LEGAL UPDATE

LEGISLATIVE UPDATE

1 February 2017

THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION AND WHAT IT MEANS FOR YOU: CIVIL LAW (AMENDMENT) BILL

SUMMARY

On 10 January 2017, Parliament passed the Civil Law (Amendment) Bill (No. 38/2016) ("**Bill**") into law. The primary effect of the Bill is that third party funding for international arbitration and associated proceedings (such as enforcement proceedings in the Singapore Courts and mediation proceedings in connection with international arbitration) will now be permitted, subject to some restrictions on the entities which can provide such third party funding.

WHAT IS THIRD PARTY FUNDING?

Typical arrangements for third party funding of legal proceedings involves a third party funder (unconnected with the dispute) entering into an agreement with a prospective claimant to provide funds for the claimant's legal costs, in return for a share of the award, in the event the claimant is successful, and nothing if the claimant is unsuccessful.

In other words, a third party funding arrangement is a risk allocation device which shifts the risk of a claim being unsuccessful away from the prospective claimant and onto the third party funder.

Such an arrangement generally increases access to justice and provides a variety of benefits for prospective claimants, including the following:

(a) The potential costs of commencing legal proceedings will be less of a deterrent to prospective claimants who might otherwise be discouraged from doing so by the prospect of high legal fees.

(b) Third party funding increases the resources which prospective claimants can bring to bear in legal proceedings, which is likely to be important particularly against defendants with deep pockets. For instance, third party funding may permit claimants to hire more expert witnesses to bolster their case and to draw on more resources to fight a war of attrition against a defendant which has dug in its heels.

(c) As mentioned above, prospective claimants will be able to outsource the uncertainty of the costs of legal proceedings to a third party. This is likely to look better on a company's balance sheet and be more acceptable to potential investors in the company.

The move to introduce third party funding as part of Singapore's legal landscape is welcome and permits Singapore to keep up with developments in the other leading arbitration seats worldwide.

CHANGES IMPLEMENTED BY THE BILL

The changes implemented by the Bill encompass three primary areas:

(a) permitting third party funding arrangements in permitted categories of dispute resolution proceedings;

(b) regulating third party funders; and

(c) clarifying lawyers' professional duties when a third party funder is involved in dispute resolution proceedings.

Third party funding arrangements permitted for certain categories of dispute resolution proceedings

Previously, third party funding arrangements were deemed to be wrongful under the torts of maintenance and champerty. Such arrangements were also previously unenforceable in Singapore as being illegal and/or contrary to public policy.

In this regard, the Bill amends the law by:

(a) abolishing the common law torts of maintenance and champerty in Singapore; and

(b) stating that third party funding agreements in permitted dispute resolution proceedings are not contrary to public policy or illegal.

Accordingly, third party funding arrangements will now be allowed for permitted categories of dispute resolution proceedings.

The Civil Law (Third-Party Funding) Regulations ("**Regulations**") presently prescribes the following categories of permitted proceedings:

(a) international arbitration proceedings;

(b) court proceedings arising from or out of the international arbitration proceedings;

(c) mediation proceedings arising out of or in connection with international arbitration proceedings;

(d) applications for a stay of proceedings referred to in section 6 of the International Arbitration Act; and

(e) proceedings for or in connection with the enforcement of an award or foreign award under the International Arbitration Act.

In her speech in Parliament, Senior Minister of State Ms Indranee Rajah explained that the current categories of permitted dispute resolution proceedings will allow the legislative framework to be tested by parties of commercial sophistication within a limited sphere. The list of permitted proceedings may be broadened after a period of assessment by the Government.

Restrictions on qualifying third party funders

The Bill also provides that third party funders must be "qualifying Third-Party Funders" as defined in the Regulations. The definition of "qualifying Third-Party Funders" under the Regulations requires third party funders to meet certain requirements and is intended to ensure that third party funding in Singapore will only be provided by professional funders.

These requirements are that:

(a) the third party funder carries on as its principal business as the funding of the costs of dispute resolution proceedings to which it is not a party;

(b) the third party funder has sufficient access to funds to fund the prescribed dispute resolution proceedings in Singapore; and

(c) these funds must be invested under a third party funding contract, to enable a funded party to meet the costs (including pre-action costs) of the prescribed dispute resolution proceedings as set out above.

