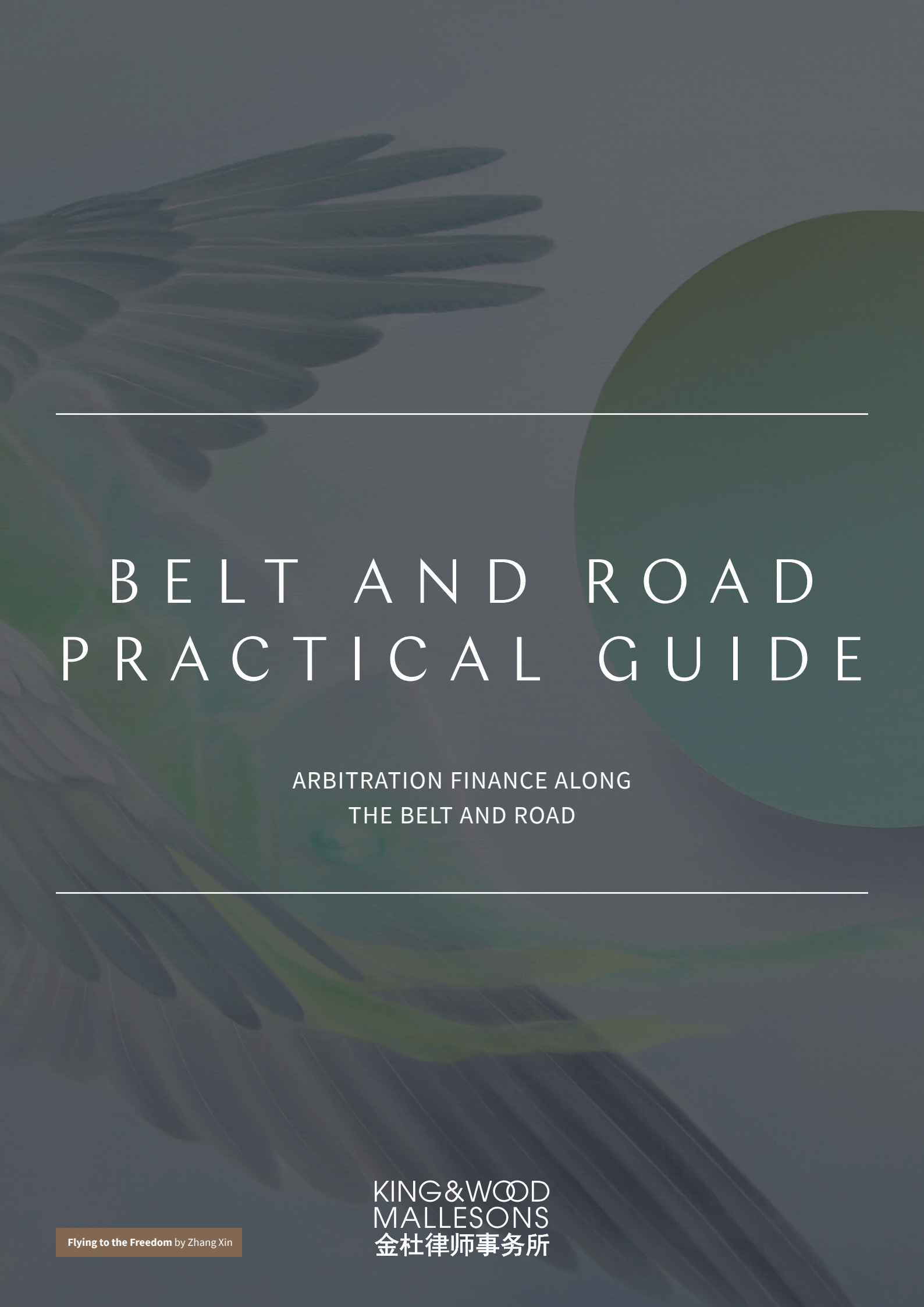
BELT AND ROAD PRACTICAL GUIDE

ARBITRATION FINANCE ALONG THE BELT AND ROAD

KING&WOOD MALLESONS
金杜律师事务所



Flying to the Freedom by Zhang Xin

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* Any reference to “Hong Kong” or “Hong Kong SAR” shall be construed as a reference to “Hong Kong Special Administrative Region of the People’s Republic of China”.

INTRODUCTION

Belt and Road Initiative (BRI) disputes are an unfortunate part of the lifecycle on the BRI, and their financing should therefore be a key consideration for parties involved in BRI projects. When it comes to financing such BRI disputes, there are a variety of reasons why alternative legal funding, including Third-party Funding (TPF) and Outcome Related Fee Structures (ORFS) should be considered by clients.

This guide provides our practical overview of how TPF and ORFSs are relevant to arbitrations which can arise from BRI projects. We examine, in particular, four major international arbitration seats[1]: Hong Kong*, China Mainland, Singapore and England & Wales (the Key Seats).

Whilst there are no hard and fast rules on the choice of seat in BRI projects, these Key Seats are the ones which are most regularly chosen in arbitration clauses in BRI project documentation to date. In our view, they will likely continue to be favoured seats for BRI project disputes in the future.

We provide practical takeaways on what a BRI party should consider when thinking of using TPF and/or ORFS and our key tips to ensure their use is successful.

Key BRI arbitration seats around the world

* Based on the cooperation agreement between King & Wood Mallesons China (KWM China) and Eversheds Sutherland (International), we are able to further extend our global reach to the UK, Europe, Middle East, Africa.

1 We refer to the legal seat of arbitration, i.e., the jurisdiction in which the arbitration occurs, which is the juridical, and not necessarily the physical seat of the arbitration.

* Any reference to "Hong Kong" or "Hong Kong SAR" shall be construed as a reference to "Hong Kong Special Administrative Region of the People's Republic of China".

OVERVIEW

SECTION 1: TPF IN THE BRI

TPF is an arrangement where a party without an existing legal interest in a dispute provides funding for the legal fees in return for an agreed 'cut' of the proceeds of any award in favour of the funded party. For this reason, most TPF (although not all) is used by claimants who may not be willing or able to fund a claim in their own right, or for whom it makes commercial sense to mitigate the risks of arbitration by securing funding for their claim.

Whether or not TPF can be used depends on the legal system where the arbitration is seated, which is the legal, rather than physical, place of the arbitration. Previously, in common law jurisdictions, TPF was prohibited by the doctrines of champerty and maintenance, developed some 700 years ago in England, but these doctrines have long since been abolished in England. Legal reform in Singapore and Hong Kong has recently taken place to allow for the use of TPF in arbitrations seated in those jurisdictions. In China Mainland, TPF continues to be unregulated with limited judicial commentary and conflicting decisions. We provide more details on the permissibility and historical background of TPF below.

With changing attitudes and new legal and market realities, TPF is experiencing something of a renaissance in arbitration, becoming increasingly common and popular over the last couple of decades in numerous jurisdictions. We expect this enthusiasm for TPF to continue to flow into BRI arbitrations.

