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LITIGATION FUNDING

Harbour View

Spring 2019

Featuring topical articles by guest authors and the Harbour Team.

harbourlitigationfunding.com

Harbour Litigation Funding Ltd
8 Waterloo Place, 4th floor, London SW1Y 4BE.
harbourlitigationfunding.com

Editor's note

Welcome to the Spring 2019 issue of Harbour View.

Ellora MacPherson, Chief Investment Officer

It has been a busy start to the year for Harbour as we continue to grow the team after our office move to Waterloo Place. We celebrated our move by holding a networking event in our new office for clients. Thank you to all those who attended an enjoyable evening and you can see some of the photographs of the event on pages 26-27.

We were also pleased to welcome Paul Lowenstein QC to the Investment Committee earlier in the year. Paul is widely recognised as one of the leading silks in civil fraud who has been involved in some of the most prominent civil fraud cases in recent years. Resolving civil frauds and asset recoveries remain an important part of Harbour's funding for claimants. Paul's article on remedies and procedures to combat fraud provides some vital practical considerations for claimants and lawyers involved in such cases.

Turning to the arbitration market, the Asia-Pacific arbitral seats remain consistently popular for parties seeking to resolve commercial disputes. In recognition of this, we have partnered with Coventus Law to produce a special report focusing on the state of Arbitration in the Asia Pacific region. The report goes into detail on each specific arbitral seat in the region but in this issue of Harbour View we have focused on Hong Kong. Dominic Afzali of Harbour's investment team provides his views on the arbitration landscape in Hong Kong given his expertise in the region and how the market for funding arbitrations in the region can support arbitration in the region.

Finally, Darrell Porter, Senior Business Development Director of Harbour Solutions Group provides a useful insight on how Treasurers and CFOs within corporate claimants are approaching disputes and how Harbour Solutions Group is providing tailored solutions in helping them manage their litigation risk (see pages 8-10). Darrell brings to the Harbour Solutions Group a wealth of in-house expertise in finance and risk management, having held senior positions in leading banks for over 25 years.

Looking forward, the Harbour team will be participating in key events over the next few months. London International Disputes Week (of which Harbour is sponsoring) is taking place between 7 – 10 May 2019 and we are also excited to be participating in Hong Kong Arbitration Week this year by hosting the annual Harbour Lecture in Hong Kong on 21st October. We look forward to seeing you all at these events.

We hope you find the articles in this issue useful and the Harbour investment team are happy to discuss any queries you may have arising from its content.

Ellora MacPherson

In hot pursuit

The use of flexible remedies and procedures to combat fraud

Paul Lowenstein QC and Matthew McGhee, Barristers, 20 Essex Street

In Summer 2018, the Lord Chancellor announced that a new flagship court would be opening in London and be specifically designed to tackle fraud, cybercrime and economic crime. Plans for its opening are underway and it is hoped that the court will be in full service by 2025. Judging by current trends, the new court will be very busy from day one.

Reliable estimates of the prevalence of fraud, especially cyber-fraud, are difficult to assess. What is clear, however, is that such activity is increasing. Earlier this year, for example, Santander announced that it closes 24,000 UK bank accounts per year on suspicion of fraud, of which about 11,000 are suspected of being operated as 'money mule' accounts – ie. operated by fraudsters (who may or may not be the account holder) to conduct illegal activities such as money laundering.

The problem is not just with Santander. Nationwide closes about 12,000 bank accounts per year for similar reasons, of which about 6,000 are suspected 'money mule' accounts. Facebook has also recently taken steps to remove adverts from its platform where fraudsters were offering its users £1,200 in exchange for those users allowing their accounts to be operated as 'money mule' accounts.

In such times, lawyers and judges must recognise the need for the law to respond appropriately. There is no need to reinvent the wheel; well-established processes and remedies can be adapted and applied to the new challenges. In this update, we provide a brief overview of some of the ways in which this has been achieved in recent months.

Development of the 'persons unknown' jurisdiction

In *CMOC v Persons Unknown* [2018] EWHC 2230 (Comm), the High Court confirmed that it has jurisdiction to make worldwide freezing orders against persons unknown. In the case of a cyber-fraud, this enables a victim to freeze the accounts to which sums were sent in the course of the fraud even if the victim does not (yet) know the identity of the account holder.

There is similarly a growing body of cases where *American Cynamid* injunctions are granted against persons unknown who have been involved in gaining unauthorised access to claimant parties' IT systems. Threats are often made to disclose commercially sensitive data unless a ransom payment is made. See *PML v Person(s) Unknown* [2018] EWHC 838 (QB) and *Clarkson Plc v Person or Persons Unknown* [2018] EWHC 417 (QB). In such cases, the respondents are routinely ordered to not disclose the data, and may additionally or alternatively be asked to destroy any copies of the data that they have made (*cf. Bloomsbury Publishing v News Group Newspapers* [2003] 1 WLR 1633).

'Spartacus' (or self-identification) orders may also be made in such instances. A 'Spartacus' order requires the unnamed respondent is ordered to identify him or herself to the Court. Although such 'Spartacus' orders may not be complied with, the threat of contempt proceedings should the respondents later be unveiled may act as a spur to prompt compliance of some individuals.

However, helpful as the 'persons unknown' jurisdiction is, it should not be seen as a magic panacea for any difficulty in identifying the parties to a fraud. In *Cameron v Liverpool Victoria Insurance* [2019] UKSC 6, the Supreme Court explained that there are two kinds of unnameable defendants: defendants who were identifiable but whose names were unknown; and defendants who were anonymous and could not be identified. Claims can only be made against 'persons unknown' in the first category, not the second. The first category covers the defendants/respondents in *PML, Clarkson & CMOC*, where it was plain that there was a conspirator or body of conspirators operating from certain email addresses or bank accounts, but the actual identities were unknown. The second category would include (in the case of *Cameron*) the unknown hit-and-run driver, but also other defendants who are not only anonymous but are also unidentifiable. It seems that the distinction may be between 'persons unknown' who can or cannot be served, whether that be directly or by alternate means.

Facilitate and support investigations

The courts have also shown a willingness to facilitate and support fraud investigations, both by specific orders but also through a general preparedness to apply their procedural powers in a flexible but principled manner.

In facilitating investigations into fraud, the High Court in *CMOC* (*cf.* [2017] EWHC 3599 (Comm)) confirmed that it would make disclosure orders against international banks in foreign jurisdictions to require those banks to provide information about their clients, the holders of the accounts which received the stolen funds, so as to facilitate the fraud investigation and asset tracing exercise. This is an important step forward in facilitating international fraud investigations, given that the decision in *AB Bank v Abu Dhabi Commercial Bank* [2016] EWHC 2082 (Comm) effectively prohibits a victim of fraud from seeking Norwich Pharmacal relief against parties outside of the jurisdiction.

