Paving the way for third-party dispute resolution funding

Newsletters

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Civil Law (Amendment) Act 2017

In 2017 Parliament aligned Singapore with other leading arbitration jurisdictions, such as London, Paris and Geneva, by embracing third-party funding as a viable method for increasing access to justice for parties involved in specific arbitration proceedings. The Civil Law (Amendment) Act 2017 was passed by Parliament on 10 January 2017 and, along with the Civil Law (Third-Party Funding) Regulations 2017, came into force on 1

March 2017. These laws abolished the tort of maintenance and champerty and legalised third-party funding in relation to international arbitration proceedings and related court and mediation proceedings.

Less than one year later, the market for third-party funding in Singapore has seen significant activity – with numerous third-party funders setting up operations in Singapore and the topic being widely debated in major conferences throughout the region. Practitioners and clients alike are keen to explore the benefits and opportunities associated with third-party funding.

This article explores the concept, historical approach and new framework for third-party funding, as well as implications and considerations for lawyers and clients who may be considering this alternative.

What is third-party funding?

Third-party funding is a process by which a claimant can finance its claim through a third-party funding company, which provides cash or other assistance in exchange for a percentage share of judgment sum or settlement sum. The capital provided is generally non-recourse – if the case does not result in settlement and the claimant loses the case, the third-party funder receives nothing and loses the cash or assistance invested. The claimant has no obligation to repay the cash or other assistance to the third-party funder.

The provision of third-party funding is not necessarily limited to a single litigation proceeding – some third-party funders have also begun offering financing for clients' litigation portfolios. Portfolio financing enables companies to use capital provided by third-party funders to flexibly finance fees and expenses for multiple litigation proceedings, and also allows third-party funders to offer lower pricing since the risk of funding is diversified within the litigation portfolio.

Historical position

Before the recent legislative amendments, agreements for third-party funding of dispute resolution proceedings generally violated the doctrines of maintenance and champerty and were thus rendered unenforceable. Maintenance refers to the provision of assistance to a party by a person or entity that has no interest in the proceedings, while champerty is the maintenance of an action in return for a share in the proceeds of the action.

Historically, under the common law, maintenance and champerty have been declared unlawful for various reasons, including to:

- protect vulnerable litigants who are at risk of exploitation by the champertous maintainer due to the unequal bargaining power between the parties, which may result in a subordination of the litigants' interests;
- uphold the purity of justice by preventing a proliferation of frivolous litigation and preventing the judicial system from becoming an avenue of speculative business ventures; and
- guard against an abuse of the court process in which the champertous maintainer uses his influence to suppress evidence and suborn witnesses.

New legislative framework

The shift in global attitudes towards third-party funding (eg, in the United Kingdom, Australia and Hong Kong) and Singapore's desire to maintain competitiveness as a leading arbitration hub have culminated in the enactment of the amendment act and the funding regulations.

The amendment act, by amending the Civil Law Act, abolishes the tort of champerty and maintenance and clarifies that contracts affected by champerty and maintenance may still be unenforceable by virtue of being contrary to public policy or otherwise illegal. However, the amendment act expressly stipulates that certain contracts regarding third-party funding are valid if they satisfy the following criteria:

- The third-party funding must be in relation to prescribed dispute resolution proceedings, which includes international arbitration proceedings and related court or mediation proceedings; and
- The third-party funder must be a qualifying third-party funder, which means that it must carry on the principal business of funding dispute resolution proceedings (in Singapore or elsewhere) and must have a paid-up share capital or managed assets of not less than S$5 million or the equivalent amount in foreign currency.

A third-party funder that ceases to meet or fails to comply with the qualifying criteria will be unable to enforce its rights under the third-party funding contract, although it must still perform its obligations under the contract, in particular its obligation to fund the claim. In such an event, to ensure fairness to the third-party funder, the court or arbitral tribunal may grant relief to the third-party funder if the non-compliance was accidental or due to inadvertence or some sufficient cause, or if the court or arbitral tribunal finds that it is just and equitable to grant relief.

In addition, the amendment act, by amending the Legal Profession Act, permits a solicitor to introduce or refer a third-party funder to a client, provided that the solicitor receives no direct financial benefit from the introduction or referral (eg, referral fees or a commission). A solicitor is also allowed to negotiate, advise or draft a third-party funding contract and act on behalf of a client in any dispute arising out of the contract.