SECTION 2: ORFS IN THE BRI

Different from TPF which is about money coming in to fund the matter, ORFS arrangements concern how much money goes out to pay lawyers' fees dependent on the outcome of the case. ORFS can be seen as another tool in the parties' arsenal to finance an arbitration.

Depending on the size and complexity of the deal or infrastructure project, arbitration over the disputes arising from it can be costly. Time and cost are named as the worst characteristics of arbitration (2021 Queen Mary Survey) and among the costs incurred, fees paid to lawyers often take up a sizeable proportion. ORFS is an agreement between a client and a lawyer, whereby the lawyer advises on contentious litigation and arbitration proceedings and the lawyer receives a financial benefit if those proceedings are successful within the meaning of that agreement (see for example, definition of ORFS at section 1.2 of the "*Outcome Related Fee Structures for Arbitration - Consultation Paper*" by the Law Reform Commission of Hong Kong, December 2020). Three paradigm structures are CFA, DBA and Hybrid DBA, as explained in the following table below.

Traditionally under common law, ORFS is prohibited by the common law torts of maintenance and champerty. A personal interest in the outcome of the proceedings is forbidden. Nowadays under ORFS, lawyers effectively receive more if their client wins (conversely less if their client losses).

However, as more and more common law jurisdictions have relaxed the ancient common law rules, as seen above in relation to TPF, ORFS have been introduced in all of the key arbitration seats along the BRI – Hong Kong very recently in 2022, Singapore in 2022; England and Wales since 1990s. China Mainland as a civil law jurisdiction has allowed ORFS since the 2000s.

	Unsuccessful outcome/ no financial benefit obtained	**Successful outcome/ financial benefit obtained**
Conditional Fee Agreements ("**CFA**")	Client pays nothing or the usual/ discounted fees	Client pays for the legal services plus an agreed uplift
Damages-based Agreements ("**DBA**")	Client pays nothing	Client pays the lawyers an agreed proportion of the financial benefit awarded/ recovered ("**DBA Payment**")
Hybrid DBA	Client pays nothing or the usual/ discounted fees	Client pays the usual/ discounted fees plus DBA Payment

HOW CAN ARBITRATION FINANCE HELP PARTIES TO MITIGATE THE RISKS ASSOCIATED WITH BRI PROJECTS?

TPF and ORFS offer several advantages for parties involved in disputes arising from BRI projects and many of the reasons to usually recommend both of them are particularly true in the context of BRI projects. This is because many projects are often transnational in nature and take place in countries with high political, operational, commercial and legal (amongst other) risks.

If a dispute arises, many commercial parties will face the challenge of crafting a claim under an unfamiliar set of legal rules, procedures and norms. Commercial parties may also be concerned about the multiple downstream and upstream risks of disputes that may arise in complex infrastructure projects involving networks of local and international subcontractors. Arbitration finance is therefore an important aspect of any BRI dispute resolution framework in offering a vital risk mitigation strategy, and other potential advantages, which we set out below.

For further detail on these risks and other tips, see our Practical Guide to Resolving Disputes on the BRI, available at: https://www.kwm.com/hk/en/insights/latest-thinking/publication/belt-and-road-practical-guide-how-to-resolve-disputes-on-the-belt-and-road-2024.html

Mitigating the risks

TPF and ORFS can be valuable parts of any risk management strategy for a commercial party involved in potentially high-risk BRI projects. Even if a claimant has sufficient funds to arbitrate, TPF and ORFS offer the opportunity to share the financial risks associated with arbitration – which, regardless of the financial standing of a party, can be an expensive and protracted process. This is particularly important in complex infrastructure projects which may give rise to multiple parallel disputes across different sub-contracts.

An added benefit for parties is that they can invest the money they would otherwise spend on running the arbitration elsewhere.

The partial 'outsourcing' of dispute financing also relieves cash-flow pressures associated with arbitration. Offloading this risk, in exchange for a return to be paid to the funder or lawyers out of the award from arbitration, can be a win-win situation that provides otherwise risk-averse commercial parties assurance to tender for BRI projects in high-risk environments.

Screening out unmeritorious claims and opening up new avenues for claims

One of the concerns often levelled at TPF and ORFS is the potential for the practice to encourage frivolous and vexatious claims. Although this criticism has historically been a legitimate one, the practice in most of the major funding marketplaces and amongst the main funding bodies now appears to favour a highly selective and rigorous review process before agreeing funding. This mitigates much of the concern and makes sense. Funders only recover their investment in a successful claim and as such, they have a direct economic incentive to be selective in funding cases.

In being selective, funders can provide much needed additional due diligence to arbitration claims. In many cases, this will involve employing external legal counsel to review the merits of the claim before agreeing to fund it. This process can assist in screening unmeritorious or speculative claims and ensuring that the decision to take a claim to arbitration is rigorous.

The same is true when it comes to ORFS in the legal market. ORFS provide clear incentives for lawyers to pursue meritorious claims. Where the clients' and lawyers' success are interdependent, it is clearly in the lawyers' interests to pursue good claims with high chances of success. This helps to weed out weak claims and save clients from the strain of lengthy legal disputes for potentially nothing.

Further, by offering an arrangement whereby a third-party (be it a professional funder or lawyers) funds the costs of arbitration of a disputant commercial party, TPF and ORFS provide new avenues for claims that (i) parties have otherwise been unable to bring because of cost pressures, or (ii) have traditionally been forced to settle.

Promoting more efficient dispute resolution by TPF

As major infrastructure disputes often involve multiple upstream or downstream disputes, portfolio financing and funding (which is a popular option with various funders) can be very effective. This approach may allow for 'holistic' funding and easier management of multiple disputes arising from projects. Once a funding arrangement is in place, the funder often acts as a go-between in settling legal costs and estimates with external counsel. Downstream parties unsophisticated in dealing with legal counsel may benefit from this approach when dealing with back-to-back contract chains.

Additionally, the funding arrangements often require legal teams acting on the claim and the funded party to provide regular reports, enabling the funder to monitor the claim's progress, the costs incurred, the chances of success and proper compliance with the funding agreement. This active monitoring may also enhance the case management of downstream disputes and, as a result, assist in costs management. Care must nevertheless be taken by the funded party and the funder to ensure that the lines of reporting are clear.

One of the potential corollary effects of funding arrangements is the effect that the presence of a funder may have on the of the claim process. A notable potential area in which the presence of a funder may assist is in the discouragement of vexatious or oppressive interlocutory applications or discovery processes, which are often used by respondents to stifle a claimant's claim in arbitration. Where a claimant is funded, its deeper pockets may discourage such applications.

A further corollary benefit is in the settlement of claims: knowledge of a funding arrangement (if disclosed) may increase the respondent's perception of the claim's strength, thereby promoting the possibility of settlement.

Comprehensive arbitration finance regime

The fact that both TPF and ORFS are available to clients in parallel suggests even greater financial autonomy for clients in arbitrations. In practice, clients may compare the pros and cons between accepting fee quotes from different funders and different lawyers, balance the risks and then consider whether to opt for either one or both. Indeed, TPF may not be suitable for every arbitration and not every party is willing or able to reach a deal with the funders, which depends on the specific funder's assessment of the merits and/or their requested level of return. Where clients believe their case is particularly strong, they may decide against TPF, as this means a reduction of the potential award received. They may instead be eager to work out a more flexible term of payment of their legal fees.

