Brand New Possibilities — Opening Up Third-Party Funding for International Arbitration in Singapore

On 10 January 2017, the Singapore Parliament passed the Civil Law (Amendment Act) 2017 ("**Amendment Act**"), which came into force on 1 March 2017. The Amendment Act introduced changes to both the Civil Law Act and the Legal Profession Act, permitting qualifying organisations to provide third-party funding for international arbitrations that are seated in Singapore.

What are the changes introduced by the Amendment Act?

Previous state of the law

Third-party funding previously not allowed in Singapore

Prior to the enactment of the Amendment Act, contracts affected by maintenance and champerty would be struck down as being against public policy – "*maintenance*" being the provision of assistance in litigation by a disinterested third party and "*champerty*" being a particular form of maintenance where a disinterested third party agrees to aid another to bring a claim on the basis that the third party will receive a share of what may be recovered in the action. Due to the operation of the laws of maintenance and champerty, third-party funding of claims was generally not allowed in Singapore.

Revocation of prior ban on third-party funding

Abolishment of tort of maintenance and champerty

The Amendment Act seeks first to clarify, by way of a new section 5A(1) to the Civil Law Act, that no person, under the law of Singapore, shall be liable for the tort of maintenance and champerty.

Third-party funding contracts may still be unenforceable

This does not mean, however, that all contracts for third-party funding of claims would now be given effect. Indeed, section 5A(2) of the Civil Law Act further clarifies that even though there will no longer be civil liability for the tort of maintenance and champerty, contracts for third-party funding of claims may still be *unenforceable* on the basis that they are contrary to public policy and, hence, illegal.

Third-party funding contracts for international arbitration declared to be valid

Contracts for funding of international arbitration claims declared to be valid

Only certain types of contracts for third-party funding of claims are expressly identified to be valid. Section 5B of the Civil Law Act read with Regulations 3 and 4 of the Civil Law (Third-Party Funding) Regulations 2017 stipulate that only third-party funding contracts which meet the following criteria will be enforced in Singapore:

(a) The third-party funder must be a "**qualifying Third-Party Funder**", i.e., a third-party funder must: (i) carry on the principal business of funding claims, whether in Singapore or elsewhere; and (ii) have a paid-up share capital, or have managed assets, of not less than S$5 million or the equivalent amount in foreign currency.

(b) The funding must be in relation to "**international arbitration proceedings**" (and/or related court / meditation proceedings). An arbitration is "international" if it falls within the scope of section 5(2) of the International Arbitration Act, namely:

(i) at least one of the parties to an arbitration agreement has its place of business in a State other than Singapore, at the time of the conclusion of the agreement;

(ii) one of the following places is situated outside the State in which the parties have their places of business:

(A) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(B) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(iii) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

What happens if a third-party funder fails to meet the criteria of a "qualifying Third-Party Funder"

Non-qualifying Third-Party Funder may still receive payment

Even if a third-party funder fails to meet the criteria of a qualifying Third-Party Funder, this does not mean that it cannot enforce its third-party funding contract. Sections 5B(5) and (6) of the Civil law Act provides that a third-party funder may still apply to a court or arbitral tribunal to enforce its third-party funding contract on the ground that the non-compliance was accidental or that it is just and equitable for it be granted payment.

Funded party can always enforce its rights under the contract

It is noteworthy that even if a third-party funder should fail to meet the criteria necessary to be a qualifying Third-Party Funder and therefore be disentitled from claiming under the third-party funding contract, the funded party's rights are not affected. The third-party funder would still be obliged to perform the contract and the funded party can legitimately bring an action to enforce its rights against the third-party funder, should the latter not comply with its contractual obligations.

Lawyers' role and duties of disclosure

Lawyers can be involved in matters pertaining to the third-party funding contract

The Amendment Act also brought about changes to the Legal Profession Act. Section 107(3A) of the Legal Profession Act now provides that lawyers are allowed to introduce or refer a third-party funder to their clients, advise, draft or negotiate a third-party funding contract on their client's behalf, and act on behalf of their clients in any dispute arising out of the third-party funding contract.

