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IN THIS ISSUE

This article outlines the latest legislation in Singapore on Third Party Funding.

Third Party Funding in Singapore – Riding the New Wave and Navigating the Storms

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I. Introduction

Singapore has recently amended its Civil Law Act and Legal Profession Act to expressly allow third party funding of international arbitration and related court proceedings. As the name suggests, third party funding involves the funding of a claim by a party which is unconnected to the dispute.

Third party funding, which not too long ago was frowned upon for falling afoul of the principles of champerty and maintenance[1], is now said to be beneficial as it promotes access to justice, given the increasing costs of litigation[2]. This is particularly so in international arbitration where costs have been rising at an unsustainable rate.[3] This has paved the way for litigation funding to be utilised as a risk management tool through sharing both the risks and spoils of litigation, while the funders weed out frivolous claims.

The third-party funding industry has been thriving. Members of the Association for Litigation Funders in England and Wales have raised approximately £457 million in funds, and the IMF (Australia) Ltd earned a net income of $37,956,774 in 2011.[4]

As astutely observed by Mason P in *Fostif Pty Limited v Campbells Cash and Carry* [2005] NSWCA 83[5]:

> "*The considerations of public policy which once found maintenance and champerty so repugnant have changed over the course of time. The social utility of assisted litigation is now recognised and the provision of legal and financial assistance viewed favourably as a means of increasing access to justice*".

All is well and said - save that there is no consensus as between jurisdictions on how to regulate this burgeoning industry. This article examines the key issues of the funder's control over the proceedings and the funder's liability for costs in the context of international arbitration, and whether there is a need for further regulation.

II. Amendments to Singapore's Civil Law Act and Legal Profession Act

The key tenets of the amendments to the Civil Law Act (with effect from 1 March 2017) are that[6]:

(a) The common law tort of maintenance and champerty is abolished;

(b) Third-party funding contracts are not contrary to public policy or illegal in certain prescribed categories of dispute resolution proceedings. International arbitration and related

[1] 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. See *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another* [2007] 1 SLR(R) 989 and *Re Vanguard Energy Pte Ltd* [2015[SGHC 156.

[2] Report of the Law Reform Committee on Litigation Funding in Insolvency Cases at [8]

[3] Keynote address by the Honourable Chief Justice Sundaresh Menon at the Chartered Institute of Arbitrators International Arbitration Conference on 22 August 2013 at [15] – [16]

[4] Report of the Law Reform Committee on Litigation Funding in Insolvency Cases at [22] – [25]

[5] Report of the Law Reform Committee on Litigation Funding in Insolvency Cases at [10]

[6] Page 5 of Annex A of the Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016

court and mediation proceedings is currently the only category;

(c) Third party funders have to comply with regulations, or face consequences for non-compliance. Currently, these regulations deal with barriers to entry of the funder, restricting it only to funders which have litigation funding as its principal business, and which have a paid-up capital not less than S$5 million (or the equivalent)[7]; and

(d) The Legal Profession Act is amended so that a solicitor may recommend to his client a funder or facilitate a funding contract so long as the solicitor does not receive any direct financial benefit.

In line with the main global trend[8], Singapore has adopted a "*light touch*" approach in erecting a legislative framework which allows funding in the limited sphere of international arbitration and related court and mediation proceedings, with the potential to expand the framework to other areas. The Singapore Law Reform Committee has issued a report on expanding the ambit of permissible litigation funding to insolvency situations. As the Senior Minister of State of Law Ms Indranee Rajah had explained at a parliamentary session on 10 January 2017[9]:

> "*It is only for certain prescribed categories of proceedings that a third-party funding contract will not be contrary to public policy or illegal by reason that it is a contract for maintenance or champerty. These categories will be specified in subsidiary legislation after the Bill comes into force. At the outset, third-party funding will only be permitted for international arbitration proceedings, and related court and mediation proceedings. This will allow the framework to be tested within a limited sphere by parties of commercial sophistication.*"

In response to this blank canvas framework, arbitral institutions such as the Singapore Institute of Arbitrators[10] and Singapore International Arbitration Centre have released guidelines for the conduct of third-party funders and/or practice notes applicable to cases involving external funding. It is the writers' opinion that regulation by arbitral institutions may prove to be an invaluable source of "soft law", thus developing the norms of conduct of third party funders vis-à-vis other litigating parties which may shape future regulation of third party funding in other areas. Arbitral institutions are market sensitive and able to introduce more flexible regulations in the form of guidelines given the contractual nature of arbitration (which tribunals have regard to in rendering its awards) as compared to legislative intervention. In this way, the needs of the litigating parties (who have the right of choice of the arbitral institution and rules) may be better addressed to suit the fairness of each case.

[7] Paragraph 4 of the Civil Law (Third-Party Funding) Regulations 2017
[8] Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [4.14]
[9] Hansard, Page 2 – 3 of 16
[10] SIARB Guidelines for Third Party Funders

This new framework is by far preferable to the previous common law regime whereby third-party funding agreements may have been unenforceable by reason of the doctrines of champerty and maintenance[11] - there is now certainty to the validity of funding agreements in the sphere of international arbitration in Singapore.