SECTION 1: TPF IN THE BRI

WHAT KIND OF REGULATIONS APPLY TO TPF IN THE KEY ARBITRATION SEATS?

In this section, we set out the current status and background to TPF for each of the Key Seats as well as the current trends and regulations that apply to TPF.

HONG KONG

Historically, TPF is prohibited for reasons of maintenance and champerty. Following amendments to the Arbitration Ordinance (Cap 609) ("AO") in February 2019, Hong Kong now permits TPF in relation to arbitration and its ancillary court proceedings. Together with the AO, TPF in Hong Kong is regulated by the Code of Practice for Third Party Funding of Arbitration.

The AO

Disclosure Requirements

Hong Kong law requires a funded party to disclose to each other party or parties to the arbitration, and to the relevant court or tribunal, and to the relevant arbitral institution (if any):

- The existence of a funding agreement;
- The name of the funder; and
- The end of the funding agreement (if other than because the arbitration has ended) and the date it ended.

The funded party must give such notice by the commencement of the arbitration, or, if the funding agreement is entered into on a date after commencement, within 15 days after that agreement is made.

Conflicts of interest

The new subsection (1)(b) of section 98J of the AO defines the meaning of "third-party funder" as a party under a funding agreement "who does not have an interest recognised by law in the arbitration other than under the funding agreement".

Section 98O of the AO further clarifies that lawyers and law firms can act as third-party funders only where they do not act for any party to the arbitration in the course of their legal practice.

Confidentiality

Hong Kong has express statutory confidentiality obligations that govern all arbitrations taking place under the AO (section 18 of the AO). These strict confidentiality obligations do not apply where a disclosure of information is made for the purpose of having or seeking TPF (section 98T of the AO).

Costs and security for costs

The AO does not give arbitral tribunals the power to make an adverse costs order or a security for costs order against a third-party funder. Under the current regime, the tribunal only has the power to do so against a party.

The Code

In December 2018, Hong Kong also introduced the Code of Practice for Third Party Funding of Arbitration (the "Code") (available at: https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf).

The Code imposes the following obligations on third-party funders of Hong Kong-seated arbitrations. A funder shall, amongst other obligations:

- Have at least HK$20 million capital in order to cover all debts/liabilities for a minimum of 36 months;
- Explain clearly the key features and terms of the funding agreement and advise the funded party its right to seek independent legal advice;
- Maintain effective procedures for managing conflicts of interest;
- Observe confidentiality and privilege of all information and documentation relating to the arbitration and the subject of the funding agreement; and
- Set out in the funding agreement its liability for the funded party's costs, including adverse costs, security for costs and any other financial liability.

For more details of the Code, please see our article "Major Breakthrough in Hong Kong: Third-party funding of arbitration launching 1 February" dated 14 January 2019 (available at: https://www.kwm.com/hk/en/insights/latest-thinking/third-party-funding-of-arbitration-launching-soon.html).

CHINA MAINLAND

Permissibility of TPF

Whilst TPF has historically been prohibited in common law jurisdictions under the doctrines of maintenance and champerty, it has not been officially introduced nor regulated in China Mainland. As such, it is generally understood that Chinese law allows TPF. That said, a recent case before the Second Intermediate People's Court of Shanghai, *Company A v Company B* (2021) Hu 02 Min Zhong No. 10,224 called this generally held view into question. Contradicting other cases which have supported the legality and validity of TPF, instead the subject third-party funding arrangement was found to be against public policy because the court believed that the third-party funders and chosen lawyers were strongly corelated, the funders exercised excessive control over the litigation, and the funders failed to disclose the funding agreement. There are however different voices: afterwards several professors and lawyers expressed their voices of criticism towards the judgment of this case.

As TPF industry continues to develop in China Mainland, we foresee laws and regulations on TPF will follow in the near future. The current Chinese law recognizes the rationale behind arbitration finance with the following funding options:

(a) A contingency fee, which is in its nature a form of ORFS (see later in this article) and shares traits with TPF. The "Measures for the Administration of Lawyers' Fees" issued jointly by the National Development and Reform Commission and the Ministry of Justice in 2006 officially confirmed the legitimacy, conditions, and restrictions of contingency fees;

(b) In addition to the contingency fee arrangement, legal expenses insurance, claim assignment and other funding options play an important role in relieving the financial burden of dispute resolution in practice; and

(c) recent case law also tacitly recognised the legitimacy of third-party funding in arbitration in *Sunan Ruili Airlines Limited et al v. Silver Aircraft Leasing (Tianjin) Co. Ltd* (2022) (2022) Su 02 Zhi Yi No.13 and (2022) Jing 04 Min Te No.368 and No.369.

The current status of TPF players in China Mainland

The major third-party funders in China Mainland are domestic Chinese TPF institutions. This is because foreign institutions usually do not have a deep understanding of Chinese law, and also because arbitration costs in China are not as high as those in most common law jurisdictions.

Key TPF developments adopted by China Mainland arbitral institutions

CIETAC International Investment Arbitration Rules

On 1 October 2017, the China International Economic and Trade Arbitration Commission's ("**CIETAC**") International Investment Arbitration Rules (the "**CIETAC Investment Rules**") came into effect (available at: http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en).

Article 27 provides that the funded party shall disclose the existence and nature of the funding agreement, as well as the name and address of the third-party funder, to the other party or parties, the arbitral tribunal, and the Investment Dispute Settlement Centre in Beijing or the CIETAC Hong Kong Arbitration Centre, whichever administers the case, as soon as the funding agreement is concluded.

TPF should not affect the decision on the costs of arbitration. However, under Article 27 of the CIETAC Investment Rules, the arbitral tribunal, when making a decision on the costs of arbitration and other fees, may take into account the existence of any funding agreement and whether the funded party has complied with its disclosure obligations.

New CIETAC Arbitration Rules (the "CIETAC 2024 Rules") also came into force on 1 January 2024 (available at: http://www.cietac.org/index.php?m=Page&a=index&id=531&l=en). This new edition incorporates revisions reflecting recent developments in international arbitration including third-party funding. Article 48 of the 2024 Rules regulates third-party funding. Without delay the funded party must communicate to the CIETAC Court, the existence of the funding agreement, the financial interest therein, the name and address of the third-party funder and other relevant arbitration.

BAC International Investment Arbitration Rules

On 1 October 2019, the Beijing Arbitration Commission/Beijing International Arbitration Centre (the **BAC**) Rules for International Investment Arbitration came into effect (the **BAC Rules**) (available at: https://www.bjac.org.cn/english/page/tz/RULES%20FOR%20INTERNATIONAL%20INVESTMENT%20ARBITRATION.pdf). Similar to the CIETAC Investment Rules and CIETAC 2024 Rules, Article 39 of the BAC Rules sets forth the definition of TPF, disclosure obligations and requirements regarding costs decisions. It is also worth noting that Article 39 provides that the arbitral tribunal may order the funded party to provide appropriate security for costs if the third-party funder has not committed to undertake adverse costs liability.