Although it was a case of breach of confidence, not fraud, *Hyperama v Poulis* [2018] EWHC 3483 (QB) is a useful reminder to parties of another investigative tool – the so-called 'doorstep delivery-up' order, a less-Draconian form of search order. The key difference is that the applicant is not entitled to conduct the search him or herself (by their lawyers), but rather attends (without entering) the respondent's property unannounced to demand immediate delivery-up of documents or other evidence. The Judge in *Hyperama* conducted a succinct review of doorstep delivery-up orders and confirmed that an *"elevated standard of whether [the court has] a high degree of assurance that [the applicant] will be able to establish its claims at trial"* applies in doorstep delivery-up orders, albeit that this is a slightly lesser standard than required for a search order (ie. *"extremely strong prima facie case"*).

The courts have shown willingness to develop the procedural flexibility necessary to deal with cyber-fraud cases in a proportionate manner. For example, a final injunction against a cyber-blackmailer has been made without a hearing where it was clear that nobody would appear at court to contest the application: *Clarkson*. The authors are also aware that, in ongoing cyber-fraud investigations, the Court has been willing to consider return dates (and even initial *ex parte* applications) for freezing orders as paper applications. In *CMOC*, the judge permitted service by Facebook Messenger, WhatsApp

Paul Lowenstein QC

messenger and by access to a data room, among other means, commenting that *"the court will consider proactively different forms of alternative service where they can be justified in the particular case."*

Post-judgment freezing orders

A post-judgment freezing order is a powerful tool to assist in enforcement – particularly where a claimant needs to enforce its judgment abroad and the English Court can be persuaded to grant a worldwide freezing order.

In *Michael Wilson v Emmott* [2019] EWCA Civ 219, the Court of Appeal recently confirmed that post-judgment freezing orders can be more readily granted than pre-judgment freezing orders – indeed, a post-judgment freezing order may be granted irrespective of whether an earlier application for a freezing order was made. In *Michael Wilson*, the applicant sought to remove the wording in the standard form freezing order which permits the respondent to use the frozen assets for transactions in the *"ordinary course of business"*. The Court explained that there is no presumption that this exception be removed in a post-judgment freezing order, but that its removal was equally not a remedy of last resort. In *Michael Wilson*, the Court of Appeal agreed to exclude that exception on the basis that the respondent's conduct demonstrated that it was attempting to avoid paying the judgment debt, not that the respondent was unable to do so.

Conclusion

The courts are ready to engage with victim claimants to assist them in seeking recourse against the perpetrators of fraud. There is a broad array of possible remedies and procedures available, and judges have shown a willingness to adapt existing tools to meet new challenges. Critically for litigants, it is important to build the trust of the Court.

This means that litigants should be frank when seeking to expand existing doctrine or to extend a remedy into a difficult area. It also means being scrupulous in ensuring proper compliance with procedural requirements – including in respect of full and frank disclosure. There have been several high-profile recent cases (eg. *Punjab National Bank v Srinivasan* [2019] UKHC 89 (Ch)) where freezing and other orders have been set aside for material non-disclosure. This can result in otherwise-valid relief being refused, adverse costs orders being made and often the entire litigation derailed.

In the context of cyber-fraud, particularly cases where defendants/respondents may not engage with proceedings, proper compliance with procedure has an additional incentive – future enforcement. It would be a pyrrhic victory for a claimant to obtain an English judgment on a cyber-fraud case, but when seeking to enforce that judgment against the foreign-domiciled fraudster the local courts refuse to enforce the judgment on the basis that the claimant failed to follow proper procedure to the prejudice of the fraudster.

A final note on Brexit: At time of writing, there is no certainty as to the outcome of the UK's negotiations to exit the EU. As it stands, there is therefore no certainty as to how UK judgments and orders may be enforced abroad in EU jurisdictions. It is likely that some form of mutual recognition will be granted between UK jurisdictions and EU jurisdictions, but at the time of writing parties must work on the basis that they will lose the benefits of the Recast Brussels Regulations. This may pose its own challenges to cross-border enforcement, particularly in cases of cyber-fraud where speedy domestication abroad is often essential if the locally-obtained relief (eg. freezing orders) is to be effective.

Matthew McGhee

Q&A with...
Darrell Porter, Senior Business Development Director

In 2018, the Harbour group grew again with the addition of Harbour Solutions Group (HSG), a business designed to offer our corporate clients the problem-solving skills of a team of commercially experienced risk management experts. Ellora MacPherson speaks with Darrell Porter, Senior Business Development Director at Harbour Solutions Group.

Darrell you joined Harbour in late 2018, can you tell me briefly about your past experience and what you bring to the role?

I have worked in finance for over 25 years, enjoying senior positions at Barclays Capital, Deutsche Bank and most recently as a Managing Director within the Risk Solutions Group at Nomura (which was awarded Risk Solutions House of the Year 2018 by Risk Magazine). For much of that time I helped corporate and institutional clients mitigate their exposure to changes in exchange and interest rates, including bespoke deal-contingent hedging solutions for clients engaged in M&A activity. These organisations are now showing interest in using similar strategies to manage their financial exposure to commercial litigation.

Can you explain to readers what Harbour Solutions Group offers and how it fits in with Harbour Litigation Funding?

Certainly. Since its inception in 2007, Harbour has focused on litigation funding, with the vast majority of cases being referred by law firms. Harbour Litigation Funding is expert at understanding and meeting the needs of this important constituency. Harbour Solutions Group was formed last year in recognition of the fact that our corporate clients can have a different set of needs to law firms and consider litigation risk in the context of other solutions with which they are familiar. We adopt a consultative approach knowing that many cases that corporate clients are considering are at a very early stage and require consideration of a range of risk management solutions that can include litigation-related insurance policies as well as funding. Many companies are intrigued to learn about the After-The-Event insurance market, the fact that such insurance can be purchased right up to the start of a trial, and that they may be able to cap damages should they go to trial.

Do corporate clients confuse litigation funding and ATE insurance?

Generally insurance is well-understood as a concept and it is recognised that it has different features to funding; their respective applicability is dependent on the risk appetite of the claimant. Litigation funding provides a complete financial hedge in that it removes from the claimant the cash flow and accounting impact of paying fees and disbursements and, by being without recourse to the client, it removes the litigation from the financial statements whilst still leaving the client in full control of the conduct of the litigation. Insurance is only a partial hedge as the client pays the fees, disbursements and insurance premia as they fall due. The litigation remains evident in their financial statements, but, if the litigation fails, legal fees will be reimbursed up to the limit of the agreed indemnity, leaving the claimant out-of-pocket only to the extent of the insurance premium paid and anything incurred by the claimant in excess of the limit of indemnity.

Is this really seen as a new area by so many companies?

Absolutely. When I speak with Group Treasurers, it is typically their first conversation about litigation funding or ATE insurance and they often ask why they haven't heard of these strategies already, especially as the techniques are similar to those they would use to manage other financial exposures. Portfolio Managers at Private Equity firms are usually disappointed at the missed opportunities to monetise litigation as they hadn't known these existed before we met. In conversations with litigators, many in private practice express surprise that in addition to providing litigation funding Harbour has experience in buying judgments, enforcing claims and can access ATE insurance to cap damages, should a case go to trial.

What makes HSG attractive to corporate clients?

