A New Reform for a Very New Year of International Arbitration and Third-Party Funding in Singapore

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On January 10, 2017, Singapore enacted yet another landmark legal reform, renewing its status as a leading seat for international arbitration. Singapore has completely abolished the torts of maintenance and champerty. This will allow parties to international arbitration to engage attorneys on a contingency fee basis. In addition, Singapore has expressly declared that third-party funding agreements are neither illegal nor contrary to public policy. Third-party funding arrangements allow parties to borrow money from certified lenders to pay their lawyers or experts in advance, but at the cost of a significant portion of the expected recovery. Once the reform comes into effect, the changes will further solidify its status as international arbitration hub.

Here we restate the objectives of Singapore's Civil Law Amendment Bill, after which we examine the effect of the bill on contingency fee arrangements. We explore comparisons with other jurisdictions throughout. We will also address the most remarkable effect of the Civil Law Bill, Singapore's resounding affirmation of third-party funding. We then examine the framework under which the Civil Law Act will soon delegate its regulation of third-party funding to the Ministry of Law.

The Civil Law (Amendment) Bill of 2016[1] explains that its objectives are as follows:

(a) to clarify that the common law tort of champerty and maintenance is abolished in Singapore;

(b) to clarify that in certain prescribed categories of proceedings, third-party funding contracts are not contrary to public policy or illegal.

(c) to provide for regulations to be made for the prescribed qualifications and other prescribed requirements that every Third-Party Funder has to comply with;

[1](https://www.parliament.gov.sg/sites/default/files/Civil%20Law%20(Amendment)%20Bill%2038-2016.pdf)

(d) to provide a Third-Party Funder that fails to comply with any prescribed qualification or other prescribed requirement cannot enforce its rights arising from or under the third-party funding contract; and

(e) to make related amendment[s permitting solicitors introduce or refer funders to their clients so long as they do not receive direct financial benefit from the introduction/referral]

Singapore recognizes Contingency Fee Arrangements

Singapore's disavowal and abolition of champerty and maintenance mean that Singapore-seated arbitral tribunals will encounter no obstacles to honoring contingency fee arrangements in orders and awards for reimbursements of costs. This measure has been very long overdue.

Champerty and maintenance are traditional common law doctrines that bar attorneys from offering their clients representation on a contingency fee arrangement. Both are civil actions in tort (under English common law they were also crimes). The doctrines also prevented third-party funding. But other common law jurisdictions have moved well beyond champerty and maintenance restrictions.

Singapore's blessing of contingency fees now places it amongst the majority of common law jurisdictions (i.e., Australia, Canada, the UK, and the US). Most jurisdictions in the United States have long recognized the utility and legality of contingency fees. Such contingency arrangements promote access to justice even as they also acknowledge the reality and ubiquity of financial lending in the modern commercial world. Therefore, it is somewhat belated that Singapore has now acceded to the public policy benefits of permitting clients to pay for representation in proportion with their ultimate recovery. The initial theories behind champerty and maintenance were intended to prohibit an attorney from becoming too involved in what was supposed to be his client's case. Champerty and maintenance acted as a kind of conflict of interest rule before the proliferation of formalized and unified attorney codes of ethics. The two doctrines may still remain operative to regulate the payment and retention of expert witnesses in some states. The wording of Singapore's new legislation will abolish the doctrines in their entirety upon the date for commencement of the Civil Law Amendment.

Eyes turn now to Hong Kong, as the arbitration community wonders whether that jurisdiction will also update its Arbitration Ordinance accordingly.[2]

Chinese commercial enterprises undertake representation on terms involving some degree of contingency fee with relative frequency. Chinese law firms certainly welcome such value-oriented fee arrangements. Singapore's adoption and recognition of the contingency fee arrangement will end the uncertainty and complications that could sometimes arise when Chinese (or other) parties sought to recover their attorney's fees in connection with their arbitration award.

Singapore has long been viewed as a leading seat for international arbitration. The removal of champerty and maintenance reinforces this perception. It allows tribunals seated in Singapore to award contingency fees to a prevailing party with a contractual and actual basis for such fees. Of course, the removal of champerty and maintenance also permits even more sophisticated arrangements, such as third-party funding.

Singapore emerges as Asia's Pioneer Jurisdiction for Third-Party Funding

Practitioners have devoted the lion's share of their attention regarding Singapore's Civil Law Amendment Bill to its affirmation of Third-Party Funding (also "TPF"). The Amendment will have reversed Singapore's stance on TPF, virtually overnight. As of the beginning of last year, it seemed unlikely that Singapore could even permit TPF agreements to have any involvement in international arbitration. Few may have considered that Singapore-seated Tribunals might dare permit parties to apply and recover the associated TPF costs of their representation. Nonetheless, this week Singapore has resoundingly endorsed the legality and viability of Third-Party Funding. It has also committed to the establishment of an open and coherent set of regulations which will give parties and TPF lenders clear guidance on how to borrow and lend in the context of Singapore-based arbitration proceedings. After all, a tightly regulated TPF regime will serve international arbitration better than a runaway free-for-all for funders and funded.

