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A REVIEW OF LEGAL FINANCE

Key developments in insolvency funding in Hong Kong and Singapore

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Legal finance has been used in Asia for over a decade in the context of insolvency, but the awareness of its use among the legal community and the appreciation of its value for insolvency practitioners have grown considerably following the introduction of the third-party arbitration funding framework in Singapore and Hong Kong. Courts in both jurisdictions have in recent years clarified and expanded the scope of legal financing arrangements for insolvency practitioners. Given the courts' increased willingness to facilitate external finance, it is essential for practitioners to understand its current status in these two jurisdictions, the practical considerations of financing in the insolvency context and what lies ahead for legal finance in Asia.

Arbitration proceedings have brought renewed momentum to the use of funding in insolvency

Both Singapore and Hong Kong recently passed legislation establishing a framework for legal finance and its various products to be used in association with international arbitration matters. The framework in Singapore was given effect through amendments in 2017 to the Civil Law Act; the Hong Kong funding arrangement introduced by the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 was implemented in February 2019. The introduction of these arbitration frameworks has since led to a renewed interest in the development of the legal finance industry, not only in insolvency in Hong Kong and Singapore, but also more broadly across other Asian jurisdictions.

Further, growing focus in recent years on corporate governance in public companies has acted as a catalyst for the increasing willingness of liquidators and creditors to pursue claims relating to misconduct of former company directors and audit oversights.

The market momentum and growing awareness of legal finance more broadly are helping to facilitate the pursuit of claims

relating to insolvency situations, thereby enhancing the prospects of recovery for creditors. As developments continue to unfold through case law and legislative reform, it's essential for insolvency practitioners to stay up to date on the changing status of external finance in these jurisdictions and understand the practical considerations of insolvency proceedings and legal finance.

Developments in insolvency funding in Hong Kong vs. Singapore

The development of legal finance in Hong Kong and Singapore (outside the context of international arbitration) is progressing at different speeds, with Singapore more willing to make funding available whereas Hong Kong seems to be treading more cautiously.

SINGAPORE

The Courts in Singapore have played an important role in pushing forward the development of legal finance in Singapore, and there have been significant changes in recent years to the law governing legal finance agreements in Singapore. The first came from the landmark 2015 decision *Re Vanguard Energy*, in which the High Court held, for the first time, that the sale of the fruits of a cause of action belonging to a company was within a liquidator's power of sale and was therefore permissible. In *Re Vanguard*, Chua Lee Ming JC (as he then was) gave considerable support to the use of funding, expressing the view that it was "undeniable that litigation funding has an especially useful role to play in insolvency situations," signaling growing support and a more positive attitude towards external finance from the Courts.

The second significant change came in 2017 when the Civil Law Act was amended to abolish the torts of maintenance and champerty, and the use of "third party funding" was recognized by legislation for the first time. It is noteworthy that the amendments to the 2017 Act were forward-looking as funding is made possible for "prescribed dispute resolution proceedings" which, in addition to international arbitration, will in time be expanded to cover other dispute resolution mechanism.

The third and most recent development—the Insolvency, Restructuring and Dissolution Act (IRDA)—came into effect on 30 July 2020 as an omnibus legislation that collated and consolidated Singapore's insolvency regime into a single piece of legislation. The Act expanded and clarified the circumstances in which an insolvency practitioner may use legal finance, consolidating the incremental developments brought by the Courts in this area.

HONG KONG

While maintenance and champerty remain torts and crimes under Hong Kong law, case law has incrementally expanded the permissibility and use of finance in the context of insolvency proceedings—an important exception to the operation of the two doctrines. However, the absence of broader reforms to the legislative framework has slowed this evolution, as there has not been the opportunity to formalize the use of legal finance in the context of insolvency proceedings. Development via case law is naturally a slower process.

Until recently, it has been the practice for liquidators to apply for court sanction and for funders to require such approval as part of the funding agreement. This position recently changed as a result of *Re Patrick Cowley*, which held that liquidators need not obtain court approval before entering into a third-party funding agreement.

Despite the absence of a comprehensive statutory regime for insolvency law, there

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