ASIA LOOKS FORWARD TO NEW LITIGATION FINANCE REGIMES

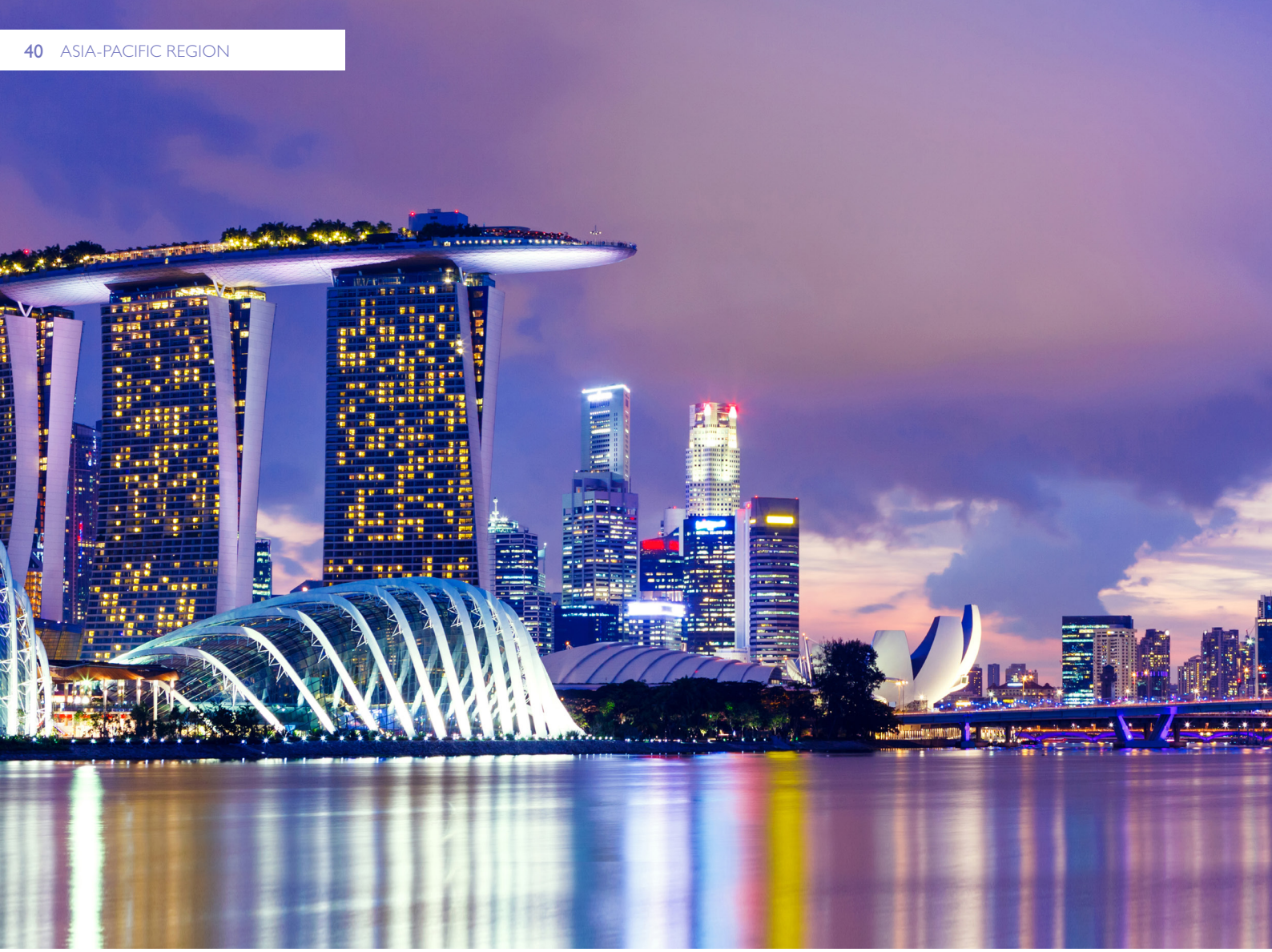
Third-party funding of arbitration will soon be permitted in Hong Kong and Singapore, but how will it be regulated? **Clive Bowman** and **Oliver Gayner** of **IMF Bentham** examine the most recent developments in this area, including the timetable for change

These are exciting times for litigation finance in Asia. In key disputes markets such as Hong Kong and Singapore, litigation funding has traditionally been difficult to impossible outside the insolvency context. However, there is significant client and lawyer demand for these services, and since around 2012 **IMF Bentham** has been consulting with the authorities in both jurisdictions as to how they might cast the net wider taking into consideration precedents from overseas.

IMF is in a unique position in this regard being the first listed, institutional grade funder with a track record stretching back over 16 years, and experience in Australia, England & Wales, the United States and Canada among others. Each jurisdiction has adopted slightly different approaches towards regulating third-party funding: there is no "one-size-fits-all" model. In this article we explain how funding in Hong Kong and Singapore has evolved, and highlight some of the key recent developments.