Shanghai Arbitration Commission Arbitration Rules

On 1 July 2022, the Shanghai Arbitration Commission (the "SHAC") Arbitration Rules came into effect (the "SHAC

Rules" (available at: https://www.accsh.org/arbviewen/story.html?id=6). Paragraph 8 of Article 34 provides that the funded party shall, immediately upon the effectiveness of the funding agreement, inform the SHAC, the arbitral tribunal and other parties of the funding agreement and the information about the third party, to assist the arbitrator in observing the challenge obligation. Although the provision is contained in the "challenge of the arbitrator" clause, it shows that SHAC is open to TPF.

SINGAPORE

Singapore introduced new legislation in 2017 to allow TPF for international arbitrations seated in Singapore, as well as for related court proceedings and mediation.

The Civil Law (Amendment) Bill, which came into effect on 1 March 2017 (available at: https://sso.agc.gov.sg/Bills-Supp/38-2016/Published/20161107?DocDate=20161107), removed longstanding prohibitions against TPF. It abolished the common law torts of champerty and maintenance in Singapore. Funding agreements for international arbitrations seated in Singapore, as well as for related litigation, mediation, annulment, and enforcement proceedings, are no longer contrary to public policy or otherwise illegal.

TPF was also extended to cover domestic arbitration proceedings, and certain Singapore International Commercial Court (SICC) and related mediation proceedings from 28 June 2021.

Subsidiary legislation was also introduced to regulate third-party funders, including the qualifications and other requirements that funders must meet to enter into a funding agreement. Funders who fail to comply with those conditions will not be able to enforce their rights under the funding agreement.

There are several guidance notes regarding TPF in Singapore, they are (i) the Guidance Note 10.1.1 of the Law Society of Singapore (the "**LSS Guidance Note**"); (ii) Guidelines of the Singapore Institute of Arbitrators (the "**SIArb Guidelines**"); and (iii) Practice Note of the Singapore International Arbitration Centre (the "**SIAC Note**"). These are guidelines only and voluntary but set the expectations as to how lawyers and funders should conduct themselves in Singapore seated arbitrations.

Disclosure Requirements

The new rule 49A of the Legal Profession (Professional Conduct) Rules 2015 requires a legal practitioner to disclose to the tribunal and to every other party of the arbitration the existence of TPF and the identity and address of the funder. The disclosure must be made at the date of commencement of the arbitration or as soon as practicable after the funding agreement is entered into.

Conflicts of interest

Similar to (and perhaps broader than) Hong Kong's Arbitration Ordinance, Section 5B(10) of the Singapore Civil Law Act defines a "Third-Party Funder" as "*a person who carries out on the business of funding all or part of the costs of dispute resolution proceedings to which the person is not a party*".

The SIArb Guidelines further supplement that a funder shall not seek to influence the party's lawyers thereby controlling the proceedings except where and to the extent permitted by the TPF agreement (section 6.1.4). The funding agreement shall contain effective procedures to address actual and foreseeable conflicts of interest.

Confidentiality

LSS Guidance Note reminds lawyers of their duty of confidentiality towards clients' information and advises clients to enter into a confidentiality/non-disclosure agreement with the prospective funder before disclosure of any documents. Paragraph 28 of the LSS Guidance Note sets out the basic elements of a confidentiality clause in a funding agreement.

Speaking from the point of view of a funder, the SIArb Guidelines similarly requires funders to observe confidentiality and the privileged nature of all information relating to the dispute.

Costs and security for costs

The SIAC Note is clear that the involvement of TPF alone shall not be taken as an indication of the financial status of the funded party. The existence of TPF is one factor which the Tribunal may take into account in an order for costs or security for costs.

Obligations of Third-party Funders in Singapore

The obligations of a funder can mostly be found in the SIArb Guidelines, including duties relating to the drafting of the funding contract, financial obligations, confidentiality, conflicts of interest etc.

Specifically, according to section 4 of the Civil Law (Third-Party Funding) Regulations 2017, a qualifying third-party funder in Singapore must have not less than SG$5 million or the equivalent in foreign currency in paid-up share capital or managed assets.

ENGLAND & WALES

England & Wales was one of the common law jurisdictions which traditionally forbid TPF through the common law doctrines of champerty and maintenance.

Nowadays, a funding agreement with a third-party funder will not be void unless it involves excessive control or disproportionate profit for the funder in respect of the case Giles v Thompson [1993] UKHL 2. TPF has gained increasing popularity in England & Wales. However, there are no statutory rules for TPF in arbitration yet. Regulation for TPF comes from within the industry. A Code of Conduct for Litigation Funders was introduced in 2011 by the Civil Justice Council and updated in 2018 (the "**Code of Conduct for Litigation Funders**") principally in respect of litigation proceedings. In contrast to the position in Hong Kong and Singapore, there is no requirement under the Arbitration Act 1996 (AA 1996) to disclose the existence of TPF to tribunal or to the opposite party. Noted the international approach, disclosure of the existence of TPF was an issue raised in the Law Commission consultation on reform of the AA 1996.[2] Against the context of the PACCAR decision and proposed legislative developments (as mentioned below), in a separate development, the Civil Justice Council (CJC) will review the TPF market and published terms of reference on 23 April 2024 (available here: https://www.judiciary.uk/wp-content/uploads/2024/04/20240422-CJC-TPF-Review-TOR.pdf). An interim report is anticipated by Summer 2024 and a full report by Summer 2025.

Confidentiality

Confidentiality issues between a solicitor, a third-party funder and the client may arise when the solicitor has to disclose his client's information to a prospective third-party funder. This situation generally happens when the client needs funding and the funder requires access to the evidence of the case in order to assess the strength of the claim (or defence). Pursuant to Rules 6.3-6.5 of the SRA Code of Conduct, a solicitor must keep his client's affairs confidential unless: (i) disclosure is required, (ii) permitted by law, or (iii) the client consents to the disclosure. As a solution, the funder can sign a Non-Disclosure Agreement (NDA) or confidentiality agreement.

Costs and security for costs

An arbitral tribunal in England & Wales cannot issue a costs order against a third-party funder. This is because a tribunal would not automatically have personal jurisdiction over the funder. However, the situation can be solved if the arbitration agreement contains a clause which: (i) provides that a party must disclose that it is using a funder, (ii) requires the funded party to secure some sort of security over the costs should it lose the case, or (iii) if the parties agree that the arbitral tribunal will have authority to issue a costs order against a third-party funder. A funded party can also consider after the event insurance (ATE) to cover liability for an adverse cost award.

In respect of a party's own costs, following the decision in Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC (Comm) 2361, a successful party in arbitration may be allowed to recover the cost of its TPF arrangement.

