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Singapore's New Conditional Fee Agreement Regime: An Uplifting Reform?

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In Singapore, lawyers and their clients will soon be able to enter into conditional fee agreements ("**CFAs**") for arbitrations and certain court proceedings. CFAs provide parties with an alternative to traditional fee arrangements and third-party funding ("**TPF**") by enabling part or all of their lawyers' fees and costs, as well as an uplift fee, to be conditioned on the outcome of the dispute.

This post considers whether Singapore's status as a leading international dispute resolution hub will be enhanced by these reforms before comparing them to similar reforms that Hong Kong has recently announced.

Background to Singapore's Reforms

Singapore, like Hong Kong, has traditionally banned outcome related fee structures, such as CFAs and damages-based agreements ("**DBAs**") (*i.e.*, agreements where a lawyer receives a proportion of the damages awarded to the client if the case succeeds) due to prohibitions against maintenance and champerty and concerns that such agreements can create conflicts of interest between lawyers and their clients.[1)]

In August 2019, however, Singapore's Ministry of Law launched a public consultation on reforms to permit CFAs (as previously covered in this blog). This move recognised the potential for CFAs to enhance access to justice for impecunious parties, the increasing demand from sophisticated dispute resolution users for alternative funding arrangements to manage the costs and risks of disputes, and the importance of Singapore maintaining its status as an international dispute resolution hub by levelling the playing field with other jurisdictions where CFAs and/or DBAs have increasingly been allowed.

Following positive feedback to the public consultation, the Ministry of Law introduced the Legal Profession (Amendment) Bill on 1 November 2021. The bill detailed amendments to the Legal Profession Act 1966 to establish a framework for CFAs.[2)] The bill was passed by the Singapore Parliament on 12 January 2022 and received Presidential assent on 8 February 2022 to be enacted as the Legal Profession (Amendment) Act 2022 (the "**Act**").

Singapore's New CFA Regime

The Act defines a CFA as an agreement between lawyers (including Singapore qualified and registered foreign lawyers[3]) and their client providing for the *whole* or *part* of the remuneration (*e.g.*, legal fees) and costs (*e.g.*, disbursements) incurred in respect of dispute resolution proceedings (whether in Singapore or elsewhere) to be payable only upon the occurrence of the specified circumstances set out in the CFA.[4] For example, a CFA could define the specified circumstances as the success, in full or part, of the client's claim or defence.[5]

The CFA can also provide for an 'uplift fee', being an amount that is higher than the legal fees or costs that would otherwise be payable if there were no CFA, to be payable only upon the occurrence of the specified circumstances.[6]

Although not yet formally confirmed by subsidiary legislation, Singapore's Second Minister for Law, Mr Edwin Tong, has indicated that parties will be permitted to use CFAs in the same categories of dispute resolution proceedings that allow TPF, namely:[7]

- international and domestic arbitrations;
- certain Singapore International Commercial Court ("**SICC**") proceedings; and
- related court and mediation proceedings.

To take a couple of examples of how Singapore's CFA regime could operate in practice:

- a 'No-Win, No-Fee' CFA could provide for the client to pay 100% of their lawyer's legal fees (*e.g.*, based on hourly rates) and costs incurred for SICC proceedings, as well as an uplift fee of a further 100% of those fees and costs, if their claim succeeds or nothing if their claim fails. The lawyer could therefore receive either 0% or 200% of the legal fees and costs; and
- a 'No-Win, Low-Fee' CFA could provide for the client to pay 50% of their lawyer's legal fees and costs in international arbitration proceedings regardless of the outcome of the case, with the remaining 50% plus an uplift fee comprising 25% of those legal fees and costs being payable if their defence succeeded. The lawyer could therefore receive either 50% or 125% of the legal fees and costs.

Unlike England's CFA regime, uplift fees will not, initially at least, be subject to any maximum limits or caps.[8] Singapore's laissez-faire approach in this regard arguably reflects the commercial reality that: (1) CFAs will primarily be used by sophisticated parties who are capable of negotiating a mutually beneficial CFA; and (2) it would be arbitrary to set limits or caps upfront given the range of circumstances in which a CFA could legitimately be used.

However, the Act does prohibit uplift fees from being calculated as a percentage or proportion of the amount awarded to a client in damages or recovered in a dispute.[9] DBAs will therefore continue to be banned in Singapore. This reflects the Ministry of Law's concern that DBAs provide a monetary benefit to lawyers that has "*no direct correlation with the work done*" and "*may give rise to added risks of conflicts of interests for the lawyer*".[10]

Whether such concerns are justified is questionable since DBAs have been successfully used in other jurisdictions. This prohibition may also prove unpopular in some quarters, with the Law Society of Singapore having suggested during the reform's public consultation process that DBAs should be allowed in order to "*provide equal opportunities for Singapore lawyers to compete*" with lawyers from other jurisdictions that allow DBAs.[11] Such calls may grow louder following Hong Kong's proposal to permit DBAs, which is described further below.

