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Paul Teo[1] and Philipp Hanusch[2]

A. Legislation and rules

A.1 Legislation

A.1.1 Third-party funding of arbitrations in Hong Kong permitted as of 1 February 2019

Third-party funding ("TPF") has become increasingly common for arbitrations in numerous jurisdictions such as Australia, England and Wales, and the US. A major benefit of TPF is that it provides parties, irrespective of their financial position, with an additional financing option to pursue their claims and allows them to share the risk of non-recovery with funders. This takes any potential financial outlay and exposure off the balance books and enables parties to focus their resources on more fundamental areas such as running and growing the business. In the short term, this allows the parties to improve their cash flow.

Hong Kong has introduced TPF of arbitration in a two-stage process which will be completed on 1 February 2019 when TPF of arbitration will be expressly permitted in Hong Kong.

In June 2017, a new part 10A to the Arbitration Ordinance (Cap. 609) ("AO") was introduced. Part 10A sets out the legal framework for permitting TPF for Hong Kong seated arbitrations and arbitration-related proceedings falling under the AO (e.g., emergency arbitrator proceedings or arbitration-related court proceedings), and for services

[1] Paul Teo is a chartered arbitrator and partner in Baker McKenzie's Hong Kong office and leads the Firm's Arbitration Practice in Greater China. He handles disputes related to corporate and commercial transactions, energy, mining and resources, infrastructure and construction, offshore and marine, and telecommunications.
[2] Philipp Hanusch is a senior associate in Baker McKenzie's Hong Kong office. His practice focuses on international commercial arbitration. Philipp has represented parties in arbitrations under the ICC Rules, HKIAC Rules, CIETAC Rules, Vienna Rules, ICDR Rules, and the UNCITRAL Rules.

provided in Hong Kong in relation to offshore arbitrations. Express permission is necessary, as it would otherwise remain uncertain whether the common law doctrines of maintenance and champerty continued to apply to render TPF of arbitration a tort and criminal offense.

On 7 December 2018, the Secretary for Justice issued the Code of Practice for Third Party Funding of Arbitration ("Code"). The Code sets out standards and practices that funders are ordinarily expected to comply with when carrying on activities in connection with TPF of arbitration.

On 1 February 2019, the provisions expressly permitting TPF and implementing other measures and safeguards became operative. The key features of the regime in Hong Kong for TPF of arbitration that is now fully in place is as follows:

(a) TPF can be in the form of money or any other financial assistance in relation to any costs of the arbitration. Anyone who is a party to a funding agreement for the provision of arbitration funding and who does not have an interest recognized by law in the arbitration other than under the funding agreement will be considered a third-party funder. Lawyers will be permitted to act as funders, provided they do not act for a party in relation to the arbitration. However, lawyers and their firms acting for any party in relation to an arbitration continue to be prohibited under Hong Kong law from providing funding to a party in that arbitration, whether by entering into conditional or contingency fee arrangements or in any other manner.

(b) The funding agreement between a funded party and a funder must be in writing. The funded party will have to disclose in writing to the other parties and the arbitral tribunal (or emergency arbitrator or court) that a funding agreement has been made. The funded party will also have to disclose that a funding agreement has ended and the date it ended.

(c) As an exception to the express confidentiality obligations under the AO, parties will be allowed to communicate confidential information to potential or existing funders who will then also become subject to such confidentiality obligations.

The standards and practices set out in the Code include, in particular, the following:

(a) A funder must set out and explain clearly in the funding agreement all key features and terms of the proposed funding and the agreement (e.g., grounds for termination or withholding of funding).

(b) A funder must take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement.

(c) As part of the standards of capital adequacy, including that a funder must ensure that it maintains access to a minimum of HKD 20 million (approx. USD 2.5 million) of capital and accept a continuous disclosure obligation under each funding agreement in respect of its capital adequacy.

(d) A funder must maintain for the duration of the funding agreement effective procedures for managing conflicts of interest. The Code provides for proposed procedures which, if shown to be in place, will be considered sufficiently effective.

(e) A funder must observe confidentiality and privilege of all information and documentation relating to the arbitration and the subject of the funding agreement to the extent that Hong Kong or other applicable law permits.

(f) The funding agreement must set out clearly that the funder will not seek to influence the funded party or its legal representative to give control or conduct the arbitration to the funder except permitted by law.

(g) The funding agreement must state whether the funder is liable to the funded party to meet any liability for adverse costs, pay any premium to obtain costs insurance, provide security for costs, and meet any other financial liability.

(h) The funding agreement must state whether the funder may terminate the agreement in the event that the funder reasonably (i) ceases to be satisfied with the merits of the arbitration, (ii) that there has been a material adverse change to the funded party's prospect of success, or (iii) believes that, the funded party has committed a material breach. The funding agreement must also provide that if the funder terminates the agreement, the funder is to remain liable for all funding obligations, accrued to the date of termination, unless the termination is due to a material breach by the funded party.

