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Third Party Funding in Asia: whose duty to disclose?

Christine Sim · Tuesday, May 22nd, 2018

Hot on the heels of Singapore's liberalising third party funding (TPF) for arbitration, Hong Kong followed with similar legislation. Keen to ensure the new regime works, the Singapore Ministry of Law is already seeking feedback on whether cases are being funded, businesses are benefiting from the liberalisation, and whether to expand third party funding.[1)]

As the two Asian arbitration hubs embrace TPF, practitioners should pay close attention to two key differences between Singapore and Hong Kong regarding their disclosure obligations.

Tribunal's powers to order disclosure of TPF

By amending its Civil Law Act,[2)] Singapore abolished the tort of champerty and maintenance only for arbitration and related proceedings including arbitration-related court assistance, mediation, conciliation, or insolvency.[3)] In contrast, TPF is still a potential tort, ground for invalidity of the TPF contract, and ground for professional ethical responsibility in Singapore court litigation.[4)]

Reflecting Singapore's intention to strictly regulate TPF, section 5B(8) of the Singapore Civil Law Act provides for the Minister to "make regulations necessary or convenient to be prescribed for carrying out or giving effect to this section". Although this power was likely envisioned to be a method of regulating TPFs in terms of the type of dispute resolution proceeding the TPF exercises influence over,[5)] capital requirements,[6)] and other industry regulations, it may also be used more generally for "governing the provision and manner of third?party funding including the requirements that the Third?Party Funder and the funded party must comply with".[7)]

Singapore presents a peculiar arrangement. It has legalised TPF through its Civil Law Act,[8)] but chosen to prescribe the relevant disclosure rules in its Legal Profession Rules instead.[9)] This could

be to ensure that lawyers in Singapore do not themselves hold any share or other ownership interest in a third-party funder funding their client's case.

During the passing of the Singapore legislation, the Singapore Minister of Law briefly explained the rationale for disclosure of TPF:

> "In addition, the Legal Profession (Professional Conduct) Rules will be amended to impose a duty on lawyers to disclose the existence of any third-party funding which their client is receiving…Disclosure of third-party funding is necessary to ensure there is no conflict of interest…It is anticipated that similar to other jurisdictions where third-party funding is prevalent, industry-promulgated guidelines or best practices will emerge."[10)]

Principle A.1 of the ICCA-Queen Mary Task Force Principles on Third-Party Funding recommends that a "party and/or its representative" should disclose the identity of the funder to the arbitrators and the institution.

Disclosure of TPF is indeed critical to ensuring there is no conflict of interest for the arbitrators. Therefore, guidelines and best practices are not the ideal method of enforcing such an important rule.

Sections 49A and 49B of the Singapore Legal Profession Rules were amended concurrently to clarify that lawyers may introduce or refer funders to their clients so long as they do not receive direct financial benefit from the introduction/referral; and may act for their clients in relation to the third-party funding contract.[11)]

However, the parties themselves are certainly not bound by the Singapore Legal Profession Act nor its Legal Profession Rules, which applies generally to registered lawyers practising in Singapore.[12)] Furthermore, although Singapore counsel are bound by the Legal Profession Rules, unregistered foreign counsel representing parties in arbitrations seated in Singapore are not strictly bound by the Singapore Legal Profession Rules.[13)]

Legal practitioners regulated by the Singapore Legal Profession Rules[14)] are under a strict obligation to disclose—to the court or tribunal and every other party to those proceedings—the existence of any third-party funding contract[15)] and the identity and address of any funder.[16)]

In contrast, Hong Kong has combined its regime for disclosure of TPF with its liberalisation provisions. Article 98U of the Hong Kong Arbitration Ordinance states:

> "(1) If a funding agreement is made, the funded party must give written notice of—
>
> (a) the fact that a funding agreement has been made; and
>
> (b) the name of the third party funder.
>
> (2) The notice must be given—
>
> (a) for a funding agreement made on or before the commencement of the arbitration—on the commencement of the arbitration; or
>
> (b) for a funding agreement made after the commencement of the arbitration—within 15 days after the funding agreement is made.
>
> (3) The notice must be given to—
>
> (a) each other party to the arbitration; and
>
> (b) the arbitration body."[17)]

In Hong Kong, the obligation to disclose the existence of a funding agreement is imposed directly on the funded party, not on their counsel. Therefore, disclosure obligations apply equally to all arbitrations regardless of their choice of counsel.

One downside may be that some funded parties may be prevented from choosing Hong Kong for their arbitration, due to fear of having to disclose their funding details or a potential breach of the terms in a funding agreement.

When to make disclosure

Second, the time provided for disclosure once TPF becomes involved could be different.

The Hong Kong Arbitration Ordinance specifically requires disclosure within 15 days after the funding agreement has been made. 15 days is the same amount of time prescribed under the UNCITRAL Arbitration Rules 2010 for challenging an arbitrator for issues of independence and impartiality.[18)]

In practice, this would give counsel a reasonable amount of time to take instructions from their clients regarding the extent of detail to be provided in disclosure, and to prepare correspondence containing the disclosure to the tribunal and other parties to the arbitration.

Timing is less clear under the Singapore Legal Profession Rules. The legal practitioner is under a strict obligation to make the disclosure "as soon as practicable after the third-party funding contract is entered into".[19)]

In each case, the practitioner could either be unduly pressured by professional ethics and duties to the client, or take the opportunity to delay disclosure by arguing that it was not reasonably practicable under the circumstances. Consequences could be harsh for Singapore advocates and solicitors and foreign registered lawyers found in breach of the Legal Profession Rules.[20)]

Solutions and further questions

Is Hong Kong's approach better? Compliance with an order to disclose third party funding details in Singapore could in reality be more tightly enforced because the obligation is imposed directly on counsel who must disclose if they wish to operate within the Singapore arbitration and legal profession framework.