If a third party funder does not meet the requirements under the Regulations, it will not be able to enforce its rights under the third party funding agreement (whether by court proceedings or arbitration proceedings). However, the same is not true of the other parties to a third party funding agreement, whose rights are not prejudiced by the third party funder's disability. In other words, the third party funder must continue to perform its obligations under the third party funding agreement even if it cannot enforce its own rights under the third party funding agreement.

However, in the interests of fairness, the Bill carves out an exception permitting a court or arbitral tribunal to grant relief to such a third party funder on the funder's application with conditions (if any) where the third party funder's failure to meet the requirements under the Regulations was accidental, inadvertent, or due to some other sufficient cause, or if it is otherwise just and equitable for relief to be granted.

Clarification of lawyer's professional conduct

The Bill also amends the Legal Profession Act to permit lawyers to introduce or refer third party funders to their clients as long as the lawyers do not receive any direct financial benefit from the introduction or referral.

In addition, to protect against potential conflicts of interests, Senior Minister of State Ms Indranee Rajah also indicated that amendments will be made to lawyers' professional conduct rules to require lawyers to disclose whether their clients are receiving third party funding, although such changes will not require lawyers to disclose the commercial terms of the third party funding agreement.

Apart from the Regulations, Senior Minister of State Ms Indranee Rajah also suggested that guidance will primarily be provided by industry-promulgated guidelines and best practices addressing issues like confidentiality, conflicts of interest, control of proceedings and termination of the funding contract.

Parallel Updates to SIAC Investment Arbitration Rules

In parallel with the Bill, the Singapore International Arbitration Centre ("**SIAC**") introduced the first edition of the SIAC Investment Arbitration Rules 2017 ("**SIAC IA Rules 2017**"), effective 1 January 2017.

The SIAC IA Rules 2017 introduce the following rules which mirror the intent of the Bill:

(a) tribunals may order the disclosure of the existence of a party's third party funding arrangement and/or the identity of the funder, and where appropriate the funder's interest in the outcome of the proceedings and/or whether the funder has committed to undertake adverse costs liability (Rule 24(l) of the SIAC IA Rules 2017); and

(b) tribunals may take into account third party funding arrangements in apportioning the costs of the arbitration (Rule 33.1 of the SIAC IA Rules 2017).

While the SIAC IA Rules 2017 are only applicable to a specialised and narrow set of arbitration cases, we see no reason why the SIAC Rules 2016 will not be similarly updated in due course to include similar provisions addressing third-party funding arrangements.

While the point has not yet been tested in Singapore, it appears that 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 the arbitration (for more information, please see the recent client update by our fellow Director, Mr Benedict Teo, on the UK High Court decision of *Essar Oilfields Services v Norscot Rig Management* [2016] EWHC 2361).

Potential Pitfalls Not Addressed by the Bill

However, parties should be aware that the current controls on third party funding set out in the Bill do not generally regulate the terms of the third party funding agreement.

This means that the inherent pitfalls involved in entering a third-party funding agreement are not presently addressed, which include the following (as pointed out elsewhere by other commentators):

(a) High cost of funding, including both a share of the recovered amounts and various pre-contractual processes (such as due diligence and drafting of a bespoke funding agreement);

(b) Risk of more "impecunious" claimants, against whom a costs order cannot be fully satisfied, with little recourse against a third party funder;

(c) Additional "party" in the proceedings, potentially giving rise to more conflict of interest issues; and

(d) Improper influence of the third party funder over the proceedings.

Some controls which may help to ameliorate such risks include imposing restrictions on the percentage of the award that can be recovered (similar to restrictions on interest rates imposed on licensed moneylenders) and imposing an implied

term into all third party funding agreement that a portion of the funds must be earmarked and set aside for the purpose of satisfying an adverse costs order or any order of security for claim or costs.

Whether further controls will be imposed and what controls will be imposed in the future remains to be seen.

CONCLUSION

Finally, it should be noted that the Bill and the Regulations are not yet in force and will only come into operation on a date to be notified in the Government Gazette.

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