(i) Finally, the funding agreement must provide that the funded party may terminate the agreement if it reasonably believes that the funder has committed a material breach of the Code or the agreement which may lead to irreparable damage.

The express permission of TPF of arbitration since 1 February 2019 is a key development for Hong Kong. The availability of TPF for arbitrations will become an increasingly important factor and tool for businesses to take into account, both in terms of choosing Hong Kong as a seat of arbitration, and how they fund and conduct arbitrations. This will allow Hong Kong to further cement its position as one of the leading arbitration hubs globally.

A.2 Institutions, rules and infrastructure

A.2.1 New HKIAC Administered Arbitration Rules

On 1 November 2018, a new version of the HKIAC Administered Arbitration Rules came into effect ("2018 Rules"). The amendments introduced by the 2018 Rules further improve user-friendliness, efficiency, and reflect international best practice.

(a) Expanded right to commence single arbitration under multiple contracts - The 2018 Rules allow a claimant to commence a single arbitration under multiple contracts with separate arbitration agreements even if the parties are not bound by each of the arbitration agreements. This is premised on having a common question of law or fact, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions, and all arbitration agreements concerned are compatible.

(b) Concurrent proceedings - A tribunal sitting in multiple arbitrations involving a common question of law or fact will be expressly allowed to conduct those arbitrations at the same time, one immediately after another, or suspend any of them until the determination of any other of them. This may be particularly useful in situations where consolidation of arbitrations is not possible or desirable.

(c) Early determination procedure - A significant amendment is the express power for a tribunal to determine certain issues at an early stage of the arbitration. It applies to a point of law or fact that is manifestly without merit or manifestly outside of the tribunal's jurisdiction, or assuming the point is correct, it would not result in an award in favor of the party that submitted such point. Requests for early determination must be made as promptly as possible after the relevant points are submitted. The tribunal has 30 days to decide whether to allow the request and, if so, another 60 days to decide on the request.

(d) Emergency Arbitrator Procedures - The 2018 Rules shorten all time limits under the emergency arbitrator procedures. In addition, they allow a claimant to apply for the appointment of an emergency arbitrator prior to the commencement of the arbitration provided that the claimant commences arbitration within seven days thereafter. In deciding an application for

emergency relief, an emergency arbitrator will apply the test a tribunal applies for interim measures under article 23.

(e) Deadline for delivery of awards - Once the proceedings are declared closed, tribunals will have to inform the parties of the anticipated time of delivery of an award. Importantly, tribunals will have to render awards within three months from the date when the tribunal declares the entire proceedings or the relevant phase thereof closed. The time limit can only be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

(f) Remedy against a party failing to pay its share of advance on costs - If a party fails to pay its share of an advance for costs and the other party pays that share, the paying party can request the tribunal to make an award for reimbursement. This should help to reduce or mitigate situations where a respondent shifts the burden of bearing an advance on the claimant.

(g) Third-party funding - In line with the relevant amendments to the AO permitting TPF of arbitration in Hong Kong (see section A.1 above), the 2018 Rules provide that a funded party is required to disclose promptly the existence of a funding agreement, the identity of the funder, and any subsequent changes to such information. A funded party will be permitted to disclose arbitration-related information to its existing and potential funder.

(h) Use of technology - The 2018 Rules expressly embrace the use of technology by including it among the factors to be considered by a tribunal when determining suitable procedures for the conduct of an arbitration. The rules also propose a new method of delivery through the use of a secure online repository.

(i) Alternative means of dispute settlement - The 2018 Rules clarify that, if parties wish to pursue alternative means of

settling their dispute (e.g., mediation) during the arbitration, a party may request the suspension of the arbitration. The arbitration shall resume at the request of any party. Attempting to settle the dispute after commencing the arbitration has the advantage that, if the parties reach a settlement, they can request the tribunal to record it in the form of an award. Such an award on agreed terms is enforceable as any other final award.

(j) Practice Note on Appointment of Arbitrators - The 2018 Rules are accompanied by a new practice note setting out HKIAC's general practice of appointing arbitrators. HKIAC normally appoints arbitrators from its panel or list of arbitrators published on its website. When appointing arbitrators, HKIAC takes into account a wide range of factors, such as the amount, nature, and complexity of the dispute, the governing law of the contract, and availability and proposed fees of the arbitrator. Where the parties are of different nationalities, HKIAC will generally appoint a sole or presiding arbitrator of neutral nationality; however, in cases involving at least one Mainland Chinese party, HKIAC may still appoint a holder of a Hong Kong passport.

Notably, the practice note makes clear that HKIAC will include, wherever possible, qualified female candidates and qualified candidates of any age, ethnic group, legal or cultural background among those it considers for arbitrator appointments. This confirms HKIAC's commitment to promoting diversity in arbitrator appointments.

B. Cases

B.1 Court of Final Appeal clarifies principles applicable where a party seeks to resist enforcement of an award under the New York Convention out of time

In *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2018] HKCFA 12, the CFA allowed First Media ("FM") to resist enforcement of awards under the New York Convention out of time. The CFA's decision of 11 April 2018 clarifies the applicable principles when considering whether time should be extended where an award debtor seeks to resist enforcement after the prescribed time limit has expired.