Lawyers cannot receive referral fees

While a lawyer can be remunerated for the provision of legal services which are connected to the third-party funding contract, a key caveat is that the lawyer must not receive any direct financial benefit from *introducing or referring* a third-party funder to the client. Rule 49B of the Legal Profession (Professional Conduct) Rules 2015 also provides that the lawyer cannot directly or indirectly hold any share or ownership interest in the third-party funder which it refers to the client, or any third-party funder which has a third-party funding contract with the lawyer's client.

Lawyers must disclose existence of third-party funding

Rule 49A of the Legal Profession (Professional Conduct) Rules 2015 provides that when conducting any dispute resolution proceedings, the lawyer must disclose to the court / tribunal and to all other parties to the proceedings the existence of any third-party funding arrangement pertaining to that dispute, and the identify and address of the third-party funder. Such disclosure must be made either at the date of commencement of the dispute, or as soon as practicable. Such disclosure is necessary so as to ensure that there is no conflict of interest.

Further guidelines and best practices

Further guidelines for third-party funding will be put in place in due course

Additional guidelines and best practices will be put in place in due course and these will apply not just to lawyers, but extend also to regulating the conduct of third-party funders and arbitrators. The Senior Minister of State for Law, Indranee Rajah *S.C*, has noted that the legislature will draw upon the experience of other countries where third-party funding is more developed, and will adopt a limited but targeted regulatory approach. Issues such as confidentiality, conflicts of interest, control of proceedings and termination of the funding contract are amongst those which will be addressed in the subsequent guidelines to be promulgated.

Why are the changes brought about by the Amendment Act important?

Entrenching Singapore's position as an international dispute resolution hub

In endorsing the changes under the Amendment Act, Ms Rajah noted that opening the doors to third-party funding would serve to entrench Singapore's position as a leading international dispute resolution hub.

As it stands, Singapore is one of the top 5 most preferred arbitration seats in the world alongside London, Paris, Geneva and Hong Kong. London, Paris and Geneva already permit third-party funding for international arbitration proceedings while Hong Kong is presently deliberating whether to allow third-party funding for such proceedings. Other jurisdictions such as Australia, Germany, the United States and Wales also already allow for such third-party funding.

The changes under the Amendment Act are thus important to promote Singapore as an arbitration centre so that parties do not decide to arbitrate elsewhere due to the lack of third-party funding in Singapore.

How does the Amendment Act affect you?

Potential claimants in international arbitration more able to initiate claims

One key benefit brought about by the Amendment Act is that potential claimants who may not have the requisite funds to initiate / sustain a claim in international arbitration can now turn to professional third-party funders to assist in bearing a substantial part of the costs of such proceedings. Indeed, costs are often considered to be one of the key downsides of international arbitration, and can have a deterrent effect on the commencement of a claim, especially for those with more limited resources. This is particularly so given that the cross-border nature and scale of international arbitrations often entail the incurring of significant legal costs.

The availability of third-party funding will therefore help mitigate against situations where potential claimants with legitimate meritorious claims are effectively compelled to either settle the dispute on unfavourable terms or abandon their claims altogether, simply because it would be too costly for them to ventilate their claims fully in arbitration.

Potential claimants in international arbitration able to hedge risk

Quite apart from claimants with limited financial resources, even those with resources may find it beneficial to turn to third-party funding – instead of risking the possibility of total loss should a claim fail, a potential claimant can now hedge its risk by procuring external funding at a known, specified cost.

How does it work

The specific terms will have to be worked out / negotiated with the third party funder. Generally, however, a third-party funding arrangement may be structured along the following lines: (a) the third-party funder agrees to bear the costs up to a specified limit/budget; and (b) in exchange, the potential claimant agrees to reimburse the third-party funder in full, plus a success fee, in the event it is successful in the claim.

Potential increase in coverage of claims in the future

While the Amendment Act only permits third-party funding in international arbitration, the government has noted that this may change in the future. Third-party funding may eventually be available for other categories of proceedings as well, after a period of assessment.

25 YEARS

In essence, the Amendment Act has opened the door to third party funding. How much further that door opens will ultimately depend on the success of the recent legislative changes.

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