They appreciate our consultative approach and the evident depth of experience that is reflected in our being one of very few Band 1 Litigation Funders in the eyes of Chambers & Partners. By combining knowledgeable litigators with experts from the field of finance who have in many cases built trusted relationships with Group Treasurers and Finance Directors over decades, Harbour has created an extremely powerful partnership.

What is the most common reaction when you speak with a General Counsel?

General Counsel will almost always cite their pre-conception that if Harbour provides funding then we will look to take control of negotiations, strategy and decisions over settlement. This is simply not the case. It's easy to refute this belief as such an approach would contravene the Code of Conduct of the Association of Litigation Funders, where we are a founder member.

Isn't litigation funding just for those clients who are unable to cover the costs of a legal dispute, which is why larger companies are not familiar with it?

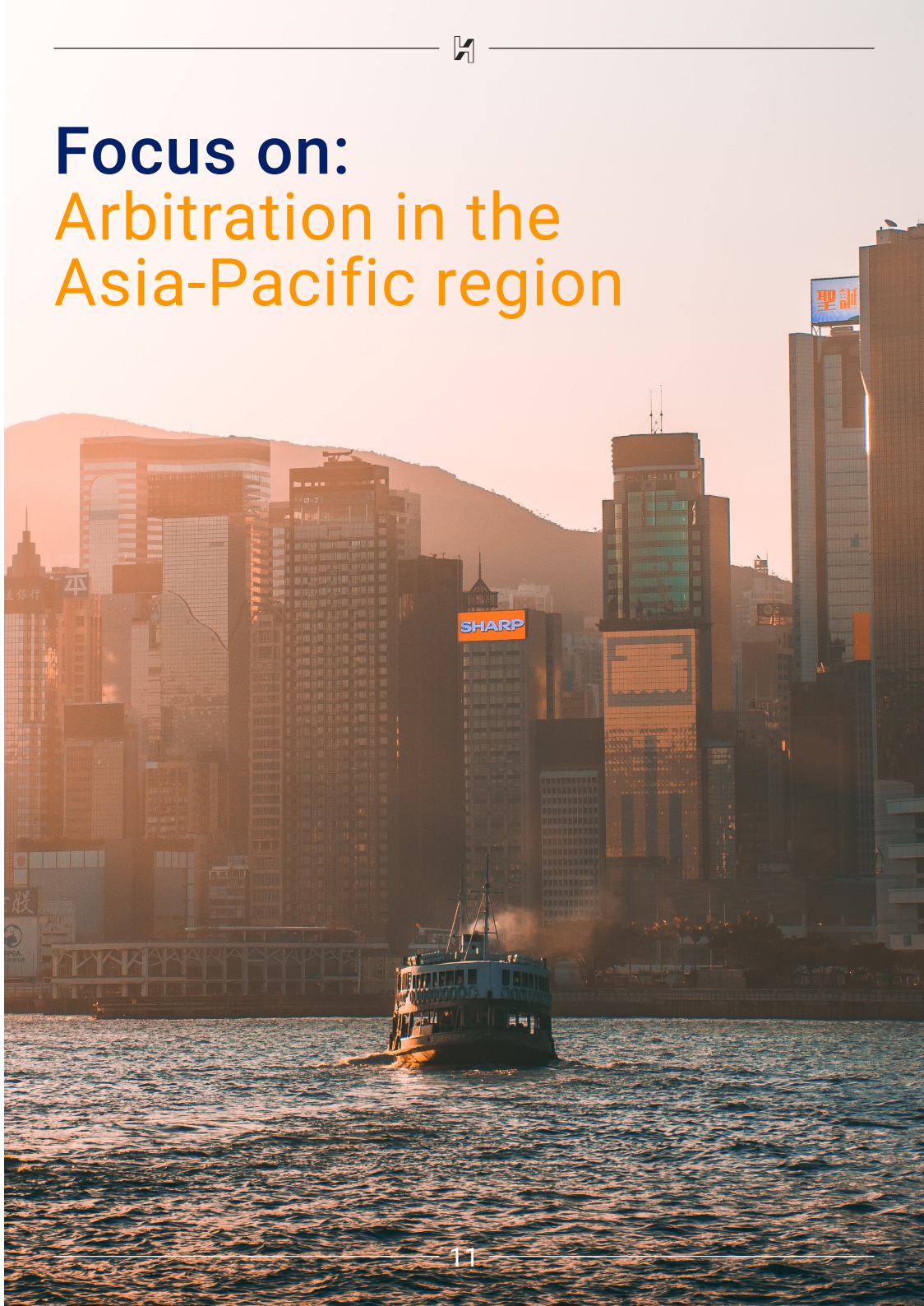
Increasingly even well-resourced companies are turning to litigation funding. This may be because they have exhausted their legal budget, they prefer to deploy the cash elsewhere, or perhaps they just appreciate certainty when it comes to legal expenses. After all, the costs of litigation are notorious for being unpredictable, lasting for several years and coming with the risk of an adverse costs award. To give you a couple of examples, last week I had meetings with two of the larger FTSE100 constituents, one a corporate and the other a financial institution. Both solid investment grade credits. Confidentially, both had previously been funded by Harbour and we were keen to explore how we could expand our relationship. One has a judgment that has now been recognised in the relevant jurisdiction so we may look to purchase that from them. With the other client you've reminded me that I need to have a more in-depth conversation with them regarding insurance!

Career highlights

- Darrell is Senior Business Development Director for Harbour Solutions Group
- Darrell has over 25 years' experience in finance, primarily focused on the development of bespoke risk management and financing solutions for corporate clients.
- He has held senior positions at Barclays Capital, Deutsche Bank and most recently as a Managing Director within the Risk Solutions Group at Nomura, which was awarded Risk Solutions House of the Year 2018 by Risk Magazine.
- Fellow of the Association of Corporate Treasurers
- Fellow of the Chartered Institute of Bankers
- Chartered Fellow of the Chartered Institute for Securities and Investment

If you would like to learn more about Harbour Solutions Group and how we can help, please contact Darrell Porter for an informal conversation.
Via email: **darrell.porter@harboursg.com** or +44 20 3829 9343

Focus on:
Arbitration in the Asia-Pacific region



Arbitration in the Asia-Pacific region

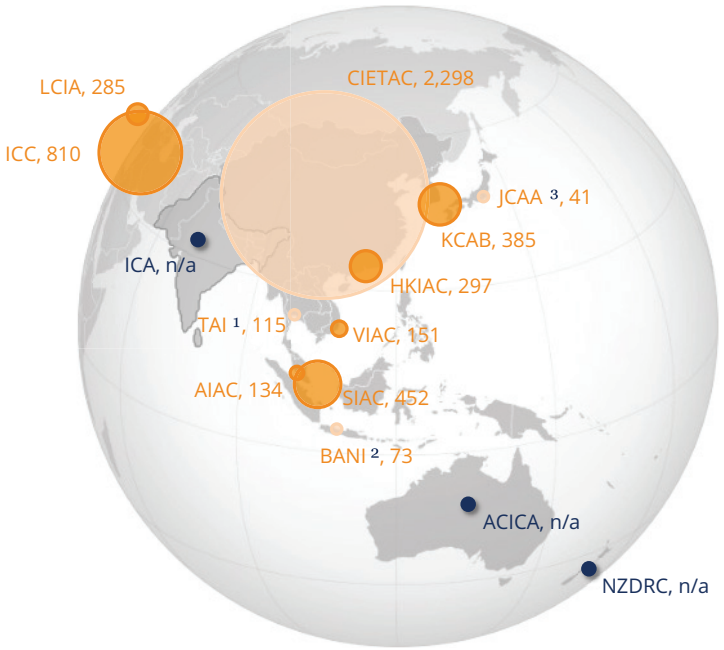
Harbour commissioned Coventus Law to produce a report on the arbitration market in the Asia – Pacific region earlier this year and we have shared some of the most interesting findings over the next few pages.