Significance of the "Trucks" Supreme Court decision

The English Supreme Court in Paccar Inc v Road Haulage Association Ltd [2023] UKSC 28[3] determined that litigation funding agreements involving the funder's remuneration taking a percentage of any damages recovered are damages based agreements (DBAs) under s.58AA of the Courts and Legal Services Act 1990 (the "PACCAR decision"). The additional requirements of the DBA regulations[4] now apply to such agreements. As a result of this decision, TPF litigation agreements will be unenforceable unless compliant with the DBA regulatory regime. This is likely to have a bearing on arbitration practice too as funders will look to ensure that all such funding agreements for both English seated arbitration and court litigation fall outside the DBA framework. There is uncertainty on whether the regulatory regime for success fees applies to arbitration as well as to litigation. A conservative approach is recommended, as a recent English High Court decision, upheld by the Court of Appeal, held that a CFA, agreed for arbitration work, was unenforceable as it did not satisfy the CFA regulatory regime.[5]

Following the PACCAR decision, steps have been taken to introduce legislation to restore the position that existed prior to PACCAR. The Litigation Funding Agreements (Enforceability) Bill was introduced into Parliament on 19 March 2024 which would have reversed the impact of PACCAR as it provided that litigation funding agreements are not DBAs. However, the UK Parliament was prorogued on 24 May 2024 due to the general election, and this Bill is one of many that could not be completed. It remains to be seen if the legislation will be reintroduced in the current parliament.

The Code of Conduct for Litigation Funders

It is important to note that the Code of Conduct for Litigation Funders is voluntary and applies only to members of the Association of the Litigation Funders ("ALF"). It has been amended regularly over time.

We set out below some of its key elements:

Obligations: the funder is financially liable to the funded party and in particular, has to:

i. Take reasonable steps to ensure the funded party receives independent advice on the terms of the funding agreement prior to its execution;

2 Law Commission. Review of the Arbitration Act 1996 A Consultation paper (first of two reports to date). September 2022. (available at: https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2022/09/Arbitration-Consultation-Paper.pdf) Retrieved 9 August 2023.

3 PACCAR Inc & Ors, R (on the application of) v Competition Appeal Tribunal & Ors [2023] UKSC 28 (26 July 2023) (bailii.org)

4 Damages Based Agreements Regulations 2013 (SI 2013/809)

5 Diag Human SE v Volterra Fietta (A firm) [2022] EWHC 2054 (QB). [2023] EWCA Civ 1107

ii. Not seek to influence the party's solicitor or barrister to cede control or conduct of the dispute to the funder;

iii. Ensure it maintains the capacity to pay all debts when they become due and payable and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months;

iv. Maintain access to a minimum of £5m of capital, and

v. Accept a continuous disclosure obligation in respect of its capital adequacy.

Financial liability: in the funding agreement, the parties should state whether and if so to what extent the funder is liable to the funded party to:

- meet any liability for adverse costs that results from a settlement accepted by the funded party or from an order of the court;
- pay any premium to obtain adverse costs insurance;
- provide security for costs; and
- meet any other financial liability.

USING TPF IN A BRI ARBITRATION PRACTICAL TIPS

We set out overleaf some of our key practical tips for parties who are seeking to use TPF in a BRI arbitration.

TIP 1 | PICK THE RIGHT FUNDER FOR YOUR DISPUTE

Not all funders are created equal

Some funders are specialised in TPF for arbitration cases or have expertise in your type of dispute (construction, investor-state or commercial arbitration) and/or industries (energy, infrastructure, etc.). The engagement of a funder with deep experience of your specific type of dispute can add an extra dimension of expertise in decision-making and better understanding of suitable budgeting. It may be that in due course that funders will have a particular expertise in BRI disputes.

Funders usually work on cases with claims ranging from US$2,000,000 to over US$100,000,000. Some funders focus on specific jurisdictions (only common law or civil law or both). Most sizeable funders will have experience in institutional arbitration before most recognised international arbitration centres.

All of the above means that BRI parties seeking to use TPF should either take care to do their own due diligence or (preferably) engage a law firm familiar with the different funders and their different expertise and strengths to do it for them. It is not always the funder which offers the best price which is necessarily the best suited to a particular claim!

Single case or portfolio?

Single case funding is the most popular TPF option. However, in large BRI infrastructure or construction disputes where there may be, for instance, multiple sub-contractor arbitrations, client portfolio funding may be an attractive option. In portfolio funding, multiple related or unrelated claims or defences to claims can be combined in a single funding agreement with a funder.

Portfolio funding enables parties not only to pursue smaller claims that would not usually be viable on a standalone basis. It also potentially gives a party leverage to negotiate better overall financial terms with a funder.

Multiple types of financing are available

Multiple types of TPF financing are available and may be suitable:

- **Seed funding:** initial investment to prove viability of a case, which ensures that claims are not abandoned prematurely.
- **Dispute-related costs:** legal and associated costs, i.e., legal fees, expert witnesses and court or arbitral institution's fees.
- **Adverse costs:** no insurance is needed and the funder will pay any costs orders against you.
- **Security for costs:** if it is required by a court or an arbitral tribunal.
- **Working capital advance:** it provides financing for your core commercial operation pending the resolution of the dispute.

Be aware of the funder's internal financing

A funder's internal financing can vary significantly: some are publicly listed, some are backed by high net worth individuals whilst others have lines of credit available to them. The nature of a funder's financing structure can affect not only its ability to maintain necessary funds but may influence its approach to claim management.

KEY TAKEAWAYS

All of the above means that BRI parties seeking to use TPF should either take care to do their own due diligence or (preferably) engage a law firm familiar with the different funders and their different expertise and strengths to do it for them. It is not always the funder which offers the best price which is necessarily the best suited to a particular claim!

TIP 2 | PREPARE YOUR CLAIM

Timing

TPF can be used at most stages of proceedings, but it is best to involve a funder early, ideally when a dispute arises and at least three months before the hearings if funding for the dispute itself, and not just enforcement, is sought.

The process of obtaining TPF can take as long as several months and may involve approaching multiple funders and extensive due diligence. Therefore, if funding is a prerequisite to pursuing a claim, start the process as soon as possible so as not to disrupt the commencement of the arbitration.

Preparation

A funder will want complete and well-considered information in order to make a decision about whether or not to fund an arbitration. Whilst this will involve the funder performing their own due diligence, there are a number of practical things that a potential funded party can do to assist and speed up this process. In a broad sense, this will mean having complete and well prepared information on the prospects of success and recovery.

Here an assessment of the legal merits and enforcement strategy either by a law firm or a barrister is invaluable. A funder will want good prospects of success and will want to do its own assessment to ascertain this. However, having an existing assessment will (at the very least) be an invaluable comparison point on the:

- Desired level of investment required;
- Strategy for any arbitration;
- Scale of legal team to run that strategy; and
- Bottom line (monetary or otherwise) outcome that is being sought in the dispute.

Funders will ask both clients and their lawyers to answer questions and respond to document requests (for which more at Tip 4 below). In return, you should also expect funders to be responsive and to provide a clear assessment of what their bottom line is.

KEY TAKEAWAYS

The fact that a number of BRI countries still expressly disallow, or do not expressly allow, TPF should therefore caution against an assumption that enforcement is a fait accompli. Parties should consult legal counsel and consider this at the stage of deciding whether or not to use TPF.