Updates have also been made to the Legal Profession (Professional Conduct) Rules 2015. A legal practitioner must disclose to the court or tribunal and to every party to the proceedings the existence of any third-party funding in relation to the costs of the proceedings and the identity and address of the third-party funder. The disclosure must be made either at the date of commencement of the proceedings or as soon as practicable. A legal practitioner or law practice is also prohibited from holding any financial or other interests in the third-party funder.

In Parliament's second reading of the bill, Senior Minister of State for Law Indranee Rajah highlighted the importance of self-regulation among arbitrators, lawyers and third-party funders. This has resulted in the promulgation of the following 'soft laws' in an attempt to develop a set of best practices:

- The Law Society of Singapore and the Singapore Institute of Arbitrators have issued a guidance note to lawyers and guidelines to third-party funders, respectively, advising the inclusion of certain issues in the third-party funding contract, such as:
    - confidentiality and legal privilege for documents disclosed to the third-party funder;
    - scope of funding provided and third-party funder's financial liabilities, including for adverse costs orders;
    - mechanisms to manage conflicts of interest;
    - the third-party funder's level of involvement in proceedings; and
    - the termination of agreement by third-party funder.
- The Singapore International Arbitration Centre has also issued a practice note on arbitrator conduct where the involvement of a third-party funder is permissible, highlighting that:
    - a potential arbitrator must disclose to the registrar and parties involved any circumstances that may compromise their impartiality or independence as soon as reasonably practicable before their appointment (eg, any direct or indirect relationships with a third-party funder);
    - an appointed arbitrator must disclose to the registrar and parties involved circumstances that may compromise their impartiality or independence, which have arisen or are discovered during the proceedings; and
    - the tribunal has the power to conduct such enquiries that it deems necessary or expedient, including the disclosure of any funding relationship and if so, the identity of the third-party funder and details of the relationship.

Practical implications and the way forward

In light of the legislative amendments, the balance between the competing policy considerations of the prevention of abuse of vulnerable litigants and the court process, and facilitating the access to justice, has been tilted in favour of the latter.

This may be because the need to protect vulnerable litigants is reduced in the context of international arbitration proceedings, which usually involve sophisticated parties. The risk of frivolous litigation is curtailed since professional third-party funders are focused on profits – since they will not be repaid unless the funded party wins the case, they will generally not want to fund a case unless they believe that the case has sufficient merit. As the costs of international arbitration proceedings may sometimes be substantial, claimants are now empowered to pursue viable claims through third-party funding. By transferring their risk of losing in such proceedings to the third-party funder, firms will be able to devote their funds to their core business instead of bearing the financial burdens of litigation.

Parliament's decision in extending third-party funding only to international arbitration proceedings highlights its cautious and conservative approach. However, this paves the way for third-party funding for other dispute resolution proceedings in Singapore in the future and parties should remain cognisant of the potential expansion of third-party funding to other areas such as litigation, domestic arbitration and insolvency proceedings.

Implications for lawyers

Lawyers should take the initiative to network with third-party funders and understand the different services that various third-party funders offer. The key consideration that lawyers should be mindful of when evaluating which third-party funder is most suitable for the clients' needs is the structure of third-party funders, in particular its staying power. By referring clients to suitable third-party funders in appropriate situations, they will be able to provide better legal services. This also results in a win-win situation for both lawyers and third-party funders – lawyers are assured of the availability of funds for their remuneration and third-party funders are also awarded an investment opportunity.

However, lawyers must ensure that they receive no direct financial benefit from the introduction or referral of a third-party funder to their clients other than for their fees, disbursements and expenses. They should also be familiar with the soft laws released by the respective bodies and draft third-party funding contracts that are consistent with these best practices.

Implications for clients

Clients stand to benefit from third-party funding by being able to bring claims that they

would otherwise be unable to due to financial constraints, thus increasing their access to justice.

Clients should also consider entering into portfolio financing agreements with third-party funders if they anticipate being involved in multiple litigation proceedings or, by virtue of the nature of their industry, are exposed to a high volume of litigation proceedings (for example, a large pharmaceutical company).

Third-party funding will invariably help clients relieve cash flow, budget or accounting pressures. However, significant costs may still be incurred from entering into a third-party funding agreement. These costs may stem from the extensive due diligence to be performed and the drafting of the funding contract, which may include special bespoke clauses to safeguard both parties' interests. Ultimately, the onus is still on clients to carry out a cost-benefit analysis to make sure that commencing arbitration proceedings, even with financial assistance from the third-party funder, makes commercial sense.

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