The arbitration market in the Asia-Pacific region is diverse in size and characteristics. Amongst the arbitral institutions in the region, China International Economic and Trade Arbitration Commission (CIETAC)'s 2017 **report** revealed that 2,298 arbitration cases were filed across its institutions in Beijing, Shanghai, South China, Tianjin, Southwest China, Hong Kong, Zhejian, Hubei and Fujian. This makes China the largest market in the Asia-Pacific region for arbitration, followed by Singapore (452 arbitration cases), South Korea (385 arbitration cases) and Hong Kong (297 arbitration cases). By comparison, the International Chamber of Commerce (ICC) received 810 arbitration cases and the UK's London Court of International Arbitration (LCIA) received 285 arbitration cases.

Harbour's Chief Investment Officer, Ellora MacPherson, is also optimistic about third party funding's positive impact on arbitration in Asia:

"Lawyers in Singapore and Hong Kong have historically worked not only on arbitrations seated in their home jurisdictions but also further afield in places like South Korea, Japan, and Mainland China. The fact that the TPF legislation in Singapore and Hong Kong permits funding of those lawyers' services in arbitrations seated elsewhere will help to open up new or less developed arbitration markets whilst affording the end users of arbitration (that is, the clients) access to some of the best arbitration lawyers in the world."

SNAPSHOT OF ARBITRATION CASES REPORTED BY EACH ARBITRATION CENTRE



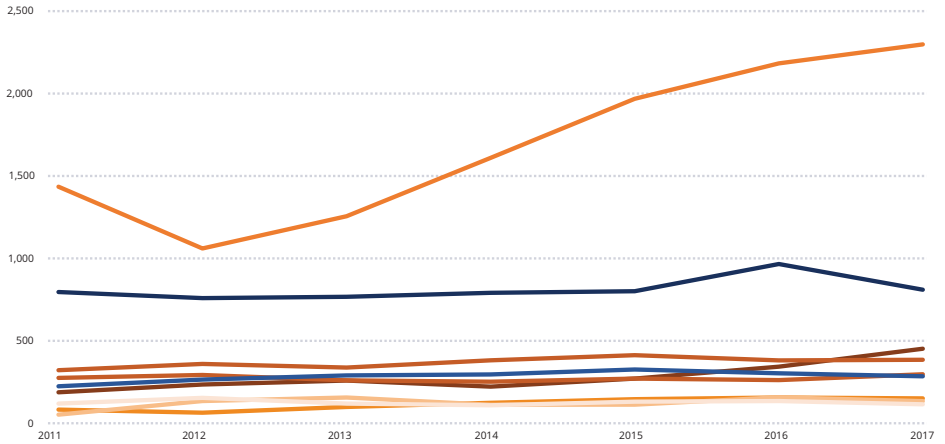
Data received & analysed | Desktop research & estimated | Data not received & analysed

1. Data recorded by Thai Arbitration Institute
2. BANI reported to receive 731 arbitration cases from 2007 to 2016, therefore the centre hosts on average, 73 cases p.a.
3. International Bar Association. 2018. Arbitration - Country Guide: Japan. [ONLINE] Available at: https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx.[Accessed 11 October 2018].

Not only is CIETAC the biggest arbitral institution in the Asia-Pacific region in terms of total numbers of cases filed, but CIETAC has also seen the biggest growth in the number of arbitrations filed annually (increasing from 1,435 cases filed in 2011 to 2,183 cases filed in 2017). The Singapore International Arbitration Centre (SIAC) came second with an increase from 188 cases filed in 2011 to 452 filed in 2017. While Malaysia's Asian International Arbitration Centre (AIAC) placed third with an increase from 52 cases filed in 2011 to 134 cases filed in 2017.

Across the Asia-Pacific region, AIAC is the fastest growing, at 17% compound annual growth rate (CAGR) for the period of this study. SIAC is a close second with 16% CAGR followed by Vietnam International Arbitration Centre (VIAC)'s 10% CAGR. Thailand's Thai Arbitration Institute (TAI) is the only institution where the arbitration cases recorded has decreased, from 119 cases in 2011 to 115 cases in 2017, making its CAGR a -1%.

ARBITRATION CASES REPORTED BY EACH CENTRE

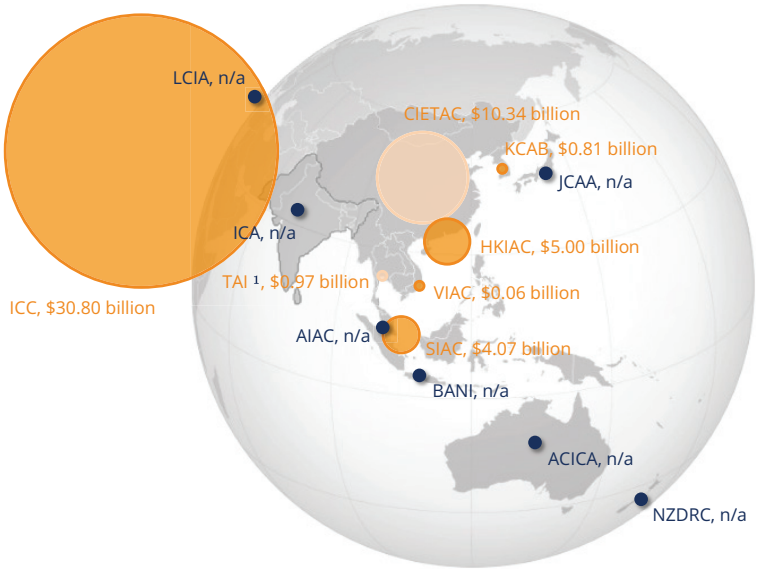


Arbitration centre	Malaysia (AIAC)	Singapore (SIAC)	Vietnam (VIAC)	China (CIETAC)	UK (LCIA)	South Korea (KCAB)	Hong Kong (HKIAC)	France (ICC)	Thailand (TAI)
2011 to 2017 compound annual growth rate	**17%**	**16%**	**10%**	**8%**	**4%**	**3%**	**1%**	**0%**	**-1%**
Cases 2017	**134**	**452**	**151**	**2,298**	**285**	**385**	**297**	**810**	**115**

Access to data on amounts in dispute through the arbitral institutions in the Asia-Pacific region were also varied. CIETAC leads Asia-Pacific arbitral institutions with a reported total amount in dispute of $10.34 billion in 2017, followed by the HKIAC's $5.00 billion and SIAC's $4.07 billion. The arbitral institutions with the smallest totals for amount in dispute in 2017 were the TAI's $970 million, the KCAB's $810 million and VIAC's $60 million. By comparison, the ICC saw a much higher total amount in dispute of $30.80 billion in 2017.