The traditional approach

Historically, the doctrines of maintenance and champerty have remained more prevalent in ▶



Hong Kong and Singaporean law than in other major common law jurisdictions such as England & Wales and Australia.

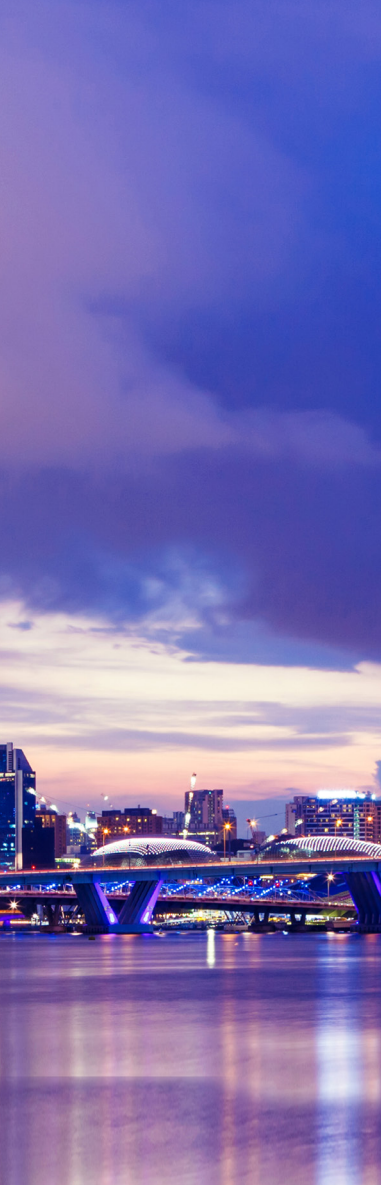
In Hong Kong, it is still a criminal offence to maintain litigation: as recently as 2011, solicitors have been convicted for acting on contingency, for example in *Winnie Lo v HKSAR*. However, since the mid-2000s attitudes towards funding have started to soften. There have been several decisions, in particular by **Justices Harris** and **Ribeiro** (*Unruh v Seeberger (2007)*, *Re Cyberworks (2010)* and *Re Po Yuen Machine Factory (2012)*, for example) in which the courts have recognised the lawfulness of funding in certain defined categories, in particular where the funds are necessary to provide access to justice for impecunious claimants. IMF has funded three cases in Hong Kong in this way since 2013, all arising out of insolvencies.

In Singapore, meanwhile, the leading case is that of *Re Vanguard Energy (2015)*. The High Court held that an assignment of part of the proceeds of litigation to the shareholders of an insolvent company, who had agreed to fund the company to pursue its claims, was not champertous. However arbitration funding has not been possible. In the 2007 case of *Otech v Clough*, the Singapore Court of Appeal held that there was no reason to treat arbitration differently to court litigation and if it was champertous to fund one it would be champertous to fund the other. Interestingly, in Hong Kong, **Justice Kaplan** had reached the opposite conclusion in *Cannonway Consultants (1997)*.

These are the type of issues that funders have faced in the past: while the demand for funding from clients and lawyers has continued to grow, existing common law has blocked the supply.

2015 onwards: changes afoot

The pace of change has accelerated rapidly in the last year. In October 2015, after a two year consultation process, the Hong Kong Law Reform Commission (HKLRC) published a report which recommended that third-party funding for international arbitrations in Hong Kong be permitted provided certain ethical and financial safeguards were met. IMF, alongside other stakeholders, drafted submissions to the HKLRC which recommended that a voluntary code of conduct be adopted for an initial trial period, before any decision on whether to move



to statutory regulation was considered.

In this regard, we drew on our experiences in Australia, where IMF helped to pioneer the funding industry built around high ethical standards and financial transparency, and in England & Wales where funding is self-regulated under the Association of Litigation Funders (ALF) Code of Conduct.

In October 2016, the HKLRC released its final recommendations which adopt that approach, and which specify key provisions for a code of conduct including capital adequacy, disclosure of funding arrangements and managing conflicts of interest.

Singapore also assesses arbitration funding

Singapore has also been examining the question of law reform. There is a sense of an ongoing race developing between the two jurisdictions who are vying to become the pre-eminent arbitration centre in South East Asia.

In June 2016, the Ministry of Law in Singapore released draft legislation to permit arbitration funding. It is short and to the point: the torts of maintenance and champerty will be abolished for qualifying third-party funders in the context of "prescribed dispute resolution proceedings".

"Prescribed proceedings" means international arbitration, and court or mediation proceedings arising out of international arbitration. In this context, "qualifying" refers to professional funders who have sufficient capital to fund the case in question: in our view, this should be set by reference to a minimum buffer, say of SGD 5 million, but in reality there are several possible approaches to capital adequacy and none of them are perfect.

