Third-Party Funding in Singapore: The Dawn of a New Era

Third-party funding is the funding of costs of legal proceedings by an entity that has no direct interest in the outcome of the dispute. Recent changes to Singapore law now allow third-party funding in respect of international arbitration proceedings, and provide parties with a new tool for financing claims.

On 10 January 2017, Parliament passed into law the Civil Law (Amendment) Bill that allows third-party funding for international arbitration and related proceedings before the Singapore courts. The enactment of these widely anticipated legislative amendments confirms that new sources of funding will now be available to parties that are involved in or are contemplating international arbitration proceedings.

Introduction

In our previous briefing in July 2016, we discussed the prevailing prohibition on third-party funding under Singapore law and how the Singapore government was expected to implement changes that would permit third-party funding in international arbitration and related proceedings.

On 10 January 2017, Parliament approved sweeping changes which, primarily:

- clarify that the common law torts of maintenance and champerty, inherited from English common law, are abolished in Singapore law; and
- provide that third-party funding agreements in relation to international arbitration and related proceedings will no longer be illegal and unenforceable under Singapore law.

The impetus for change

At the Second Reading of the Civil Law (Amendment) Bill on 10 January 2017, Senior Minister of State for Law, Indranee Rajah SC, observed that while Singapore had risen to rank among the top five most preferred arbitral institutions worldwide (alongside London, Paris, Geneva and Hong Kong), Singapore needed to "stay responsive to business and constantly adapt what we do".

With that in mind, the Senior Minister stated that the legislative changes seek to achieve the following objectives:

- To offer businesses an additional financing and risk management tool when engaged in the relevant categories of proceedings. This includes the financing of valid claims which they may otherwise not pursue due to financial constraints.
- To strengthen Singapore's position as a premier international commercial dispute resolution hub.

In short, the changes are designed to "level the playing field so that international businesses that arbitrate in Singapore are able to make use of the financing and risk management tools available to them in other major arbitration centres" (such as London, Paris and Geneva).

Key issues

- Singapore law no longer recognises the common law torts of maintenance and champerty.
- Third-party funding contracts are now permitted in international arbitration and related court and mediation proceedings.
- Prospective funders would have to meet certain requirements to qualify.

Abolition of the torts of maintenance and champerty

The new section 5A(1) of the *Civil Law Act* clarifies that the common law tort of champerty and maintenance is abolished in Singapore, as had previously been stated by the High Court in *Jane Rebecca Ong v Lim Lie Hoa*.

Nonetheless, Section 5A(2) provides that the abolition of such torts does not affect the rule that contracts of maintenance and champerty will continue to be unenforceable for being contrary to public policy. It is only for certain categories of proceedings, as prescribed by the Minister, that third-party funding contracts will not be deemed contrary to public policy or illegal.

Third-party funding agreements only valid in certain circumstances

The prescribed categories of dispute resolution proceedings in which third-party funding agreements are accepted as valid are set out in the *Civil Law (Third-party Funding) Regulations 2016*. At present, only third-party funding contracts in relation to international arbitration or related court and mediation proceedings are enforceable. This includes applications for stay of court proceedings in respect of matters which are the subject of arbitration agreements, as well as for the enforcement of arbitral awards. However, as the Senior Minister has commented, the "framework may be broadened in future after a period of assessment".

There are also certain prescribed conditions with which third-party funders must comply. Specifically:

- third-party funding may only be provided by professional funders whose principal business is funding claims; and
- third-party funders must have sufficient capital both to fund and meet the costs of the proceedings.

Failure to comply with such requirements may result in the third-party funder being unable to enforce its rights under the relevant funding agreement.

Lawyers allowed to introduce funders to clients

The recent amendments also encompass updates to the Legal Profession Act, which provide that solicitors are not prevented from:

- introducing or referring a third-party funder to their clients, as long as the solicitor does not receive any direct financial benefit from the introduction or referral;
- negotiating, advising on or drafting a third-party funding contract for their clients; or
- acting on behalf of their clients in any dispute arising out of the third-party funding agreement.

Disclosure and development of best practices over time

So as to ensure no conflict of interest, lawyers will be required to disclose the existence of any third-party funding which their client is receiving (under an amendment to the *Legal Profession (Professional Conduct) Rules*).

In addition, the Senior Minister expressed an expectation that, as in other jurisdictions where third party funding is permitted, a set of industry promulgated guidelines and best practices will emerge over time. According to the Senior Minister, "The Ministry of Law is working with arbitration institutions and practitioners to initiate the production of such 'soft laws'."

What this means for businesses and implications

The legislative amendments are welcome changes that should make it easier for businesses of all sizes to access justice through the arbitral process. Smaller firms will now be able to pursue claims that their limited resources might not have allowed previously. Similarly, larger firms will now be able to isolate the costs of arbitration and share the risk of pursuing arbitration with a third party.

An additional incentive for the use of third-party funding may be found in the recent English High Court decision in *Essar Oilfields Services v Norscot Rig Management* [2016] EWHC 2361, where it was held that a tribunal has the power (in this case, under the English Arbitration Act 1996) to award the cost of third-party funding as costs of the arbitration. This decision indicates a judicial inclination, in the English courts at least, for funded parties to be made whole and avoid being out of pocket *viz* the funder's fees.

The move to allow third-party funding in international arbitration also

coincides with the drive to promote Singapore as a hub for investor-state arbitration, an area which has been at the forefront of developments in funding practices, and the release of the SIAC Investment Arbitration Rules on 1 January 2017.

The availability of these financing options is good news for investors.

However, it is critical that parties considering using third-party funding understand the various products available, the terms on which they are usually offered and the extent to which each product may impact on the control of the proceedings and their recovery in the event of success.

The litigation funding market is increasingly diverse, in both products and providers, and expert guidance is required.

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