Statistics on the average amount in dispute per case reveals that the HKIAC's average of $16.84 million per case is the largest in the region, followed by SIAC's average of $9 million per case and Thailand Arbitration Centre (THAC)'s average $8.42 million per case. CIETAC's average amount in dispute per case of $4.5 million ranks fourth on this measure. This seems to confirm the finding in the International Bar Association's 2015 **report** that Hong Kong and Singapore have emerged as safe seats within the Asia-Pacific region for international arbitration. As a comparison from outside the region, the ICC's average amount in dispute per case of $38.02m is larger.

SNAPSHOT OF AMOUNT ARBITRATED IN EACH ARBITRATION CENTRE IN 2017 (US$b)

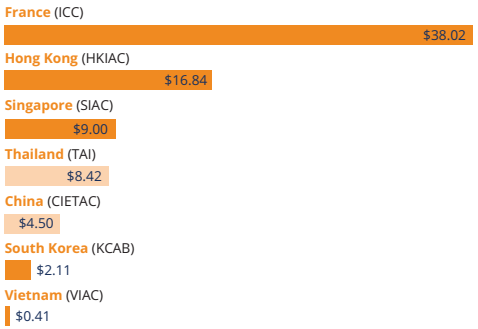


Data received & analysed | Desktop research | Data not received & analysed

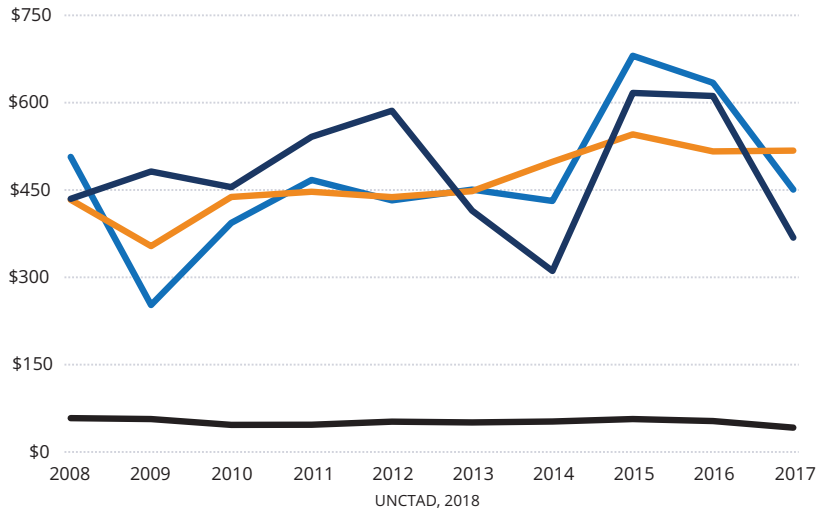
Notes: All arbitration amounts that were denoted in local currencies were converted to USD for comparison
1. Data recorded by Thai Arbitration Institute

As the region is increasingly infused by movement of capital and commerce, the likelihood of business friction and disputes increases. The United Nations Conference on Trade and Development's tracking of foreign direct investment (FDI) from 2008 to 2017 reveals that Asia saw an expansion in capital inflows whereas total FDI reduced during the same period in the US and Europe as per the UNCTAD's World Investment Report 2018 (see graph on next page).

AVERAGE AMOUNT PER CASE ARBITRATED IN EACH CENTRE (US$m)



FOREIGN DIRECT INVESTMENT ($ BILLION)

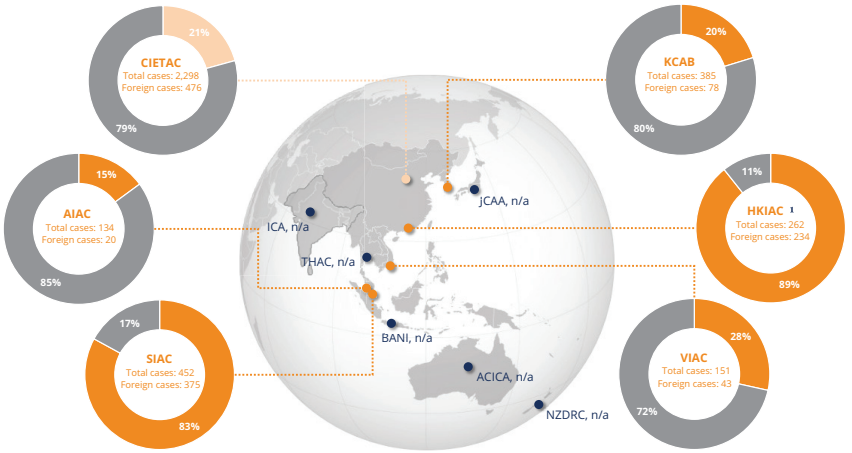


Asia – $517.48 | America – $450.67 | Europe – $368.24 | Africa – $41.77

Five of the seven arbitral institutions approached for this report track the number of arbitration cases brought about by a foreign entity. Of the seven arbitral institutions with such data, the HKIAC (89%) and SIAC (83%) have seen an overwhelming proportion of matters that were initiated by a foreign entity. This again confirms the finding in the International Bar Association's 2015 **report** that Hong Kong and Singapore have emerged as safe seats in the region for foreign arbitration. Whilst in 2017, CIETAC recorded the highest number of arbitration cases initiated by a foreign party with 476, that only constitutes 21% of the total number of cases filed at CIETAC. In the same year, SIAC attracted 375 arbitration cases from foreign parties while HKIAC (in their most recent report) attracted 234 cases from foreign parties.

According to Alexander Fessas and Abhinav Bhushan of the ICC, the reasons for which China, India, Indonesia, Singapore and Vietnam seem to have more foreign parties is that not only are these the countries with the fastest growing economies in the world but they are also the largest consumers of energy – a sector in which disputes are predominantly subject to arbitration. This observation is confirmed also by Franz Dominic from the AIAC, who added that Singapore is the base for many businesses from which foreign companies operate in the region.

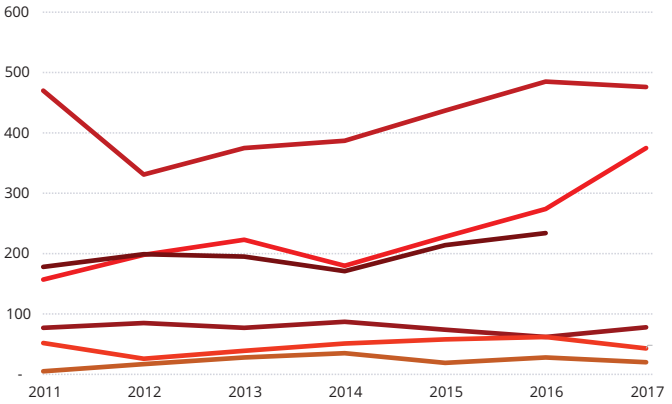
SNAPSHOT OF FOREIGN ARBITRATION CASES IN EACH JURISDICTION



Data received & analysed | Desktop research | Data not received & analysed

Note:
1. Only showing 2016 data for HKIAC because they have not released their 2017 breakdown of foreign vs local cases.