TIP 3 | BE AWARE OF POTENTIAL RISKS

Funding agreement

As a first step, it is paramount that proper consideration is given to any funding agreement and legal advice obtained on it. Particular areas of focus should include:

- Clearly setting out how the funding agreement defines "success" and, therefore, how and when a portion of any awarded damages becomes payable to a funder. At a minimum, a party should try to ensure that funds only become due upon successful recovery from a respondent and not at an earlier, pre-enforcement stage;
- What level of input and control a funder will retain, and, in particular, what happens in a settlement scenario;
- The circumstances in which either party may terminate the funding agreement and the consequences of termination; and
- Liability for any costs (e.g., in the event of any adverse interim costs order).

Conflicts

Usually, funders are not the ultimate decision makers. They do not control the client's legal representatives and do not themselves offer legal advice, but they do collaborate with the claimant's team by providing strategic advice and/or monitoring risks.

However, when a funder pays the legal costs directly, a BRI claimant should be aware of their tolerance for the funder being more directly involved in proceedings. The funder may for example instruct legal counsel directly and there may be concern that decisions may favour the funder's interests and views over those of the claimant beyond the terms set out in the funding agreement. BRI claimants accepting funding which results in direct payment of legal costs should therefore carefully consider the nature and extent of a funder's control over proceedings.

Privilege and Confidentiality

Be alert to issues of confidentiality and privilege. The law on privilege and confidentiality differs between jurisdictions and case law is developing as the use of TPF becomes more prevalent. Confidential documents and communications will need to be disclosed to a potential funder. A funder will also need to be kept updated during the case. A well drafted and comprehensive NDA or confidentiality agreement should be agreed before providing information and documents to potential funders. These documents will seek to maintain confidentiality and preserve privilege in any documents provided. However, some courts might consider that privilege and confidentiality is waived when a client discloses privileged information and documents to a potential third-party funder. Express advice should be sought to confirm the position in the relevant jurisdiction.

In common law jurisdictions, communications between lawyers and their clients are generally protected from disclosure under legal advice privilege as communications for the purpose of seeking and receiving legal advice. Funders generally do not request documents which are only protected by legal advice privilege, but materials which could need to be disclosed in the proceedings. Communications with third party funders will likely be protected under 'common interest privilege' meaning that the funder and funded party share a common interest or under 'litigation privilege' as materials prepared for the dominant purpose of conducting the litigation.

KEY TAKEAWAYS

Usually, funders are not the ultimate decision makers. They do not control the client's legal representatives and do not themselves offer legal advice. They will however collaborate with the claimant's team by providing strategic advice and/or monitoring risk.

TIP 4 | BE AWARE OF THE DIFFERENT STAGES OF FUNDING

As explained above, TPF is a complex and highly selective process. Knowing the usual stages and procedures involved in funding will be helpful to parties seeking funding who can then have a better idea of the process before deciding to use TPF for any BRI arbitration.

OVERVIEW

Stage 1: The first stage can last from a few days to 30-90 days: a party will sign a confidentiality agreement with the funder, which will then perform its due diligence, based on the background documents provided.

Stage 2: After the funding is approved by the funder, the party will negotiate the funding agreement with the funder.

Stage 3: Finally, as soon as the funding agreement is signed, the funder will start funding and monitoring the case through to its resolution.

IN DETAIL

Stage 1: The funder's due diligence

The formal engagement with a funder will usually start with the execution of an NDA or confidentiality agreement to ensure that information is kept confidential and that any legal advice shared remains legally privileged.

Then, a funder will proceed with an initial assessment based on background documents.

The funder's committee will later review the merits and economics of the case, and will base its funding decision on the following criteria:

- Identity of the respondent(s);
- Ability of the respondent(s) to pay/creditworthy respondent(s);
- Basis of the claim (facts and legal merits of the case and likely defences);
- Assessment of the time for the case to go to final hearing;
- Assessment of the claim value and costs, and the amount of funding required;
- Experience of the legal representatives (successful track records and strategic approach).

The funder may conduct further due diligence as needed, and may require agreement to an exclusivity period to conduct further due diligence. This work will not be charged to the funded party, it can be conducted by external experts to assist the funder, and the funder will pay for the costs as a preliminary investment. The funder may also require:

- An additional legal opinion on strength of the case and defences;
- Quantification of damages (usually, for an investment of US$2,000,000, expected compensatory damages should be around US$20,000,000);
- Litigation strategy and settlement prospects;
- Prospects of recovery from the respondent(s);
- Budgets and likely contingencies.

Stage 2: Negotiation of the funding agreement

When the funding is approved, the party will negotiate the funding agreement with the funder. A would be funded party should take care to ensure that any agreement reflects the desired balance of risk and costs and be aware of the usual funding agreement terms, which include:

- The proposed funded costs, based on the risks, size and length of the case (some funders may pay legal costs already incurred, and most funders will agree to increase the agreed funded costs under certain circumstances);
- The funder's return on investment, either as a multiple of invested capital or a percentage of the case recoveries by award or settlement or a combination of both, depending on the funder's risk exposure (for some funders, for cases taking one to three years, the return has to be at least three times the investment, and for cases taking four to six years, the return has to be at least four or five times the investment);
- The priority of payments from any recoveries (i.e., in the order of funder, then lawyer if contingency fee, then client);
- The liability for costs (e.g., in case of security for costs or adverse costs order);
- The extent of the funder's involvement in the matter, including in relation to settlement (most funders decide that they will not have any rights in the control of the proceedings and settlement if any);
- Provisions on confidentiality and privilege;
- Procedures for managing conflicts between the client and the funder (e.g., a "QC clause": appointment of an independent person to resolve conflicts); and

- A "*material adverse decline*" clause to withdraw the funding: for situations in which the case becomes no longer viable (example: respondent becomes bankrupt) or a breach of the funding agreement occurs. The costs are paid until the date of termination, thus, the funder loses its investment. This is unheard of in practice but there is also an alternative for the funder: to negotiate an agreement with the funded party to terminate the funding agreement.

Stage 3: Execution of the funding agreement

As soon as the funding agreement is signed, the funder will deploy the capital and start to monitor the case. Some funders set aside all the capital required for the case. Generally, the funder pays the bills monthly in accordance with the funding agreement and some bills are paid when requested.

Funders are only paid if the case is successful (although note the definition of what constitutes "success" in your funding agreement) and damages are obtained. They are not paid more than the amount recovered, so they might recover less than their investment.

In case of settlement, the client's legal team will provide an opinion about the offer made (i.e., whether it is reasonable), and they will keep the funder informed. A settlement eliminates the risk of going to the hearing, but funders always fund cases based on the assumption that there will be a hearing.

TIP 5 | DISCLOSE TPF

TPF should usually be disclosed to the arbitral tribunal, the other party or parties and the arbitral institution.

