

CASE UPDATE



Update: Third-Party Funding of International Arbitrations in Singapore

8 August 2017

Introduction

1. The Civil Law (Amendment) Act 2017 and the (Third-party Funding) Regulations (collectively, the “**Funding Regulations**”) were passed earlier this year (2017). The Funding Regulations essentially legalise and provide a framework for third-party funding in international arbitrations (and related court and mediation proceedings) in Singapore.
2. Third-party funding is funding provided by a person (the third-party funder) who is not a party in the dispute, and who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings. In exchange, the third-party funder receives a share of the proceeds in the event that a claim is successful.
3. Prior to the Funding Regulations, agreements for third-party funding of dispute resolution proceedings were not permissible in Singapore. Such funding agreements were generally unenforceable.
4. With the passing of the Funding Regulations, Singapore seeks to maintain its competitive edge as the key seat of arbitration in Asia. This is certainly a step in the right direction for Singapore, and places Singapore on equal footing as other major arbitration institutions in the world.

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Key changes to the law

5. Broadly speaking, the 2017 Funding Regulations and related legislative amendments brought about four (4) key changes:

	Change	Legislation	Relevant sections
1	Abolishment of common law tort of maintenance and champerty in Singapore	Civil Law Act (Cap. 43) (“ CLA ”)	Section 5A: Abolishment of common law tort of maintenance and champerty in Singapore

	Change	Legislation	Relevant sections
2	Third-party funding contracts now valid and enforceable for international arbitrations and related legal proceedings	(1) Civil Law Act (Cap. 43) (“ CLA ”) (2) Civil Law (Third-Party Funding) Regulations 2017 (“ CLR ”)	<p><u>CLA</u></p> <p>(a) Section 5B, CLA: Third-party Funding contracts now valid and enforceable in “<i>certain prescribed categories of proceedings</i>”, by “qualifying third-party funders”</p> <p>(b) Section 5B(3), CLA: Third-party funders must meet and continue to meet the criteria set out by the Minister.</p> <p>(c) Section 5B(4): Where the third-party funder ceases to be a qualifying third-party funder, or fails to comply with qualifying requirements, their rights in the third-party funding contract are not enforceable.</p> <p><u>CLR</u></p> <p>(d) Section 3, CLR: Sets out an exhaustive list of the types of dispute resolution proceedings for which third-party funding is allowed, such as international arbitration and related legal proceedings;</p> <p>(e) Section 4, CLR: Sets out the definition for qualifying third-party funders</p>
3	Lawyers permitted to introduce/refer third-party funders to their clients	Legal Profession Act (Cap. 161)	Section 107(3A): Provides that a solicitor is not prevented from introducing/referring third-party funders to clients as long as he does not receive any financial gains from the introduction/referral, among other things.

4	Lawyers have duty to disclose existence and identity of third-party funders; prohibited from having financial interests	Legal Profession (Professional Conduct) Rules 2015	Rules 49A: Provides that lawyers have a duty to disclose existence of third-party funding contracts and identity of third-party funders. Rule 49B: Prohibits lawyers from having financial or other interests in the third-party funder that is funding their client.
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What does it mean for parties involved?

6. The Funding Regulations and related legislative amendments set out the scope and safeguards for third-party funding in Singapore.
7. At present, the scope of third-party funding is limited to international arbitration proceedings and related proceedings in Singapore, by certain qualified third-party funders.

Third-party funders

8. In order for a third-party funder to enforce its rights under a third-party funding contract, the “qualifying third-party funder” must continue to satisfy the requirements under section 4 of the CLR. That is to say, a funder must carry on the principal business of funding dispute resolution proceedings, and have at least S\$5 million or the equivalent in paid-up capital or managed assets.
9. When a third-party funder ceases to qualify as a third-party funder under the Funding Regulations, or fails to comply with the requirements under section 4 of the CLR, the third-party funder’s rights under the third-party funding contract which are affected by or connected with the disqualification or non-compliance will not be enforceable under any legal proceedings.
10. It is important to note, however, that the non-compliance by a third-party funder does not prejudice the rights of any other party as against the third-party funder in respect of a third-party funding contract.
11. Furthermore, the Singapore Institute of Arbitrators (SiArb) has also issued guidelines for third-party funders of arbitration proceedings. Among other things, the SiArb guidelines contain instructions on matters that should be covered by a third-party funding contract, such as:
 - a. the amount of funding;
 - b. authorisation for disclosure of funder’s identity;
 - c. financial obligations undertaken by the funder,
 - d. confidentiality and privileged nature of information;
 - e. conflicts of interest and control of proceedings;
 - f. circumstances for withdrawal of funding.

Lawyers

12. To address issues of conflicts of interest, the Legal Profession Act was amended simultaneously to provide that lawyers can introduce / refer funders to clients as long as they are not financially or otherwise interested in the third-party funder, and there is no direct financial benefit derived. The Legal Profession (Professional Conduct) Rules (LPPCR) was also amended to reflect the same; in addition, the LPPCR provides that lawyers have a duty to disclose the existence and identity of third-party funders.
13. The Law Society of Singapore also issued a guidance note on Third Party Funding, which highlights various areas for lawyers to advise their clients on, when providing advice on the terms of a third-party funding contract. For example, the terms of the contract should cover the following areas:
 - a. confidentiality and legal privilege;
 - b. scope of funding provided by the Third-Party funder;
 - c. mechanisms to manage conflicts of interest;
 - d. third-party funder's level of involvement and mechanisms to resolve disputes;
 - e. right to terminate agreement (if any).

Arbitrators

14. Where arbitrators are concerned, the Ministry of Law has worked with the arbitration institutions and practitioners to develop a set of best practices regarding the implementation of third-party funding in Singapore. The Singapore International Arbitration Centre issued SIAC Practice Note 01/17 on 31 March 2017, aimed at addressing conflict of interest situations that may arise due to the presence of third-party funders in an arbitration.
15. The SIAC Practice Note requires any potential candidate who may be appointed as an arbitrator, to disclose to the Registrar and the parties involved, any circumstances that may give rise to justifiable doubts as to his impartiality or independence, including any relation to a third-party funder, as soon as reasonably practicable, before his appointment as arbitrator.
16. Likewise, where an arbitrator has already been appointed, the arbitrator is required to disclose to the disputing parties and other arbitrators (if any), and to the Registrar, any circumstances that may give rise to justifiable doubts as to his impartiality or independence, including any relation to a third-party funder, that may be discovered or arise during the arbitration proceedings.
17. Furthermore, the Practice Note also states that the Tribunal has the power to conduct enquiries if necessary to order the disclosure of matters including the existence of any funding relationship, identity of the third-party funder and details of the funding contract.
18. It also provides guidance on how much weight a Tribunal should place on the existence of third-party funding contracts, in deciding its awards or orders for security for costs.

Conclusion

19. The Funding Regulations, coupled with the related legislative amendments and practice guidance notes, are an attempt at addressing the complex issues that arise in connection with third-party funding arrangements. Under the current framework set out by the Funding Regulations, it leaves open the possibility for the expansion of third-party funding into other forms of legal proceedings, through the passing of subsidiary legislation.

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