However, in Hong Kong, an obligation that is linked directly to the parties could be more easily enforced by an arbitral tribunal's order within the context of the arbitration itself. Depending on the applicable rules, a tribunal could have discretion to make further orders, draw adverse inferences, order costs or otherwise make directions. If so, Singapore may wish to align its position closer to Hong Kong's.

Two solutions are suggested. Under section 5B(8)(c) of the Singapore Civil Law Act, the Law Minister may generally make regulations "governing the provision and manner of third?party funding including the requirements that the Third?Party Funder and the funded party must comply with".[21)] Pursuant to this power, Singapore could prescribe that:

1. The funded party shall, as soon as reasonably practicable, disclose to the court or the tribunal and to every other party to those proceedings the existence, identity and address of any TPF involved; and
2. A reasonably practicable time period for disclosure is 15 days, unless otherwise decided by the relevant court or tribunal with jurisdiction over the proceedings.

Alternatively, arbitral institutions such as the Singapore International Arbitration Centre (SIAC) could fill the gap by amending its arbitration rules.[22] Although this would not apply to the same universe of arbitrations governed by the Singapore International Arbitration Act, there is a significant empirical overlap. Issuing SIAC guidelines on disclosure, which would at least draw the attention of SIAC tribunals, could also be useful for ordering disclosure obligations against the *funded party.*

Lastly, a third question remains what level of detail should be ordered in a disclosure order, and whether this is a matter for treaty, arbitral legislation, arbitral rules or each tribunal's discretion.

Under the SIAC Investment Arbitration (IA) Rules 2017, the tribunal is expressly given the powers to order disclosure of the existence of a TPF's involvement. Furthermore, it indicates which details of the TPF agreement may be ordered to be disclosed:

> "[W]here appropriate, details of the third?party funder's interest in the outcome of the proceedings, and/or whether or not the third?party funder has committed to undertake adverse costs liability."[23]

Details of a TPF's interest in the outcome of proceedings and any commitments to undertake adverse costs liability are potentially relevant to an application for security for costs. This question, as indicated by the Singapore Minister of Law, should be best left to international arbitration's best practices and guidelines.

References

?1 Singapore Ministry of Law, Public Consultation to Seek Feedback on the Third-Party Funding Framework https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-third-party-funding.html

?2 Singapore Civil Law Act (Cap. 43), sections 5A–5B (as amended 1 March 2017).

?3 Singapore Civil Law Act (Cap. 43), section 5B(10): "'dispute resolution proceedings' means the entire process of resolving or attempting to resolve a dispute between 2 or more parties and includes any civil, mediation, conciliation, arbitration or insolvency proceedings".

?4 *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] 4 SLR 91, para 61; Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016, (published 10 January 2017), para. 18. This includes the Singapore International Commercial Court, which is a part of the Singapore Supreme Court.

?5 Singapore Civil Law Act (Cap. 43), section 5B(8)(b) (as amended 1 March 2017).

?6 Singapore Civil Law Act (Cap. 43), sections 5B(8)(a) (as amended 1 March 2017); Singapore Civil Law (Third-Party Funding) Regulations 2017.

?7 Singapore Civil Law Act (Cap. 43), sections 5B(8)(c) (as amended 1 March 2017).

?8 Singapore Civil Law Act 1999 (Cap. 43), sections 5A–5B (as amended 1 March 2017).

?9 Singapore Legal Profession Act 2001 (Cap. 161), section 71; Singapore Legal Profession (Professional Conduct) Rules 2015, sections 49A–49B.

?10 Second Reading Speech by Senior Minister of State for Law, Indranee Rajah SC, on the Civil (Amendment) Bill 2016, (published 10 January 2017), paras. 25–26.

?11 Singapore Ministry of Law, 'Legislative Changes to Enhance Singapore as an International Hub for Commercial Dispute Resolution', Press Release 7 November 2016, para. 7(iv) <available at https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/legislative-changes-to-enhance-singapore-as–an-international-hu.html> accessed 3 October 2017.

?12 Singapore Legal Profession Act 2001 (Cap. 161), sections 11, 15, 71, 130I; Singapore Legal Profession (Professional Conduct) Rules 2015, section 3, 'Application of Parts 2 to 5' (as amended 1 March 2017).

?13 See generally, Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014).

?14 Singapore Legal Profession Act 2001 (Cap. 161), sections 11, 15, 130I; Singapore Legal Profession (Professional Conduct) Rules 2015, section 3, 'Application of Parts 2 to 5' (as amended 1 March 2017).

?15 Singapore Legal Profession (Professional Conduct) Rules 2015, section 49A(1)(a) (as amended 1 March 2017).

?16 Singapore Legal Profession (Professional Conduct) Rules 2015, section 49A(1)(b) (as amended 1 March 2017).

?17 Hong Kong Arbitration Ordinance (Ord. No. 6 of 2017), section 98U, 'Disclosure about third party funding of arbitration'.

?18 UNCITRAL Arbitration Rules 2010, Article 13(1).

?19 Singapore Legal Profession (Professional Conduct) Rules 2015, section 49A(2)(b) (as amended 1 March 2017).

?20 Singapore Legal Profession Act, 2001 (Cap. 161), Part VII, 'Disciplinary Proceedings', sections 85–104, and for foreign law firms, sections 130E to 130H.

?21 Singapore Civil Law Act (Cap. 43), section 5B(8)(c) (as amended 1 March 2017); Singapore Civil Law (Third-Party Funding) Regulations 2017.

?22 SIAC Arbitration Rules 2016, Article 27(f).

?23 SIAC Investment Arbitration Rules 2017, Article 24(L).

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