Disclosure is mandatory under certain national laws when the arbitration is seated in that jurisdiction (i.e., Hong Kong and Singapore), and under certain arbitration rules and guidelines (2018 HKIAC Administered Arbitration Rules, 2017 CIETAC International Investment Arbitration Rules, CIETAC 2024 Rules, 2019 BAC Rules for International Investment Arbitration, ICSID Proposals for Amendments to the ICSID Rules, IBA Guidelines on conflicts of interests in international arbitration).

Disclosure is also mandatory when it is requested by the arbitral tribunal. For example, in Muhammet Cap v. Turkmenistan[6], the arbitral tribunal ordered the Claimant to disclose whether it was being funded by a third-party funder, and if so, the funder's identity and nature of the funding arrangements.

In cases where disclosure is not mandatory, it remains a decision of the funded party. Funders will usually recommend disclosing the name and involvement of the funder and, in our experience, it is prudent to do so.[7]

6 *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 dated 12 June 2015 (available at: https://www.italaw.com/sites/default/files/case-documents/italaw4350.pdf).

7 See our article "Thoughts on Disclosure of Third-party Funding" dated 20 June 2017 (available at: https://www.chinalawinsight.com/2017/06/articles/global-network/thoughts-on-disclosure-of-third-party-funding/).

SECTION 2: ORFS IN THE BRI

WHAT KIND OF REGULATIONS APPLY TO ORFS IN THE KEY ARBITRATION SEATS?

HONG KONG

In June 2022, the Hong Kong government gazetted The Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment Ordinance) 2022 (**"Amendment Ordinance"**) to amend the Arbitration Ordinance (Cap 609) (AO) to add a new Part 10B. The Arbitration (Outcome Related Fee Structures for Arbitration) Rules ("**ORFS Rules**") were then gazetted on 11 November 2022. The Amendment Ordinance and OFRS Rules both came into effect on 16 December 2022.

The Amendment Ordinance removes the previous restrictions on lawyers charging success fees under the Arbitration Ordinance and Legal Practitioners Ordinance. Three types of OFRS are now permitted: conditional fee agreements (CFAs), damages-based agreements (DBAs), and hybrid damages-based agreements (Hybrid DBAs).

Requirement of an ORFS agreement

The ORFS Rules set out the general conditions for the validity and enforceabilty of ORFS, and the specific conditions relating to the type of ORFS. The ORFS agreement shall, amongst others:

i. Be in writing and signed by the lawyer and the client.

ii. Include a statement that the client has been informed of the right to seek independent legal advice.

iii. Be subject to a cooling off period (minimum seven days) during which the client may terminate the agreement by giving written notice.

iv. State clearly the circumstances in which:

- a lawyer's fees and expenses, or part of them, will be payable; and
- how the lawyer's payment, expenses and costs, or any part of them, are payable by the client in the event that the ORFS is terminated by either party.

v. State whether disbursements (including barristers' fees) are to be paid irrespective of the outcome of the matter.

vi. Set out the definition of a "successful outcome" in relation to CFAs and what constitutes a "financial benefit" in relation to DBAs.

The law also requires disclosure of the existence of an ORFS agreement, as well as its termination. Where an ORFS agreement is in place, the lawyer must give written notice to each other party to the arbitration and to the arbitration body about the existence of such agreement and the name of the client.

Recovery of success fees from the unsuccessful party

In Hong Kong, generally, costs follow the event, and thus the losing party would usually bear the legal costs of the winning party. One issue arises as to whether the 'extra' fees (those in excess of the fees payable to the lawyer had there no ORFS agreement) is recoverable from the unsuccessful party.

Since the amount of the extra fees (success fees under CFAs or DBA Payments under DBA/Hybrid DBA) are matters negotiated between the successful party and its lawyers, to which the losing party is not privy, it will be unfair if the losing party is responsible for those costs. The Hong Kong Law Reform Commission was also concerned with the possibility of satellite proceedings about the losing party scrutinizing the reasonableness/rationale of the level of success fees/DBA Payments.

The Amendment Ordinance preserves the general principle that the tribunal retains the discretion to deal with costs. However, it balances the risk of satellite proceedings by expressly allowing the arbitral tribunal to order the extra fees be paid by the losing party if "there are exceptional circumstances justifying the ordering of those costs." One of the exceptional circumstances include the fact pattern of UK case Essar v Norscot [2016] EWHC 2361 (Comm), where the arbitrator found the respondent to have deliberately tried to hurt the claimant financially, with the aim to prevent it from pursuing its legitimate claim. In the circumstances, the claimant was allowed to recover the third-party funder's cost.

CHINA MAINLAND

As a civil law jurisdiction, China Mainland is not restricted by the common law doctrines of champerty and maintenance. ORFS has been explicitly allowed and confirmed in the Code of Conduct for Lawyers (for Trial Implementation) (《律师执业行为规范(试行)》) in 2004 and the Measures for the Administration of Lawyers' Fees (《律师服务收费管理办法》) in 2006. The current Chinese Mainland regime does not differentiate between the different types of ORFS, but instead groups them generally under the umbrella of contingency fees.

Most recently on 28 December 2021, the Ministry of Justice, the National Development and Reform Commission and the State Administration for Market Regulation jointly issued the Opinions on Further Regulating lawyers' Service Charges (《关于进一步规范律师服务收费的意见》), which lays down the latest regulations on contingent fee retainers and reduced the levels of permitted contingency fees by introducing a progressive cap of between 18% and 6% determined by reference to the value of the dispute.

Requirement of a contingency fee agreement

Lawyers shall enter into a written contingency fee retainer with their clients, and clearly set out in the retainer matters such as the meaning of a contingency fee, its cap, payment mechanisms, and parties' respective risks and liabilities. The terms of the agreement shall be reasonable, taking into account lawyers' professional advantages and the risk liabilities assumed by the law firm and its clients. Procedural rights such as appeal, withdrawal from the action, mediation, settlement shall be preserved and protected.

Scope of application of contingency fee arrangements

Contingency fee arrangements are prohibited in criminal litigation, administrative litigation, state compensation, group litigation cases and cases concerning marriage inheritance and certain types of labour disputes. In our experience, contingency fee arrangements are permissible in investment and commercial disputes commonly found in BRI projects.

Contingency fee cap

Most noticeably, China Mainland specifically puts a cap on the percentage of contingency fees payable to lawyers, depending on the value of the dispute:

Amount of subject matter	Maximum percentage cap
Below RMB 1 million	18%
RMB 1 million to RMB 5 million	15%
RMB 5 million to RMB 10 million	12%
RMB 10 million to RMB 50 million	9%
More than RMB 50 million	6%

SINGAPORE

Singapore has introduced a framework for CFAs with clients in selected proceedings through amendments to the Legal Profession Act which came into force on 4 May 2022. However, the prohibitions on other forms of outcome-related fee structures (e.g., damages-based agreements) remain unlike other jurisdictions such as Hong Kong and England & Wales, which have relaxed their equivalent laws.

When can CFAs be used?

The new CFA framework permits CFAs for categories of proceedings for which third-party funding is permitted:

- international and domestic arbitration proceedings;
- Singapore International Commercial Court (**SICC**) proceedings so long as they remain in the SICC; and
- related court and mediation proceedings.

