to stay. As mentioned above, to date this has been limited to a) existence and b) identity details. However, if some undesirable effects of the TPDF appear more often (such as TPDF funders being ordered to pay the costs, as it happened in *Excalibur*—albeit in litigation before English courts setting—or TPF being awarded their "uplift", as it happened in *Essar v Norscot*) some increased disclosure will be required. Possibly a full-fledged disclosure will be required