NUMBER OF FOREIGN ARBITRATION CASES IN EACH CENTRE



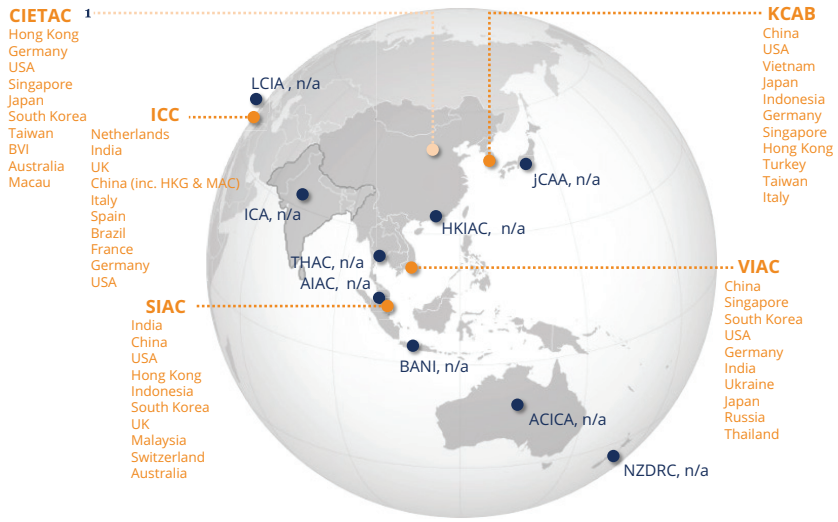
China (CIETAC) 476 | Singapore (SIAC) 375 | Hong Kong (HKIAC) 234
South Korea (KCAB) 78 | Vietnam (VIAC) 43 | Malaysia (AIAC) 20

China, India, Indonesia, Singapore and Vietnam are the parties to several multilateral and bilateral investment treaties, which often give rise to disputes. In addition, Messrs Fessas and Bhushan observed that the Belt and Road Initiative will continue to give rise to supply chain disputes to which companies from these above-mentioned countries will be party.

Michelle Chiam Xiu from SIAC observed that as FDI increased over the years into those countries, it has invariably led to an increase in cross-border disputes involving parties from these countries. With the increasing popularity of international arbitration, the number of arbitration cases involving parties from China, India, Indonesia, Singapore and Vietnam have increased as a result. From SIAC's perspective, parties from India, China and Indonesia have ranked amongst SIAC's top ten foreign users since 2011. Vietnamese parties at SIAC were amongst SIAC's top fifteen foreign users in 2016 and 2017.

Using data from the four arbitral institutions in the region that report on the country of origin of parties initiating arbitration cases, a trend can be observed. Chinese entities are amongst the top 10 users of the KCAB, VIAC and SIAC. US entities are amongst the top five users of the KCAB, SIAC, CIETAC and VIAC. Indian entities also feature amongst the top five users of SIAC and VIAC as well as the ICC.

SNAPSHOT OF FOREIGN ARBITRATION CASES IN EACH JURISDICTION (2011 TO 2017)



Data received & analysed | Desktop research | Data not received & analysed

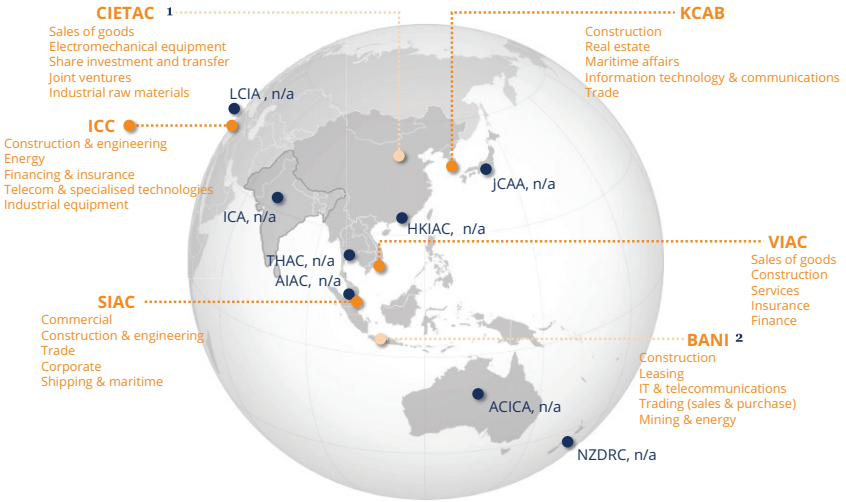
Note:
1. Only showing data for 2014 and 2015 because those are the only years reports were published

US parties also feature strongly amongst the top ten users of arbitral institutions like the KCAB, SIAC and VIAC. Messrs Fessas and Bhushan from the ICC noted that American companies are leaders in several sectors of the economy across the world, and they continue to be have the highest number of parties by country of origin in ICC arbitrations (and arbitration in general). There seems to be no reason to believe that American parties' involvement in commercial cases will drop anytime soon.

Ms Chiam from SAIC added that as FDI from the US in Asia has increased steadily over the last decade, this has invariably led to an increase in cross-border disputes involving parties from US. As a result, the number of arbitration cases filed involving US parties has increased because the preferred mode of dispute resolution for cross-border disputes is arbitration. Users from the USA have constantly been amongst SIAC's top ten foreign users since 2011. Insofar as US parties continue to remain active in cross-border transactions, we expect that the number of US parties at SIAC will continue to increase in the future.

A breakdown of the type of cases recorded by CIETAC, BANI, KCAB, SIAC and VIAC reveals a number of similarities and differences in the type of disputes in the Asia-Pacific region. Trade and sales appear in the top five types of disputes filed in all Asia-Pacific jurisdictions. Similarly, construction also appears in the top five types of disputes filed at BANI, KCAB, SIAC and VIAC. By way of comparison from outside the region, construction appears in the top five types of disputes filed at the ICC.

