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Singapore Has Boosted Its Arbitration-Friendly Reputation

Law360, New York (February 7, 2017, 4:07 PM EST) -- Singapore is poised to become the first jurisdiction in Asia to introduce legislation permitting the use of third-party funding in international arbitrations and related proceedings. This follows the passing of the Civil Law (Amendment) Bill by the Singapore Parliament on Jan. 10, 2017.

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In this article, we explain what third-party funding is and how it can soon be utilized to reduce the risks and costs involved in resolving cross-border disputes in Singapore.

Background

Third-party funding is an arrangement by which a funder agrees to finance the legal expenses of a party pursuing a claim. In return, the funder receives a share of the damages awarded if the claim succeeds. The funder receives nothing if the claim is unsuccessful.

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Third-party funding can provide access to courts and arbitral tribunals for parties which would otherwise be unable to pursue or defend claims as a result of financial constraints. It can also help those that do have sufficient funds to vindicate their rights by reducing the financial risks involved in pursuing or defending a claim.

Third-party funding, however, has traditionally been illegal in common law jurisdictions by virtue of the torts of maintenance and champerty.[1] Maintenance refers to the improper provision of financial support by a third party to a legal action in which it has no legitimate interest. Champerty is a form of maintenance where a nonparty to a dispute finances a legal action in return for a share of the proceeds of the claim. The Singapore Court of Appeal confirmed in Otech Pakistan Private Ltd. v. Clough Engineering Ltd. and another [2007] 1 SLR 989 that the common law tort of champerty applies to arbitrations held in Singapore.

Abolishment of Restrictions on Third-Party Funding

The Civil Law (Amendment) Bill abolishes the common law tort of maintenance and champerty in relation to certain prescribed proceedings in Singapore. Specifically, third-party funding will soon be permitted under Singapore law in:

- international arbitrations;
- Singapore court proceedings arising from international arbitrations, including applications for a stay of court proceedings and proceedings in connection with the enforcement of an international arbitration award; and
- mediations arising in connection with international arbitration proceedings.

The Senior Minister of Law in Singapore during the second reading of the bill in Parliament explained the motivation behind the reform as follows: "[t]oday, third-party funding has become a feature in other leading arbitration centres, including London, Paris and Geneva. Singapore is cognisant of the practices and business requirements of commercial parties, many of whom choose to arbitrate in Singapore despite their dispute having no connection to Singapore."

The bill makes clear that while third-party funding will soon be legal for international arbitrations in Singapore, it will continue to be illegal for Singapore domestic arbitrations, litigation and mediations held in Singapore which are unrelated to international arbitrations, and proceedings before the Singapore International Commercial Court. But that could soon change. As explained by the Senior Minister of State for Law, "We want to have [third-party funding] tested in a limited sphere … If the framework works well, as and when appropriate, the prescribed categories of proceedings may be expanded."

Regulation of Third-Party Funders

Third-party funders will be regulated in Singapore. Qualifying criteria for funders will include the need to have sufficient capital and access to funds to meet the expected costs of the disputes they want to fund in Singapore. In addition, the bill specifies that funders must "carr(y) on the principal business" of third-party funding.

A funder which ceases to be a qualifying third-party funder or fails to satisfy one or more of the prescribed criteria will not be able to enforce its funding agreements. As clarified by the Senior Minister of State for Law in Singapore during the second reading of the bill in Parliament, this will mean that a disqualified funder will not be able to enforce its contractual rights against the funded party and thus will not be entitled to a share of any damages awarded in the event of a successful claim.

It would appear, however, that the funded party will still be able to enforce the contract as against the funder (i.e., require it to continue to fund the case) even though the funder could not participate in the spoils of any victory. This should encourage those seeking financial support for their arbitration, but funders have expressed concerns that opportunistic parties will claim that a funder has not satisfied the regulatory requirements, such as maintaining sufficient capital, in order to escape their contractual obligation to share any winnings with the funder.

Regulation of Lawyers

Lawyers subject to Singapore law will be permitted to act for their clients in all matters relating to legal third-party funding contracts. Thus, lawyers will be able to introduce third-party funders to their clients, draft and advise on the terms of third-party funding contracts, and act in proceedings which are the subject of a legal third-party funding contract. Lawyers, however, will not be permitted to receive any financial benefit (such as referral fees or commissions) for recommending third-party funders to their clients.

The Senior Minister of State for Law in Singapore indicated during the second reading of the bill in the Singapore Parliament that lawyers will have a duty to disclose the existence of any third-party funding obtained by their clients. The precise scope of the duty to disclose remains to be seen, but could potentially extend to the disclosure of the identity of the funder and the amount being funded.

Future Regulations and Guidelines

It is anticipated that subsidiary legislation and regulations will be introduced to supplement the provisions of the bill. The Singapore Ministry of Law is also working with arbitration institutions and practitioners to develop a set of guidelines or best practices applicable to third-party funding arrangements.

Conclusion

Many of our clients, and no doubt those of others, have in recent times been increasingly interested in the use of third-party funding to help manage the costs and risks of arbitration. Some have even selected alternative jurisdictions to Singapore for resolving their international commercial disputes in an effort to gain access to this important risk management tool. Thus, with the passing of the bill, the Singapore government has demonstrated that it is sensitive and responsive to the needs of the international arbitration community. The new legislation is timely and will help Singapore, which enjoys a reputation as an arbitration-friendly jurisdiction, to keep pace with other leading seats for international arbitration.

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[1] Common law jurisdictions in which third party funding of litigation and arbitration is now permitted include Australia, the United Kingdom and the United States. In Australia and the United Kingdom, legislation was passed to abolish civil and criminal liability for the torts of maintenance and champerty. Third party funding has always been allowed in France and certain states of the United States, whereas other states of the United States which inherited the English common law doctrines of maintenance and champerty have since abolished them.
