Third-Party Funding in Singapore: out of the shadows and into the light

Third-party funding is the funding of the costs of legal proceedings by an entity that is unconnected to the dispute. Singapore law currently prohibits third-party funding in both litigation and arbitration, with limited exceptions.

On 30 June 2016, the Singapore Ministry of Law (MinLaw) announced that it proposed to enact new laws that will allow for third-party funding in international arbitration and related proceedings in the Singapore courts. These legislative amendments will open up a new funding avenue for parties involved in or contemplating international arbitration proceedings.

The current state of the law

As a common law country, Singapore's laws on third-party funding have their origins in English law. Singapore law currently prohibits third-party funding in two main ways:

- Firstly, Singapore law generally treats third-party funding agreements as contrary to public policy or illegal – and for that reason, unenforceable. This policy is informed by the common law doctrines of maintenance and champerty. In brief, maintenance is the giving of assistance or encouragement to a litigant by a person who has neither an interest in the proceedings nor any other motive recognised by law as justifying his or her interference. Champerty is a subset of maintenance – it is the maintenance of an action in exchange for a promise to give the maintainer a share in the fruits of the proceedings. Typical third-party funding agreements fall foul of both doctrines and are therefore generally unenforceable under Singapore law.
- Secondly, Singapore law regards maintenance and champerty as torts at common law. An affected party could (at least in theory) sue the party (or parties) in tort if the affected party has suffered special damage as a result of the relevant tortious arrangement.

Key issues

- At present, Singapore law generally prohibits third-party funding
- The current prohibitions extend to the third-party funding of international arbitration proceedings
- By the end of 2016, the Singapore government is expected to permit third-party funding in international arbitration and related proceedings
- These changes will benefit businesses of all sizes and further strengthen Singapore's position as a seat for international arbitration.

The prohibition on third-party funding and its exceptions

The prohibition on third-party funding under Singapore law is wide-reaching. In particular, the Singapore Court of Appeal has stated that the principles behind the doctrine of champerty apply to all types of legal disputes and claims, including arbitration proceedings[1].

There are, however, certain statutory and common law exceptions to the doctrines of maintenance and champerty.

- Firstly, the Singapore Companies Act expressly permits the liquidator of an insolvent company to sell - to a funder or other party - a cause of action and/or the fruits of a cause of action[2].

---

[1] See *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another* [2007] 1 SLR(R) 989.

[2] *See Companies Act (Cap. 50), s 272(2)(c); Re Vanguard Energy Pte Ltd [2015] 4 SLR 597, [29].*

- Secondly, in general, a third-party funding arrangement will not be struck down if:
  - it is incidental to the transfer of a property right or interest;
  - the funder has a legitimate interest in the outcome of proceedings (for example, where the funder is a beneficiary, shareholder, director or creditor of the funded party); or
  - there is no realistic possibility that the administration of justice will suffer as a result, taking into account (i) the protection of purity/the due administration of justice (for example, taking into account the extent to which the funded litigant retains control over legal proceedings or has ceded such control to the funder) and the interests of vulnerable litigants, and (ii) ensuring access to justice[3].

  Further, the fact that the funder may profit from a funding arrangement does not necessarily mean that the funding arrangement falls foul of the doctrine of maintenance and champerty[4].

The changes proposed

On 30 June 2016, MinLaw launched a month-long public consultation on its proposals for enactment of a legislative framework for third-party funding in international arbitration and related proceedings.

MinLaw stated in its press release that it is cognisant of the growing use of third-party funding in international arbitration, and is seeking to ensure international businesses can use a wider range of funding tools should they choose to arbitrate their disputes in Singapore.

MinLaw has therefore put forward for consideration a range of new laws which, if they enter into force, will bring about the following changes:

- The new legislation will clarify that the common law torts of maintenance and champerty are abolished in Singapore.
- The new legislation will provide that, in certain prescribed categories of dispute resolution proceedings (ostensibly international arbitration and related proceedings), third party funding contracts are not contrary to public policy or illegal.
- The new legislation will allow conditions to be imposed on third-party funders through subsidiary legislation.
- The new legislation will provide that lawyers may recommend third-party funders to their clients or advise their clients on third-party funding contracts, so long as the solicitor(s) concerned do not receive any direct financial benefit from the recommendation or facilitation.

To be clear, MinLaw is not proposing a *carte blanche* for third-party funding: MinLaw has proposed a number of safeguards which will affect funders, as well as the lawyers engaged by funded parties.

For instance, MinLaw has proposed that third-party funders will only be able to enforce their rights under third-party funding agreements if they satisfy a number of conditions. These conditions include a requirement that the third-party funder has access to funds immediately under its control which are sufficient to fund the relevant proceedings in Singapore (i.e. a capital adequacy requirement). Also proposed is a related rule that these funds are invested to enable the funded party to meet the costs of the relevant proceedings.

