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China Working Group News

Newsletter of the International Bar Association Legal Practice Division

SEPTEMBER 2019

Hong Kong Authorities should consider putting in place an appropriate mechanism that would allow litigation funding and at the same time prevent any abuse of its use; otherwise, Hong Kong could lack 'sex appeal' as hub for international commercial disputes.

An appropriate conclusion seems to be a quote from a learned practitioner: 'The future for arbitration practitioners is bright, and the future for third-party funders, especially for third-party funding law firms, is even brighter. While this area is very new, there will undoubtedly be a lot of further developments in Hong Kong, which will present many new opportunities to local and overseas arbitration professionals.'[10]

Notes

1 According to the Legislative Council Brief dated 28 December 2016: 'The new Part 10A is intended to come into operation in 2 stages: Divisions 1, 2, 4 and 6 will commence on the gazettal of the Ordinance, while Divisions 3 and 5 will commence on a date to be appointed (see clause 1(2) and (3)). This is to facilitate the preparatory work for the relevant regulatory framework to be done before the provisions clarifying the legal position come into operation' (para 23). Division 3 and 5 shall come into force on 1 February 2019.

2 Raafat Imam v Life (China) Company Limited and others, [2018] HKCFI 1852.

3 Hong Kong Lawyer, 'Market Reaction: Commercial Litigation Third-Party Funding' 30 August 2018, www.hk-lawyer.org/content/market-reaction-commercial-litigation-third-party-fundingaccessed [23/05/2019].

4 Hong Kong Court of First Instance, [2018] HKCFI 1852, para 98.

5 CIETAC Hong Kong Third-Party Funding Guidelines, guideline 1.1.

6 Section 98U Arbitration Ordinance (Cap. 609).

7 CIETAC Hong Kong Guidelines, guideline 4.3. Similar provisions (regarding the duty to disclosure, the power of arbitral tribunal to order such disclosure and the impact of a funding agreement on a security for costs application) are present in the CIETAC Investment Arbitration Rules 2017, Art 27.2 and 27.3.

8 Pursuant to section 98X(1) Arbitration Ordinance, the advisory body shall be appointed by the Secretary for Justice.

9 Not to the counterpart. However, in some cases, the third-party funder accepts voluntarily to pay costs directly to the counterpart. For instance, see Progas Energy Limited and others v The Islamic Republic of Pakistan, [2018] EWHC 209 (Comm), 31.

10 Melody Chan, 'Hong Kong', in Third Party Litigation Funding Law Review, Leslie Perin (ed), Ch 8, p 86.

Rabindra Jhunjhunwala

Khaitan & Co, Mumbai

rabindra.jhunjhunwala@khaitanco.com

Parag Bhide

Khaitan & Co, Mumbai

parag.bhide@khaitanco.com

Chinese investments in India – some legal considerations

India – a preferred investment destination

India is the seventh-largest country in the world by area and has the second-highest population, with more 1.3 billion people. It is the largest democracy with a pluralistic culture due to a multi-lingual and multi-ethnic society.

The Indian economy is the tenth-largest economy by nominal GDP and the third largest by purchasing power parity. India is a federal union of states; and a sovereign, socialist, secular, democratic republic, made of 29 states and seven union territories.

For some time now, India has been among the preferred destinations for foreign direct investment (FDI). FDI in India has grown significantly after the implementation of pro-business initiatives like Make in India, continued liberalisation of the FDI regime across sectors, the ambitious Start up India programme, new insolvency law, curb on corruption, goods and services tax, to name a few. These reforms have also improved India's ease in doing business.

Chinese FDI in India has also surged in recent times. In addition to traditional investments such as infrastructure and manufacturing, Chinese firms are focusing on startups and growth stage technology platforms.

This article summarises the legal provisions governing investments in India, keeping in mind the Indo–Chinese business corridor.

Investments into India – legal aspects

Chinese investors have options to set up ventures, invest in or acquire existing companies in India. For setting up ventures in India, various forms of business entities are available. However, the entity options available to non-resident investors intending to set up their business in India are more specific. Broadly, the entity types fall into two categories, unincorporated entities and incorporated entities.

Unincorporated entities

A non-resident entity may set up branch offices, liaison offices or project offices in India. These are not separate legal entities, but entities that are set up for a fixed period and for specific purposes. The setting up of these entities is regulated by the Reserve Bank of India (RBI). A liaison office acts as a representative office of its parent company in India. A branch office is an establishment of the parent entity and is allowed to carry out the same or substantially same activities as its parent company. A project office is permitted for specific projects to be carried out in India by the person resident outside India. The RBI regulates the activities carried out by these offices.

Incorporated entities

A non-resident entity may set up private limited companies, public limited companies or limited liability partnerships. FDI in incorporated entities in most sectors, including manufacturing, technology and services, follows an automatic route and no regulatory approvals are required for bringing in the FDI. Some sectors such as pharmaceuticals and retail trading are still regulated and may need regulatory approvals for investing beyond fixed caps for FDI, or to adhere to sectoral conditions such as local sourcing or minimum capitalisation.

Foreign investment regime in India has been simplified considerably, with the government introducing a single foreign investment cap, subsuming FDI, foreign portfolio investment and investments by non-resident Indians. All foreign investments in a company would be clubbed together under the composite cap. Foreign investment will include all types of foreign investments in the investee company (ie, direct or indirect).

Abundance of funding options

Non-residents can subscribe to or acquire following instruments under the FDI route:
- equity shares;
- compulsorily convertible preference shares (CCPS);
- compulsorily convertible debentures (CCD);
- warrants (in case of listed Indian companies); and
- convertible notes (in the case of startups subject to certain prescribed conditions).

CCPS and CCDs must compulsorily convert into equity shares at the end of a specified period. The RBI has also allowed equity shares, convertible preference shares and convertible debentures to be issued to non-residents, which are coupled with optionality clauses (such as put option) subject to prescribed conditions and pricing, provided there is no assured return guaranteed to a non-resident. Indemnity holdbacks and earn-out structures are also permitted under the automatic route, subject to certain limits on time and amount to be withheld.

As regards to debt funding, on 16 January 2019, the RBI notified a new external commercial borrowing framework (ECB). The framework allows for automatic approval of ECBs of up to US$750m by all eligible borrowers in each financial year. The list of eligible borrowers has been expanded to include all entities eligible to receive FDI. This change opens up ECB avenues for a range of new borrowing entities, such as companies in the service sector.

Conclusion

The Indian government has gradually liberalised the foreign investment regime, generating significant interest among foreign investors.

China, one of India's largest trading partners, has emerged as one of the fast-growing sources of foreign direct investment in India. In recent years, Chinese investment has surged in sectors such as technology, e-commerce and transportation. Given recent liberalisation of laws governing foreign investments and continued focus on reforms, we expect this trend to continue.