What is clear from reading both consultations is that the respective approaches are quite different. The HKLRC paper seeks to identify all the possible risks associated with funding, and then set guidelines, whereas the Ministry of Law have sought to keep qualifying criteria to a minimum.

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The need for certainty

Investors generally crave certainty, and litigation funders are no different. Whatever the rules are, they must be clearly defined so that investment decisions can be taken with confidence that returns will be possible if cases succeed. Predicting the outcome of litigation is difficult enough without additional regulatory risk added in.

In this regard, the lessons of history are clear. In the early days of funding in Australia, there was a spate of tactical litigation brought by defendants trying to knock out claims against them. Similarly, the introduction of legislation in England & Wales concerning conditional fees saw regular bouts of satellite litigation from 1999 until 2012. These types of satellite disputes are debilitating for all concerned and do nothing to serve the ends of justice.

In Australia, the tipping point came in 2006 with the High Court's decision in the *Fostif* litigation. That case, heard before Australia's final court of appeal, established most of the key principles that underpin the Australian funding industry, such as the importance of promoting access to justice and the fact that courts already have sufficient powers to make orders against any funders who step out of line. It was ground-breaking and paved the way for the 'light touch' regulatory approach that has developed in Australia and is now proving influential elsewhere.

A good example is project management: where claimants choose to do so, the Australian courts permit funders to project manage cases including monitoring budgets. That is a valuable service for many clients who prefer to focus on their day job.

Adverse costs

One particular issue that arises in the context of funding arbitration is adverse costs. How, if a funder is not party to the underlying arbitration agreement, can tribunals exercise jurisdiction to award costs against it?

Typically, if IMF agrees to fund a case, we also agree to pay adverse costs and in Australian litigation, we will lodge a deed poll at court confirming that we will meet any adverse costs orders on the claimant's behalf. That is an important part of ▶

- how a funder can support and enhance the civil justice system, and it helps the parties to focus on what really matters – the merits of the dispute – and avoid unnecessary sideshows such as interlocutory disputes around security for costs.

In our view, a similar approach can be adopted in arbitration, via a simple instrument such as a deed of submission, pursuant to which the funder or alternatively after-the-event (ATE) insurer (depending on the agreement reached with the funded party) agrees to submit to the jurisdiction of the tribunal in respect of costs. However, the HKLRC have said they would like further consultation before deciding on what mechanism to recommend. Further proposals can therefore be expected.

Other recent developments

Arbitration funding is also a hot topic in England & Wales right now following the High Court's decision in *Essar v Norscot (2016)*, an interesting decision which may have wider implications for the arbitration community.

In *Essar*, an **International Chamber of Commerce** (ICC) arbitration tribunal awarded the successful claimant indemnity costs including its costs of funding (which amounted to GBP 1.95 million, being three times the invested sum of GBP 650,000). The tribunal determined that such an order was justified given the unusual facts: the defendant's conduct had forced the claimant into a perilous financial position such that it had no option but to seek outside capital to pursue its claim. On appeal under s.68 of the 1996 Arbitration Act (which deals with procedural irregularity), the High Court upheld the decision including the tribunal's interpretation that article 31(1) (which is now 37(1)) of the ICC Rules (legal and other costs) (emphasis supplied) was wide enough to include costs of funding.

The same outcome may not apply under English or Australian court rules, so the decision may be viewed as a significant reason in favour of choosing arbitration.

The next steps

Many practitioners will want to know when the new rules in Hong Kong and Singapore will be introduced. The amending legislation to the Hong Kong Arbitration Ordinance has been drafted and is due to be considered by the Legislative Council during the current session – we assume this means within around six to 12 months.

Crucially, the legislation appears to have government backing: the Secretary for Justice in Hong Kong, **Rimsky Yuen SC**, gave the opening speech of the recent HKIAC Arbitration Week in which he said that funding would bring benefits to the Hong Kong legal system since it levelled the playing field between small and medium sized enterprises and large multinational corporations.

Similarly, the Singaporean legislation is expected within the first half of 2017. In time, we hope the scope of "prescribed proceedings" will be extended, for example to include litigation before the **Singapore International Commercial Court**. IMF is gearing up its Asia practice in readiness, though we anticipate the market will grow slowly in the first few years as clients familiarise themselves with the types of services on offer.

Both moves show just how far the industry has travelled: funding has gone from being an offence to being part of official policy on civil justice. ■

Clive Bowman has been involved in the litigation funding industry since 1997 and has played a key part in the formation and development of IMF Bentham Ltd as one of the leading global players. He is IMF's chief executive for Australia and Asia and is chairman of its investment committee. **Oliver Gayner** is an English litigation and arbitration lawyer who is now an investment manager based in Sydney covering Hong Kong and Singapore in addition to New South Wales.