III. Funder's Control Over the Proceedings

One of the key concerns of allowing third-party litigation funding is the fairness of the bargain between the funder and the funded, and whether the interests of the funded are still the paramount consideration in terms of the direction of the litigation, and whether these would be subordinated to the funder's financial demands. For instance, the acceptance or rejection of a settlement offer may be heavily influenced by the funding agreement by way of a minimum settlement quantum or a settlement offer for an unreasonably low figure.[12]

However, the prior question ought to be whether such issues (in what is essentially an agreement between the funder and the funded party) ought to be regulated apart from the safeguards provided by contract law?

The concerns appear to assume that the funder's control and the financial assistance provided are absolute. However, in reality, a funder may proceed along the following alternatives: provide full or part of the legal costs of the proceedings, fund only the disbursements, or agree to provide no direct funding but agree to indemnify a party's potential exposure to adverse costs. In return, the funder would expect to make a financial profit (to be negotiated) for their outlay (if any).[13] Clearly, any potential liability by the funder should, as a matter of principle, depend on the justice and facts of the particular case, including the terms of the funding agreement, its financial outlay, and the control exerted over the litigation.

Once the issue of control is understood in light of the funders' commercial commitment and expectations, it becomes clear that it is likely that third party funding will only feature in cases where monetary relief is sought, where there is high value and good prospects of success[14].
This is also the target market of litigation funding – large businesses and claims, so as to ensure that Singapore remains a choice dispute resolution jurisdiction[15]. In such cases, the matter of the funding agreement is a commercial matter for negotiation between the funded party and the funder.

An example of a funding contract in which the funder had control only over specific aspects of the litigation is the Singapore case of *Re Vanguard Energy Pte Ltd* [2015] SGHC 156. The funded party in question agreed to provide up front funding of 50% of the solicitor and client costs and any security for costs subject to a cap of S$300,000 with the

[11] Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another [2007] 1 SLR(R) 989 at [31] - [38]
[12] Report of the Law Reform Committee on Litigation Funding in Insolvency Cases at [32] – [34]; see also Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [6.42]
[13] "Improved Access to Justice – Funding Options & Proportionate Costs" The Future Funding of Litigation – Alternative Funding Structures at [122]
[14] Jackson Report, UK, at [1.5]
[15] Hansard, page 2 - 3 of 16

funder covering the remainder of these costs. The funders would indemnify the funded party against any shortfall between the recovery and the amount of costs funded by the funded party, as well as any compensation which the funded party is ordered to pay. It was also agreed that the liquidators will have full control of legal proceedings except that the funder's agreement was required on choice of solicitors and on settlement or discontinuance of the action[16]. See also *Arkin v Borchard Lines Ltd and Others* [2005] EWCA Civ 655, in which the funder only agreed to fund expert evidence and the cost of organising documents on a contingent fee basis (so it would only be paid if the claim succeeded) and in that event it would receive a share of the damages recovered.

It has been suggested that it ought to be left to the arbitral tribunal to sanction these funding arrangements[17]. However, such an approach would be too fraught with uncertainty and would undermine the central tenet of funding agreements as commercial contracts so that the funded party and the funders are free to choose the level of control over the dispute ceded to a funder, provided there is no prejudice to the tribunal.[18] The other option of self-regulation by the funders is toothless since funders who do not join the regulating organisations would not be subject to regulation (see for instance the Association for Litigation Funders in England and Wales).

It has been suggested, as a layer of protection of the funded parties' interests, that lawyers of the funded parties are duty bound to protect the interests of the funded parties[19]. However, there is an undeniable tension between the interests of the funder and that of the funded parties – whether the interests of the funder would be subliminally preferred to that of the funded parties, since the funder is the party "paying the bills". This question arises squarely at least in instances where the funder and the funded party disagree on questions of strategy. This in turn gives rise to the related question of how the funding agreement may provide as to how such differences may be resolved. These are practical issues to be examined closely and addressed as the third party funding industry develops.

Such concerns of equality of bargaining power between the funder and the funded and of control over the proceedings, may be less of an issue in insolvency situations given that the liquidator is a professional who would likely be conversant with commercial norms and practices.

The hope is that the funding industry and the authorities are able to develop an optimal and acceptable level of control by the funder in the litigation. In the meantime, control of the litigation (or lack thereof) must be a risk which the funder/ funded party has to factor into its decision to accept funding.

IV. Funder's Liability for Costs

On the flipside of the issue of control of the arbitration proceedings is the funders' liability for costs, that may be payable to the opposing

[16] At [7]
[17] Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [5.9]
[18] Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [6.43], [7.8]
[19] Hansard, at page 13 of 16

party in the event of an unsuccessful outcome.