In terms of other restrictions in the Act, parties will not be permitted to recover uplift fees from the losing party to the dispute (*e.g.*, the uplift fee cannot form part of an adverse costs order).[12] This should serve the positive function of incentivizing clients to negotiate reasonable uplift fees when entering into CFAs while also preventing costs from becoming unduly onerous for losing parties. Lawyers will also remain subject to their professional obligations to not overcharge their clients.[13]

Additional client safeguards are likely to be implemented by subsidiary legislation over the coming months, including mandatory terms and conditions (*e.g.*, a 'cooling-off' period after a CFA is signed during which the client or lawyer may terminate the CFA) and prescribed information that lawyers must provide to clients before a CFA is agreed.[14] Singapore's CFA regime will presumably enter into force once this subsidiary legislation has been issued.

Finally, the Singapore courts will retain ultimate oversight over the enforcement of CFAs to help prevent abuse. Accordingly, while CFAs will not be voided on maintenance or champerty grounds, the courts will be able to examine the validity of a CFA taking into account the requirements of the Act and subsidiary legislation, general contractual principles, as well as the circumstances in which the CFA was made.[15]

An Uplifting Reform?

Singapore's nascent CFA regime looks set to enhance its status as a leading international dispute resolution hub. Rather than implementing a rigid one-size-fits-all approach, Singapore has wisely decided to allow disputing parties and their lawyers the freedom to negotiate mutually beneficial 'No-Win, No-Fee' and 'No-Win, Low-Fee' CFAs that reflect the particular circumstances of the dispute.

The reforms should therefore provide sophisticated dispute resolution users with an attractive alternative to traditional fee arrangements and TPF to fund their disputes while also potentially enhancing access to justice in Singapore. Indeed, it is conceivable that CFAs and TPF could be used alongside each other to create novel funding solutions for clients.

While the Act creates a positive framework for CFAs, the devil is in the detail and it is to be hoped that the subsidiary legislation and Law Society of Singapore guidelines to be issued over the coming months do not impose unduly onerous restrictions and requirements that could inhibit the uptake of CFAs in Singapore. Excessive red tape, for example, could deter law firms from offering CFAs to their clients.

Hong Kong's Reforms: CFAs, DBAs and Hybrid DBAs

In December 2021, following a rigorous consultation process (as covered in this blog), the Hong Kong Law Reform Commission Sub-committee on Outcome Related Fee Structures for Arbitration (the "**Sub-committee**") released its final report with recommendations on allowing CFAs, DBAs and Hybrid DBAs to be used for arbitrations and arbitration-related court proceedings (as covered in this blog).

In March 2022, Hong Kong's Government publicly confirmed that it agrees with the Sub-committee that users of arbitration in Hong Kong and their lawyers should be permitted to enter into such fee arrangements if they so wish. Accordingly, Hong Kong's Legislative Council introduced the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 (the "**Bill**"), which substantially follows the recommendations in the Sub-committee's final report. The Bill is expected to pass into law later this year along with subsidiary legislation enacting more detailed rules and safeguards.[16)]

While Hong Kong's and Singapore's reforms have more similarities than differences, one notable point of difference is that Hong Kong will permit not only CFAs but also DBAs (*i.e.*, 'No-Win, No-Fee' DBAs) and Hybrid DBAs (*i.e.*, 'No-Win, Low-Fee' DBAs). This is consistent with the compelling argument in the Sub-committee's final report that concerns around DBAs are largely unfounded in practice and, in any event, outweighed by the considerable benefits of providing access to justice for parties who could not otherwise afford to pursue their claims.[17)] From a practical perspective, by allowing CFAs, DBAs and Hybrid DBAs, Hong Kong will enable arbitration users to benefit from the flexibility to select the type of fee arrangement that best suits their funding needs. Such fee arrangements could also potentially be combined with TPF, which is already permitted in Hong Kong.

Another point of difference is that, unlike Singapore's uncapped CFA regime, Hong Kong plans to cap the maximum CFA uplift fee at 100% of the usual hourly fees (and cap the maximum DBA payments at 50% of the financial benefit obtained by the client) to safeguard clients from unfair arrangements.[18)] In circumstances where these caps are set at similar levels to those in other jurisdictions, such as England, it is unlikely that they would unduly restrict the situations in which CFAs and DBAs could be used, although this risk cannot be entirely ruled out.