Before we assess the international position in which Singapore had found itself, we offer a brief introduction to Third-Party Funding arrangements. The basic premise is actually rather straightforward. As Singapore's Minster of Law, Indranee Rajah,

[2] (https://www.twobirds.com/en/news/articles/2017/hong-kong/hong-kong-to-give-green-light-to-third-party-funding-of-arbitration).

explained it to Parliament: "in return for the funds, the funder usually receives a share of the damages awarded **if** the claim succeeds. If the claim fails, the claimant does not have to repay the funder. This is the risk that the funder takes."[3] TPF firms offer customized financing terms to parties involved in international arbitration. TPF firms are highly specialized lenders. They almost uniformly employ highly qualified legal professionals. Sometimes these firms even assume some measure of control over the conduct of the case. On the claimant's side, TPF payment will usually be reflected in a share of the payout: often from 30% to 60%. On the respondent's side, TPF firms such as Gerchen Keller Capital offer a line of credit, up to $5 million, that may drawn as expenses arise during a legal proceeding.[4] Funding arrangements can be extremely flexible, and many TPF firms offer funding on terms that specifically fit the circumstances of each case. The TPF industry has experienced over two decades of development.

Singapore has witnessed the rapid development of Third-Party Funding primarily as a foreign phenomenon. As a common law jurisdiction, Singapore found the existing doctrines of champerty and maintenance to be obstacles to the recognition of TPF arrangements. Two Singaporean cases that grappled with TPF had decided that the torts of maintenance and champerty meant that TPF arrangements were likely to be unenforceable.[5] International arbitration practitioners had understood Singapore to be a TPF no-go-zone.

Meanwhile, other national and state jurisdictions had offered far more favorable environments for claimants (and more rarely, respondents) seeking Third-Party Funding. In 1995, Australia crafted a special exemption for TPF applicable to those provinces where the doctrines of champerty and maintenance persisted; (New South Wales, South Australia, ACT and Victoria no longer recognize champerty or maintenance). In 2010 and 2011, the UK's Chapter 11 of the Jackson Review of Civil Litigation Costs and its Code of Conduct for Litigation Funders together established standards and procedures to govern litigation funding. Civil law jurisdictions had been particularly inviting to the TPF industry. Germany has had a robust market for third-party funding for over twenty years. France also accepts third-party funding, albiet with some complications for domestic matters. TPF is better welcome in

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[3] (https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/second-reading-speech-by-senior-minister-of-state-for-law--indra3.html).

[4] (http://www.dandodiary.com/2014/02/articles/litigation-financing-2/guest-post-inside-litigation-funding/).

[5] (see *The Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] SGHC 135; *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR 989).

French-based international dispute resolution. As civil law jurisdictions, pre-existing barriers were absent in both Germany and France and each government has declined to erect any prohibitions. Likewise, Switzerland's Third-Party Funding market emerged following a 2004 Federal Supreme Court decision that prohibition of the practice would be an impermissible restraint of commerce. TPF has been readily available in the service of parties to Swiss arbitrations ever since. Harbour Litigation Funding's website provides excellent country-by-country overviews those seeking detailed information for how other jurisdictions regard TPF.[6] In short, Singapore looked at other arbitration-friendly regimes, and perhaps found itself confronted with a bit of competition.

Singapore's recent TPF reform strikes us as beyond merely satisfactory. It is pioneering. Singapore's approach is also highly prudent, because Singapore has reserved a place for a thorough regulatory regime. Under the Civil Law Amendment Act, Singapore's legislature has delegated to the Ministry of Law (more commonly called "MinLaw") the power to craft regulations that will impact and govern Third-Party Funding. MinLaw's responsibilities here are quite broad. MinLaw will determine the qualifications and requirements necessary to become a qualifying Third-Party Funder. MinLaw may proscribe the manner of relations between the Third-Party Funder and the funded party. Further, MinLaw can exclude TPF from entire classes of dispute resolution proceedings. We believe this aspect of the provisions was crafted to allow a lighter touch for TPF in international arbitration while reserving more restrictive measures for Singapore's domestic TPF. Singapore may have allowed TPF, but it will stand vigilant to safeguard the rights of all parties, including the substantial rights of the party opposing the funded party.

Even as it leaves space for future regulations, Singapore's Civil Law Amendment Act presently makes crystal clear the seriousness of the effect of a party's non-compliance, as well as the gravity for the consequences following a Third-Party Funder's disqualification. Parties simply must comply with the regulations that will be set down by Singapore's Ministry of Law. Otherwise, disqualification or regulatory non-compliance renders the rights of the Third-Party Funder or the funded party totally unenforceable. Appropriately, the burden appears to be on the Funders and funded parties. And yet, Singapore has wisely provided for an avenue whereby a Third-Party Funder may make application to an arbitral tribunal (or court) for relief from a designation of non-compliance. An arbitral tribunal (or court) may find that accident,

[6] (https://harbourlitigationfunding.com/).

inadvertence, or another "sufficient cause" excuses the disqualification or non-compliance, or that some other ground of equity or fairness provides a foundation for relief. Nonetheless, only strict compliance with upcoming regulations will presumptively assure Third-Party Funders (and funded parties) of the clear protection of their rights. We anticipate that MinLaw's initial regulations will relate to the disclosure of funding arrangements in arbitral proceedings. In addition, MinLaw may issue guidance on the minimal requirements funded parties must satisfy to recover their TPF costs. MinLaw may also direct certain circumstances where Third-Party Funders may find themselves liable to pay an opposing party's costs.

A Distinctly New Year for Singapore as Asia's Premiere International Arbitration Hub

The full magnitude of Singapore's Civil Law reform may be so far-reaching that the progress will only become entirely visible in retrospect. Two observations do however seem immediately apparent. Before 2017, some may have considered Singapore to caught in the past with regard to contingency fee arrangements. But even this early in the New Year, Singapore should be considered a pioneer with relation to third-party funding. Singapore has demonstrated that when it comes to welcoming international arbitration, it avoids mere half-measures and abhors the small bore approach. Although humbly named, Singapore's Civil Law (Amendment) Bill 2016 radically advances Singapore's attractiveness as a seat and centre for international arbitration for Asian parties.

Singapore's recent reform is truly a major development for international dispute resolution.