It is generally accepted that "*it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat*"[20]. This is a particular concern in arbitration where there is no privity of contract between the funder and the other parties so that a costs award against the funder would be unenforceable under the New York Convention[21], as juxtaposed to court proceedings where a judge has discretion to order costs against a non-party[22].

In a leap forward, the UK courts have recognised that arbitral tribunals are empowered under the UK Arbitration Act 1996 to award the costs of obtaining third party funding as part of the costs of arbitration in *Essar Oilfields Services v Norscot Rig Management* [2016] EWHC 2361. While not as direct as the award of costs directly against a funder, this is certainly a step in the right direction, and is a point which may need to be confirmed by the Singapore Courts[23] or applied by tribunals which seat of the international arbitration is Singapore.

The thorny issue is the making and enforcement of costs orders directly against the funder. There have been exploratory discussions as to whether the funders' direct liability for costs should be legislated for in the context of arbitration. Yet there is a fear that such legislation would undermine the consensual nature of arbitration.[24] Other concerns are that placing liability for adverse costs directly on third party funders could potentially restrict access to funding and weaken the jurisdiction's competitiveness as an arbitration centre[25].

The other options, for the time being, are for the third party funders to contractually submit to the tribunal's jurisdiction on the issue of costs on a case by case basis, or through the use of a simple instrument such as a deed of submission[26]. Either of these solutions can be made a condition of the arbitration if third party funding is involved. Other solutions are the use of the tool of security for costs so that there is an upfront fund from which costs may be paid out. Apart from this, the only option for direct liability and/or enforcement is for the defendants to sue the funder afresh and directly in court.

That said the interests of the funder is often aligned with that of the funded party and so costs and other orders (e.g., an order striking out or staying the proceedings, or an order for security for costs) against a funded party can indirectly be used by arbitral tribunals to

[20] Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [7.5] – [7.17]

[21] Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [7.22]

[22] See *Arkin v Borchard Lines Ltd and Others* [2005] EWCA Civ 655 in which the defendants had submitted that the funder of the plaintiff funded party should be liable for indemnity costs

[23] Drew & Napier's Legislative Update dated 1 February 2017, "Third Party Funding in International Arbitration and What it Means for You: Civil Law (Amendment) Bill"

[24] Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [7.14]

[25] Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [7.12]; See also *Arkin v Borchard Lines Ltd and Others* [2005] EWCA Civ 655 at [39] – [43]

[26] Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration dated October 2016 at [7.23]

control the litigation funders. It will however be appreciated that the extent of such control (and indeed the necessity of such control) will be proportionate to the funders' interest in the litigation per the terms of the funding agreement.

It remains to be seen as to which approach Singapore will adopt, though it is clear that the arbitral institutions will be most pressured to provide feedback and to fashion guidelines (if possible) to give clarity to this area. The parties may find that they may have to modify their arbitration agreement to take into consideration a third party funder's liability for costs.

V. Conclusion – Regulation: Less is More?

The Singapore framework allowing third party funding in arbitration and related proceedings is extremely new and the opportunities for growth of the industry abound. While litigation funders currently appear to be well-behaved in funding meritorious cases and behaving reasonably in the conduct of litigation, concerns of the funder's control and liability for costs will increase as the industry expands.

For instance, if the litigation funding market expands sufficiently to allow for portfolios of variously risked claims where funders hedge their portfolio of high risk claims against that of low risk claims[27], will there then be "*litigation trafficking*" where funders stir up disputes or encourage recourse which would have been absent if not for their intervention[28] (which is ironically, not so different from the policy targeted by the doctrines of champerty and maintenance[29])? Would there then be a need for increased regulation based on the categorisation of the cases or third party funders as a specific class of investors?

Another important trend in third party funding is the principle that the fact of funding ought to be disclosed up front in the legal proceeding. Singapore's Legal Profession Rules have been amended to make it an express duty for a legal practitioner to disclose to the Court or Tribunal the existence of a third party funding contract and the identity of the funder as soon as practicable[30]. However, its effect is limited to lawyers regulated under Singapore's jurisdiction as foreign lawyers are out of the Act's reach. This creates an unlevel playing field in the legal proceeding (especially in international arbitrations) where perceived monetisation of the claim and costs are concerned. The rules of arbitral institutions [31] may level this somewhat but more needs to be done.

Given the global movement towards litigation funding, these questions will arise for consideration at some point. As for now, the legal industry needs to get comfortable with

[27] Keynote address by the Honourable Chief Justice Sundaresh Menon at the Chartered Institute of Arbitrators International Arbitration Conference on 22 August 2013 at [13]

[28] Report of the Law Reform Committee on Litigation Funding in Insolvency Cases at [30]

[29] 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.

[30] Rule 49A of the Legal Profession (Professional Conduct) Rules 2015

[31] For instance, the SIAC Practice NotePN-01/17 dated 31 March 2017 provides that the tribunal may request that the parties agree to inform the tribunal and the registrar at the earliest opportunity of the involvement of an external funder.

litigation funding and work towards developing accepted norms.

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