Requirements of a CFA

The new CFA framework set out in the amended Legal Profession Act and the Legal Profession (Conditional Fee Agreement) Regulations 2022 prescribes a number of requirements in relation to a CFA. Before entering into a CFA, the lawyer shall advise the client in plain language of the nature and operation of a CFA, the client's right to seek independent legal advice, that the uplift fee (if any) is not recoverable from an opposing party and that the client continues to be liable for any costs orders that may be made against the client by a court or arbitral tribunal.

The CFA shall, amongst other requirements:

a. Be in writing and signed by the client;

b. Set out the particulars of the specified circumstances in which remuneration and costs or any part of them are payable to the lawyer under the CFA;

c. Include the particulars of any uplift fee;

d. Include a cooling-off period of 5 days immediately after the date of the agreement, during which either party may terminate the agreement by written notice;

e. Include terms providing that any variation of the CFA must be in writing and expressly agreed to by all parties to the CFA.

Uplift fees cannot be recovered from opposing party

Singapore does not allow the uplift fees (i.e., fees payable to the lawyer in certain circumstances which are higher than if there were no CFA) to be recovered by the client from the opposing party (section 115C of the Legal Profession Act). This means that uplift fees that are triggered or payable as a result of the fulfilment of the condition of the CFA will not be recoverable as part of party-and-party costs, should the client succeed in the proceedings.

ENGLAND AND WALES

Currently, with the exception of Hybrid DBAs*, ORFS is permitted in England and Wales following a series of incremental legislative changes. The principal governing legislation is the Courts and Legal Services Act 1990.

(*we note that the situation is unclear in the UK after the UK Court of Appeal's majority decision in Zuberi v Lexlaw Ltd [2021] EWCA Civ 16, which seems to permit Hybrid DBAs. In October 2019, proposals for reforming the DBAs rules were published for consultation. A further supplemental report incorporating feedback on the initial report was also prepared by the same authors in June 2021. DBA Regulations 2019 proposed by the consultation were not implemented.) See also discussion of Paccar Inc v Road Haulage Association Ltd above at TIP 1 on TPF England & Wales.

Requirement of an agreement

CFAs and DBAs are separately governed by the Conditional Fee Agreements Regulations 2000 and the Damages-Based Agreements Regulations 2013 (together the "**UK Regulations**"). Both types of agreements: (a) are required to be in writing; (b) must specify the proceedings (or parts of them) to which they relate and the circumstances in which the lawyer's fees and expenses (or part of them) are payable.

There is no requirement for the disclosure of the CFA/DBA agreement.

Lesson about allowing recovery of extra fees from the unsuccessful party

CFAs were made permissible in all civil cases except family matters in the UK under the Access to Justice Act 1999. The new regime successfully encouraged the adoption of CFAs. However, as the law allowed recovery of the success fees from the losing party, the English courts were faced with a rise in litigations post-decision of the underlying case, where the losing party ordered to pay the success fees challenged the validity and enforceability of the winning party's CFA. The courts were also highly critical of the fact that claimants enjoy "free-risk litigation" at the cost of the defendants – if the claim was lost, the claimants would not need to pay their lawyers (or pay as much as the normal fees) under the CFA; if the claim was won, the claimants can recover all costs from the defendant.

In view of this, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was passed and made it clear that success fees are no longer recoverable from the losing party.

TIPS

We set out overleaf some of our key practical tips on careful drafting of the OFRS agreement

The different legislation and regulations only provide a respective framework for the operation of ORFS, the real details are in the ORFS agreements. Therefore, we see it as vital that the ORFS agreement is considered and drafted with care. This is also why in most jurisdictions, it is a requirement before entering into an ORFS agreement that the lawyer has a duty to remind his client about the right to seek independent legal advice.

We have summarized a number of points to bear in mind when entering into an ORFS agreement:

What kind of ORFS?

Depending on the jurisdiction, different types of ORFS are available. We set out in the table below the different ORFS allowed in key arbitration seats.

	Hong Kong	China Mainland	Singapore	England and Wales
CFA	✓	✓	✓	✓
DBA	✓	✓*	X	✓
Hybrid DBA	✓	✓*	X	X ^

(* note that the Chinese Mainland law does not explicitly forbid DBA and Hybrid DBA)

(^ note the uncertain situation mentioned on page 17 above, in relation to England and Wales)

Availability of the types of ORFS shall be one consideration to be taken into account when drafting the clauses in the main agreement and deciding the seat of arbitration.

One further point that we have made above in the context of TPF and is worth repeating here, is that when entering into an ORFS agreement, not only should you make sure that the law of the seat of arbitration allows ORFS, but also the law of the place of where the award is enforced. There may be a risk of refusal of enforcement in some jurisdictions where ORFS is not allowed, or a certain *type* of ORFS is not allowed. The "public policy" ground as a reason for non-enforcement might be a source of concern. Where the law of the place of enforcement does not allow ORFS, parties should consult legal counsel and consider this issue *before* entering into an ORFS agreement at the seat of arbitration.

Is there a cap?

Apart from the types of ORFS allowed, we also note that different caps are applied to success fees/DBA Payments. When entering into an ORFS agreement, clients should be aware of the maximum success fee that a lawyer may charge.

	Hong Kong*	China Mainland	Singapore	England and Wales
CFA cap	100% of the normal costs without ORFS	See our summary at page 17 above	No cap	100% of the normal costs without ORFS
DBA cap	50% of the financial benefit		DBA not available	50% of the financial benefit
Hybrid DBA cap	If the case is unsuccesful, 50% of the normal costs without ORFS If the case is successful, 50% of the financial benefit		Hybrid DBA not available	Hybrid DBA not available^

(^ note the uncertain situation mentioned in page 17 above)

What is a successful outcome under CFA?

What a successful outcome is depends on how the ORFS agreement is drafted. An outcome might be successful for the defendant if the dispute is about quantum and it avoids paying damages over a certain threshold. Equally, an outcome might only be successful for the claimant if it can recover damages over a certain threshold. It may also be the avoidance of disputes altogether. The Singapore Legal Profession Act specifically provides that the CFA may provide for payment of remuneration and costs incurred in relation to preparatory advice and settlement of a claim without proceedings eventually commencing.

What is a financial benefit under DBA?

Financial benefit usually refers to the monetary damages received, however, it can be broader than that. In Hong Kong, it has been defined at section 98ZA of the AO to mean "*money or money's worth*". Therefore, where the claimant (or counterclaimant) receives shares or (rights to) properties, or settlement sum without commencement of arbitration, those may count as "financial benefit" as well.

What is payable in the event of termination of retainer before the outcome?

If payment of fees is "outcome-related", then what should happen if the lawyer-client relationship ends before the outcome of the case? The legislation discussed above requires the ORFS payment mechanism to be set out. However, legislation does not necessarily include provisions dealing with termination. Mindful of this uncertainty, notably the Hong Kong Rules do specify that a lawyer is entitled to terminate the ORFS agreement if either party has committed a material breach or has behaved unreasonably.

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