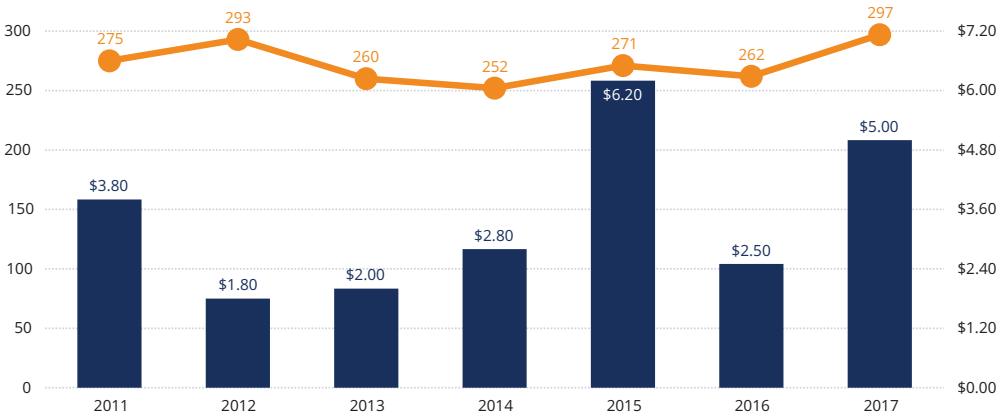
SNAPSHOT OF ARBITRATION CASES BY TYPES IN EACH JURISDICTION (2011 TO 2017)



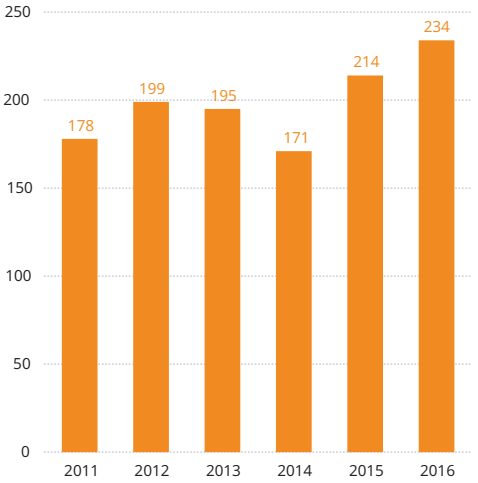
Data received & analysed | Desktop research | Data not received & analysed

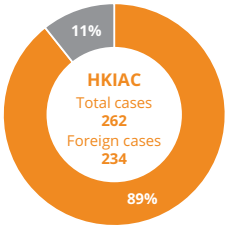
Note:
1. Only showing data for 2014 to 2016 because those are the only years reports were published.
2. Only showing data for 2014 and 2015 because those are the only years reports were published.

VALUE OF ARBITRATION CASES ($BILLION) NUMBER OF ARBITRATION CASES



NUMBER OF FOREIGN ARBITRATION CASES





HKIAC	Key statistics (2017)
Numberof cases	262
Proportion foreign	89%
CAGR	1%
Amount per case	$16.84m

HKIAC							
Cases	2011	2012	2013	2014	2015	2016	2017
Arbitration cases	275	293	260	252	271	262	297
HKIAC rules	41	68	81	110	116	94	156
UNCITRAL rules	234	225	179	142	155	168	141

Cases							
Arbitration cases	275	293	260	252	271	262	
International	179	199	195	171	214	228	
Domestic	96	94	65	81	57	34	
Exchange rate	7.784	7.756	7.756	7.754	7.752	7.762	7.793
Amount (HKD)	2011	2012	2013	2014	2015	2016	2017
HKD in billion	4.8	7.9	1.1	3.4	47.9	19.4	37.8
USD in billion	$0.62	$1.02	$0.14	$0.44	$6.18	$2.50	$4.85
Amount (US billion)	$3.80	$1.80	$2.00	$2.80	$6.20	$2.50	

Summary of findings

- The number of arbitrations filed per year remains steady. However, when we look at the rules according to which they have been arbitrated, there is a more pronounced movement.
- We see a decline in the use of UNCITRAL and a steady increase in HKIAC rules.
- In 2017, this division has become virtually 50/50 with HKIAC overtaking UNCITRAL for the first time.

Snapshot of the HKIAC as an arbitral institution

By Wesley Pang, Hong Kong International Arbitration Centre

The HKIAC continues to see disputes arising in the corporate and finance, construction, maritime and international trade sectors.

- 2017: international trade (31.9%); construction (19.2%); corporate and finance (13.5%); maritime (8.8%)
- 2016: corporate and finance (29.3%); maritime (21.6%); construction (19.2%); international trade (10.8%)

The fact that corporate and finance disputes remain among the main sectors in which we are seeing disputes arise is, for example, consistent with Hong Kong being an international financial centre with an integrated and sophisticated network of financial institutions and markets. Notably, Hong Kong has been ranked third worldwide and first in Asia by the Global Financial Centres Index this year. Its stature as a global financial centre is, to a large extent, built on its status as the world's freest economy for the past 24 years and the most judicially independent jurisdiction in Asia for the last ten years. In line with this status, the HKIAC launched in May 2018 a Panel of Arbitrators for Financial Services Disputes, comprising some of the world's leading experts in arbitrating financial services matters, including those in relation to structured financing, sovereign lending, forex trading, derivatives, asset management, interbank and banking regulatory matters.

We are also seeing a growing number of high-value cases being referred to the HKIAC for arbitration. In particular, the total amount in dispute has risen from approximately US$2.5 billion in 2016 to approximately US$5 billion in 2017, which represents a 100% increase. The average amount in dispute in 2017 was approximately US$30.6 million.

Hong Kong is a premier gateway to Asia. Its unique geographical and geopolitical position makes Hong Kong among the first stops for international companies seeking access to Asia and for Asian companies reaching out to the world. In this regard, we saw parties from 39 jurisdictions participating in the HKIAC arbitrations in 2017. The top ten geographical origins or nationalities of these parties were:

1	Hong Kong	6	United States
2	China	7	South Korea
3	Singapore	8	Thailand
4	British Virgin Islands	9	Macau
5	Cayman Islands	10	United Kingdom

As a gateway to Asia, Hong Kong also enjoys a particular advantage in relation to international disputes involving Mainland Chinese parties. From the above, it can be seen that such parties remain the top foreign users of the HKIAC arbitration (nearly, 35% of new arbitrations filed with the the HKIAC in 2017 involved a Mainland Chinese party). In this regard, the HKIAC continues to handle the largest number of arbitration cases involving Mainland Chinese parties among arbitral institutions outside of Mainland China. It is also worth noting that Hong Kong's proximity to the mainland ensures that the HKIAC benefits from an excellent knowledge of Mainland China, including its commercial, regulatory and legal environments

Susan Dunn, co-founder of Harbour observes that:

"the Working Group played an instrumental role in getting the Code of Conduct approved, which removed the final hurdle to third party funding of arbitration in Hong Kong. This will only serve to make Hong Kong a more attractive seat for arbitration (much like the legalisation of TPF did for Singapore in 2017). We are looking forward to now funding arbitrations to add to the insolvency claims we already fund in Hong Kong."

Encouraging Figures for Funding in APAC

By Dominic Afzali, Director of Litigation Funding

The recent report published by Harbour Litigation Funding and Conventus Law on arbitration in Asia-Pacific (**APAC**) confirms a number of significant factors which are important for third party funders to consider in relation to funding international arbitration in the APAC, in particular:

a. there is a high volume of cases; and
b. the national origins of parties to arbitrations in APAC are diverse.

These factors can indicate to a litigation funder that a new market or jurisdiction has potential for development. Harbour considers that Hong Kong is such a new market given that (1) third-party funding (**TPF**) of litigation is generally not permitted; and (2) TPF of international arbitration was only legalised in February 2019.