Disclosure

Apart from being prohibited from receiving direct financial benefit from third-party funding arrangements, it is proposed that lawyers will be duty-bound to disclose the existence of a third-party funding agreement and the identity of the third-party funder to a court or arbitral tribunal and every other party to the proceedings, as soon as possible.

The disclosure obligations proposed by MinLaw will have an effect on the conduct of proceedings as the existence of a third-party funding arrangement is often a factor taken into account by a court or tribunal in determining an application for security for costs (against the funded party).

There is, however, a line of international case law to support MinLaw's approach. For example, in *Muhammet Çap v Turkmenistan*, the tribunal ordered the claimants to confirm to the State whether their claims in the arbitration were being funded by a third-party funder, and, if so, to

---

[3] *See Re Vanguard Energy Pte Ltd [2015] 4 SLR 597, [43]; Lim Lie Hoa and another v Ong Rebecca Jane [1997] 1 SLR(R) 775, [46].*

[4] *See Lim Lie Hoa and another v Ong Rebecca Jane [1997] 1 SLR(R) 775, [42].*

advise the State and the Tribunal of the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder[5]. But there is a view that disclosure of the scope ordered in *Muhammet Çap v Turkmenistan* is invasive, and a number of tribunals have declined to grant relief of the kind ordered in that case.

In the investor-State arbitration field, some firms have adopted a practice of disclosing the name of any funder involved in the case in the Request for Arbitration. This way, any arbitrators appointed in the case can run conflicts checks that include both the funded party and its funder. This practice reflects the fact that, in recent years, a number of well-known international arbitrators have developed relationships with major funders.

MinLaw is addressing the conflicts issue too: the proposed legislation also envisages that best practices and guidelines (based principally on the International Bar Association Guidelines on Conflict of Interest in International Arbitration) will be issued to lawyers and third-party funders in due course.

What this means for businesses

The legislative amendments will remove uncertainty in an important area of Singapore law and make it easier for businesses of all sizes to access justice, whether in the courts or by way of arbitration. While the most obvious beneficiaries of the changes will be the small to medium-sized companies that often lack the balance sheet to finance protracted legal proceedings, it must be understood that third-party funding products are also used by larger businesses as a cost/risk shifting strategy.

- For example, a bank that faces a set of complex but unmeritorious claims will be better positioned to manage the costs of a long dispute defending such claims. Third-party funding allows the bank to move its defensive costs off its balance sheet and shift some or all of those costs (and risks) away from its shareholders and to the funder. This means that the bank's legal fees are less likely to influence its decision on whether or not to accept a "nuisance settlement" offer from the claimants.
- On the other hand, a claimant with strong claims against a well-resourced respondent will be better positioned to prosecute its claims through to a final award or judgment. The classic example here is a small mining company that has invested in a foreign country: the company may well only have one asset, and it may be that same asset has been expropriated by the host State. Without the revenue generated by that asset, the company may be unable to finance arbitration against its host State, even though it has strong claims to make. Third-party funding solves this problem, effectively giving the company access to justice it otherwise would not have had.

Buyer beware

It must be understood that the third-party funding market is complex and the range of available products is continually growing. For example, while funding is often provided in linear form (as a commitment by a single funder to pay the costs of the whole proceedings in accordance with an agreed budget), it is becoming increasingly common for multiple funders to participate at different stages of a single case.

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 their control of the proceedings and their recovery in the event of success.

Further, parties need to take great care to ensure that, when they interact with potential funders, they take appropriate steps to maintain legal privilege and confidentiality. This is an area where the practice is moving much faster than the law, and where parties need lawyers with day-to-day experience in funded actions.

Concluding remarks

We expect the law to move quite quickly in this area: the proposed changes will likely take effect within the year.

While the door to third-party funding appears to be opening for international arbitration, it remains to be seen if and when the door will open for third-party funding in pure Singapore litigation proceedings. As this is an area where questions of public policy are more finely balanced, it may be that the traditional barriers to third-party funding remain in place longer in this setting.

---

[5] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Procedural Order No. 3 (12 June 2015).

Authors

Nish Shetty
Partner

T: +65 6410 2285
E: nish.shetty
@cliffordchance.com

Kabir Singh
Partner

T: +65 6410 2273
E: kabir.singh
@cliffordchance.com

Ben Luscombe
Partner

T: +61 8 9262 5511
E: ben.luscombe
@cliffordchance.com

Dr. Sam Luttrell
Counsel

T: +61 8 9262 5564
E: sam.luttrell
@cliffordchance.com

Elan Krishna
Senior Associate

T: +65 6506 2785
E: elan.krishna
@cliffordchance.com

Andrew Foo
Associate

T: +65 6506 2790
E: andrew.foo
@cliffordchance.com

Clifford Chance Asia
Clifford Chance Asia is a Formal Law Alliance between Clifford Chance Pte Ltd and Cavenagh Law LLP
12 Marina Boulevard, 25th Floor Tower 3,
Marina Bay Financial Centre, Singapore 018982

500986-4-9585-v0.16

www.cliffordchance.com
www.cavenaghlaw.com.sg

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.