The underlying dispute arose from a joint venture agreement between companies belonging to the Indonesian Lippo group and companies within the Malaysian Astro group. Astro commenced SIAC arbitration against FM in Singapore. In the arbitration, the tribunal joined three parties as additional claimants to the arbitration ("Additional Parties") although they were not parties to the arbitration agreement. FM objected to the tribunal's order and defended the arbitration. In 2009 and 2010, the tribunal rendered awards in favor of the Additional Parties. FM did not seek to set aside the awards in Singapore.

The Additional Parties sought to enforce the awards in Hong Kong and Singapore. FM resisted enforcement in Singapore, but it did not initially resist enforcement in Hong Kong, as it believed it had no assets there. In December 2010, the Hong Kong courts entered judgment in terms of the awards. In July 2011, the Additional Parties obtained a provisional order for attaching a debt of USD 44 million owed to FM by a Hong Kong debtor. In January 2012, FM applied for an extension of time so as to seek to set aside the Hong Kong enforcement orders and judgment. FM's application was made 14 months after expiry of the 14-day time limit for resisting enforcement. Importantly, in October 2013, the Singapore Court of Appeal ("SCA") refused to enforce the awards against FM, holding that the tribunal lacked jurisdiction over the Additional Parties.

Both the Hong Kong Court of First Instance ("CFI"), in February 2015, and the Court of Appeal ("CA"), in December 2016, refused to grant FM an extension of time. In its decision, the CA relied on three factors: (i) the delay was very substantial; (ii) FM had deliberately decided not to apply to set aside the enforcement orders within the prescribed time limit; and (iii) the awards had not been set aside at the seat of the arbitration.

The CFA only dealt with the two questions of law which are relevant to the granting of an extension of time for an award debtor to resist enforcement of an award under the New York Convention, namely (i) the proper test for determining whether an extension of time should be granted for this purpose; and (ii) whether the fact that the award has not been set aside by the courts at the seat of arbitration is a relevant factor in determining whether to extend time.

The CFA mainly considered the approaches laid down in *The Decurion* [2012] HKCA 39 and *Terna Bahrain Holding Company WLL v Al Shamsi* [2013] 1 Lloyd's Rep. 86 The latter approach treats merits as secondary and promotes the importance of factors such as (i) the length of delay, (ii) reasonableness of allowing the time limit to expire, and (iii) whether the other side or the arbitrator contributed to the delay. In contrast, *The Decurion* approach looks at all relevant matters and considers the overall justice of the case. The CFA preferred the approach in *The Decurion*, as the CFA found it inappropriate in the present case to downgrade "merits" as a factor, where the tribunal's lack of jurisdiction had been conclusively established. In adopting the *Terna Bahrain* approach, the lower courts had erred in principle. This led them to downgrade the fundamentally important absence of a valid arbitration agreement between FM and the Additional Parties.

In considering whether the fact that the award has not been set aside is a relevant factor, the CFA turned to the grounds on which a Hong Kong court "may" refuse enforcement. Two grounds were relevant here: (i) the arbitration agreement was not valid and (ii) the award has

been set aside by a competent authority of the country in which it was made. The CFA noted that these are separate grounds and independently available to an award debtor. Accordingly, it is always open for a Hong Kong court to refuse enforcement of an award even if the supervisory court has decided not to set aside the award. This is a consequence of the choice of remedies principle which also applies in Hong Kong. Considering the fact that the awards were not set aside as a major factor, as the lower courts did, contradicts this principle.

Since the CFA overruled the lower courts, it had to exercise its discretion afresh, looking at all relevant matters and considering the overall justice of the case. The only basis left for refusing to extend time was substantial delay. The CFA considered that the absence of a valid arbitration agreement had to be balanced against the 14-month delay. The CFA granted the extension of time, concluding that to refuse an extension would be to deny FM a hearing where its application has decisively strong merits and would involve penalizing it for a delay which had not caused the award creditors any prejudice that could not be compensated.

C. Diversity in Arbitration

HKIAC'S new "Practice Note on Appointment of Arbitrators" contains an express commitment to include, wherever possible, qualified female candidates. This is yet another of several important steps HKIAC has taken to improve the representation of women in arbitration. In October 2016, HKIAC signed the Pledge. Since then, the number of female arbitrators appointed by HKIAC has increased from 6.7% in 2016 to 16.5% in 2017. Further, the presence of female arbitrators on HKIAC's "Panel and List of Arbitrators" has increased from 9.8% in 2016 to 17% in 2017. In February 2018, HKIAC launched the initiative "Women In Arbitration." WIA is committed to the promotion and success of female practitioners in international arbitration and related practice areas in China. It provides a forum for members to consider and discuss current topics, grow networks and

business relationships, and develop the next generation of leading female practitioners.