



HARBOUR

28 July 2016

Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016

Response

Harbour Litigation Funding Limited

We are grateful for the opportunity to provide you with feedback in relation to your public consultation paper (the **Consultation Paper**) on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016.

In general, we welcome the proposals set out in the Consultation Paper as a very positive development for dispute resolution in Singapore.

We make the following comments about the particular proposals:

1. Paragraph 7(i) of the Consultation Paper states that the proposed Civil Law (Amendment) Bill (the **Bill**) will clarify that the common law tort of champerty and maintenance is abolished in Singapore. Further, paragraph 7(iii) of the Consultation Paper states that the Bill will allow conditions to be imposed on funders through subsidiary legislation (in the first instance, the anticipated Civil Law (Third Party Funding) Regulations 2016 (the **Regulations**)) and that funders who fail to comply with the conditions will not be able to enforce their rights under the third party funding contract.

We consider that the torts of maintenance and champerty perform a useful function, in that they prevent a third party funder from taking control of the dispute to the exclusion of the funded party. We consider that the preferable approach is for the torts to remain in place but for there to be a statutory exception to the torts in respect of third party funding agreements. This exception would apply provided that a third party funder complies both as a matter of its contractual arrangements and as a practical matter with certain obligations, in particular the obligation not to seek to influence the funded party's legal representatives to cede control or conduct of the dispute to the third party funder.

In the context of the legislative scheme currently under contemplation, this could be achieved by including appropriate language in the definition of a "qualifying third party funder" in the Regulations.

Further or alternatively, as a tool to bolster public confidence in third party funding, it may be helpful to mandate or encourage third party funders who wish to fund in Singapore to sign up publicly to a code of conduct. An example of such a code is that promulgated by the Civil Justice Council, an agency of the UK's Ministry of Justice, in November 2011, to which all members of the Association of Litigation Funders of England & Wales have signed up in respect of funding the resolution of disputes within England and Wales. This code of conduct addresses matters such as capital adequacy, the need to ensure that the

funded party has taken independent advice on the terms of the funding arrangement and an undertaking not to seek to influence the funded party's legal representatives to cede control or conduct of the dispute to the third party funder.

2. Paragraph 7(ii) of the Consultation Paper states that:
 - the proposed Civil Law (Amendment) Bill will provide that in certain prescribed categories of dispute resolution proceedings, third party funding contracts are not contrary to public policy or illegal; and
 - these categories will be prescribed in the Civil Law (Third Party Funding) Regulations 2016.

We note that the draft Civil Law (Third Party Funding) Regulations 2016 would essentially permit third party funding of international arbitration with a Singapore seat and all connected proceedings in Singapore.

We respectfully agree with paragraph 4 of the Consultation Paper, which states that “As a leading centre for international commercial arbitration, 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 the jurisdiction. Introducing third party funding in Singapore for international arbitration will allow international businesses to use the funding tools available to them in other centres, and promote Singapore's growth as a leading venue for international arbitration.”

We suggest that, in the interests of promoting Singapore's growth as a leading venue for international dispute resolution, Singapore consider permitting third party funding of proceedings in, at least, the Singapore International Commercial Court and all connected proceedings in other fora in Singapore.

3. We note that paragraph 11(i) of the Consultation Paper states “related amendments to the Legal Profession (Professional Conduct) Rules 2015 [the **Rules**] are envisaged. These related amendments are expected to draw reference from best practices and international standards reflected in the revised International Bar Association Guidelines on Conflict of Interest in International Arbitration (October 2014). In brief, Legal practitioners will be under a duty to disclose the existence of a third party funding contract and the identity of the third party funder to the Court or tribunal and to every other party to the proceedings, as soon as is practicable.”

Our experience, from funding over the last 14 years in 12 jurisdictions and under 4 sets of arbitral rules, is that an increasing proportion of the users of third party funding are well-capitalised, solvent corporations and financial institutions. Some of these market participants are happy to disclose their use of third party funding and the identity of the funder, seeing it as evidence of the strength of their position in the dispute at hand. Others are less comfortable doing so, while being cognisant of the risks that they may be assuming if they choose not to disclose.

If disclosure of funding arrangements is mandated, parties in the latter category may choose to arbitrate elsewhere, they may not be frank and open with their legal advisers, or they may not use third party funding where it would otherwise be appropriate, thereby not acting in an economically efficient manner.

Further, such a mandatory obligation placed on legal practitioners who are subject to the Rules may create an unequal playing field i.e. those not subject to the Rules will not, as we understand the position, be under an obligation to disclose the presence of third party funding, which may make it more attractive for parties to a Singapore-seated arbitration to instruct law firm offices whose participants are not subject to the Rules.

We hope our comments are of assistance. Please do not hesitate to contact us if any clarification or further information would be helpful.

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