This article therefore focuses on the above factors from a funder's perspective insofar as they relate to Hong Kong to mark Hong Kong's recent liberalisation of the TPF market for international arbitration.

The high volume of cases in Hong Kong likely gives rise to a good market for TPF

It is important when opening a new market for TPF to ascertain the size (and growth rate) of the opportunity for investment in terms of volumes of new cases. This is because only a fraction of the total number cases will ultimately be signed up for TPF. The Harbour-Conventus report confirms that total number of arbitrations filed yearly across APAC is high and continues to grow on a year-to-year basis.

At first glance, the number of new arbitrations filed at the HKIAC seems to buck the overall growth trend in the region. Whilst the overall number of new cases filed yearly at the HKIAC remains consistently high (with 297 new cases filed in 2017), the growth rate in new cases filed each year has plateaued in recent years (the HKIAC's compound annual growth rate (**CAGR**) from 2011-2017 is only 1%).

The HKIAC's relatively low CAGR could be attributed to the increased competition between arbitral institutions based in Hong Kong for Hong Kong-seated arbitrations. In recent years both the ICC and CIETAC have established offices and case management teams in Hong Kong, in recognition of Hong Kong's (growing) importance as a seat of international arbitration. The competition is already driving increased innovation by the HKIAC to provide greater value and quality of services to its users[1]. It also appears to be eating into the HKIAC's numbers, as indicated in the ICC and CIETAC's statistics for arbitrations seated in Hong Kong. For example, in 2017, the ICC registered 18 new arbitrations seated in Hong Kong, and CIETAC's Hong Kong Arbitration Centre registered 23 new arbitrations. Together those arbitrations make up 13.8% of the new arbitrations filed at the HKIAC in 2017. In a hypothetical situation where those cases were added to the HKIAC's total, the HKIAC's CAGR would have trebled to 3%. That would have been a healthy growth rate for an arbitral institution of the HKIAC's considerable size and stature.

Thus, the HKIAC's apparent recent doldrums in relation to CAGR may in fact belie a wave of growth in the overall number of Hong Kong-seated arbitrations. This is encouraging for prospects of TPF in Hong Kong, because – even for a funder of Harbour's size – when considering whether to devote resources to developing a new market like Hong Kong there needs to be a robust (and growing) number of cases.

1 For instance, in November 2018 the latest iteration of the HKIAC administered arbitration rules came into force, which contains novel provisions which address two of the principal contemporary critiques of international arbitration: high costs and lack of speed. The new HKIAC rules encourage the use of technology to reduce costs (e.g., providing for delivery of documents electronically, which eliminates the costs of serving pleadings and supporting documents in hardcopy). They also respond to user feedback requesting summary determination procedures (e.g., by providing for early determination of points of law or fact), which many users have cited as an innovation that would improve international arbitration procedure.

The high percentage of foreign parties to HKIAC arbitrations is likely a result of the consensus view that Hong Kong is a "safe" seat for arbitration,

Diverse parties may lead to further opportunities for TPF

The Harbour-Conventus report confirms that arbitration in APAC – and in Hong Kong in particular – is truly international. Indeed, an astonishing 89% of new cases registered at the HKIAC in 2017 were commenced by an international party. The high percentage of foreign parties to HKIAC arbitrations is likely a result of the consensus view that Hong Kong is a "safe" seat for arbitration, with reliable arbitration-friendly legislation and courts, and which is suitable for disputes related to business conducted in APAC.

More than half of the parties that Harbour funds these days are sophisticated, well-funded (and well-advised) companies and institutions. They seek TPF for some or all of their disputes to increase their cashflow, manage their litigation risks (by laying off the downside of litigation), and to benefit from Harbour's global litigation expertise. These are also the same sorts of companies that, when structuring their international transactions in APAC, agree to refer any disputes arising therefrom to arbitration seated in Hong Kong to avoid further litigation risks such as local court biases.

The inference to be drawn from this key correlation is that the opportunities to develop the Hong Kong market for a funder of Harbour's size and experience will be significant, now that TPF has been opened up for international arbitrations in Hong Kong. We anticipate that the availability of TPF will drive growth in parties opting for arbitration in Hong Kong in their agreement so that they can effectively take litigation risks off their balance sheet and concentrate on growing their own businesses.

Future outlook for growth in international arbitration and TPF thereof in Hong Kong

Particularly as Beijing's Belt and Road Initiative gathers steam, international disputes with PRC entities will likely be on the rise. This means that total numbers of arbitrations seated in Hong Kong will continue to grow due to Hong Kong's status as a preferred seat for international arbitrations involving PRC entities. This is because, much like Stockholm was recognised as a neutral arbitral seat by US and Soviet entities for the resolution of East-West trade disputes during the Cold War, Hong Kong is seen as a safe, neutral seat for resolution of international commercial disputes with PRC entities. Parties to agreements in relation to the Belt and Road Initiative now can choose between three reputable Hong Kong-based arbitral centres' sets of rules to include in their agreements, and they can seek TPF to lay off the risk of any arbitration arising out of those agreements. All this should encourage litigation funders who are considering investing in arbitration and arbitration-related cases in Hong Kong, because a safe seat with outstanding arbitration practitioners continues to improve the quality of its offering.

Harbour News

Harbour Drinks Reception

In March, we welcomed a small number of our contacts to see our new office and to meet the team. Guests enjoyed an array of different food, speaking to a gin specialist all while an artist sketched the evening.

ARTICLE SIX - HARBOUR DRINKS RECEPTION

We are already planning our
summer drinks reception which will be held in Central London.

If you would like to attend, please register your interest by emailing:
events@harbourlf.co.uk

Upcoming
Events

London International Disputes Week 2019
7 – 10 May 2019

Harbour is thrilled to be a Silver sponsor at the event this year.

For more information on how to attend, go here: **www.lidw.co.uk**

Association of Corporate Treasurers annual conference
21 – 22 May 2019

We are delighted that Harbour Solutions Group is sponsoring the event and hosting a session in Manchester.

Hong Kong Arbitration Week
20 – 25 October 2019

Once again this year, Harbour will be hosting the annual lecture as part of the week on Monday 21st October. Please save the date for this exclusive event which remains a key focus of the week's events. **hkaweek.hkiac.org**

The Harbour Process
Simple Steps of Funding

Initial assessment
1

One of our litigation funding directors assesses the case based on the available legal opinions, quantum reports and draft budgets, after a Non-disclosure Agreement (NDA) has been signed. Our team of experienced litigators can deal with this initial stage quickly.

Letter of intent
2

If the initial criteria are met, we issue our letter of intent setting out our pricing based on the risk, size and length of the case. During an agreed period of exclusivity, we commit further internal/external resources to do our diligence, discuss potential risks and prepare for approval – at no cost to the claimant.

Investment Committee
3

The committee includes three prominent QCs who consider the legal merits and overall proposal in depth. They meet every two weeks.

Funding agreement and case progress
4

Once the funding has been approved, the funding agreement is signed.
Then our dedicated case managers, all experienced lawyers, pay the bills regularly and on time and review case progress. Together with the claimant's legal team, they monitor risk.

The Pioneer of
Litigation Funding