Conclusion

Singapore's new CFA regime appears primed for success. By allowing dispute resolution users to enter into CFAs, Singapore has ensured that it remains competitive with other jurisdictions, such as London, Paris, Geneva and New York, that have allowed outcome related fee structures for some time.

Hong Kong's reforms are equally promising and, once entered into force, will leave dispute resolution users in Asia Pacific spoilt for choice when it comes to funding their disputes. It will be interesting to see whether Singapore's uncapped CFA regime or Hong Kong's capped CFA and DBA regime ultimately proves to be the more successful.

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References

?1 *See* Second Reading Speech by Second Minister for Law, Mr. Edwin Tong, on the Legal Profession (Amendment) Bill, 12 January 2022, paragraph 13. Maintenance refers to the provision of assistance (such as financial assistance) to one of the parties to the litigation by a third party with no interest in the proceedings, whereas champerty is a particular form of maintenance where the third party pays some or all of the litigation costs in return for a share of the proceeds. With the enactment of the Civil Law (Amendment) Act 2017 permitting TPF, Singapore abolished the tort of maintenance and champerty and implemented a 'carve out' confirming that TPF agreements were not contrary to public policy for maintenance or champerty reasons. *See* Sections 5A and 5B of the Civil Law Act 1909.

?2 *See* Legal Profession (Amendment) Bill, Bill No. 40/2021. The bill also includes a proposed refinement to the scope of representation of foreign lawyers in SICC proceedings.

?3 Legal Professional (Amendment) Act, No. 8 of 2022, Clause 6, Section 115A(2); *see also* Legal Profession Act 1966, Parts 4A and 8.

?4, ?6 Legal Professional (Amendment) Act, No. 8 of 2022, Clause 6, Section 115A(1).

?5 *See* Legal Profession (Amendment) Bill, Bill No. 40/2021, Explanatory Statement, p. 14. It will be up to the lawyer and the client to define in the CFA what constitutes a successful outcome.

?7 Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the Legal Profession (Amendment) Bill, 12 January 2022, paragraph 29.

?8 While the present intention is not to impose limits or caps, the Act reserves the possibility of such limitations being introduced in the future. *See* Official Report of Parliamentary Debates of the Fourteenth Parliament First Session on 12 January 2022, Vol. 95 No. 46, Legal Profession (Amendment) Bill, Mr Edwin Tong's speech at 1:43 pm; Legal Professional (Amendment) Act, No. 8 of 2022, Clause 115B(7)(d).

?9 Legal Professional (Amendment) Act, No. 8 of 2022, Clause 6, Section 115B(4); Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the Legal Profession (Amendment) Bill, 12 January 2022, paragraph 37.

?10 Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the Legal Profession (Amendment) Bill, 12 January 2022, paragraph 37(i).

?11 Law Society of Singapore, Feedback to the Public Consultation on Conditional Fee Agreements in Singapore, 8 October 2019, page 5.

?12 Legal Professional (Amendment) Act, No. 8 of 2022, Clause 6, Section 115C; Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the Legal Profession (Amendment) Bill, 12 January 2022, paragraph 44.

?13 Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the Legal Profession (Amendment) Bill, 12 January 2022, paragraph 38.

?14 Legal Professional (Amendment) Act, No. 8 of 2022, Clause 6, Sections 115B(7)(c) and (e); Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the Legal Profession (Amendment) Bill, 12 January 2022, paragraph 37.

?15 Legal Professional (Amendment) Act, No. 8 of 2022, Clause 6, Section 115D; Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the Legal Profession (Amendment) Bill, 12 January 2022, paragraph 45.

?16 Hong Kong's Legislative Council Panel on Administration of Justice and Legal Services: Paper on Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 dated 28 March 2022.

?17 The Law Reform Commission of Hong Kong, Consultation Paper, Outcome Related Fee Structures for Arbitration, December 2020, paragraphs 4.37-4.49; The Law Reform Commission of Hong Kong, Report, Outcome Related Fee Structures for Arbitration, December 2021, paragraphs 2.16-2.25, 5.10-5.13.

?18 *See* Hong Kong's Legislative Council Panel on Administration of Justice and Legal Services: Annex to the Paper on Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 dated 28 March 2022; The Law Reform Commission of Hong Kong, Report, Outcome Related Fee Structures for Arbitration, December 2021, Chapters 4 and 8.

This entry was posted on Thursday, April 7th, 2022 at 8:23 am and is filed under Conditional fee agreements, Contingency Funding, Costs, Costs in arbitral proceedings, Counsel, Counsel fees, Fee Agreeements, Hong Kong, outcome related fee structures, Singapore
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