



THIRD-PARTY FUNDING IN SINGAPORE: EFFICIENT RISK ALLOCATION IN TROUBLED TIMES

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INTRODUCTION

When deciding whether to pursue a legal claim, parties often ask - “do we have the budget for this?” This question is revisited even after dispute resolution proceedings have commenced, due to changes in a party’s financial circumstances, unknown strategies deployed in the legal proceedings, and the fluctuating economic climate (e.g. insolvency risks due to the COVID-19 pandemic).

One way to allocate risks and manage financial exposure of legal proceedings is via third-party funding (“TPF”), where an unrelated entity steps in to fund the legal proceedings in return for financial gain. This article features the recent expansions to Singapore’s TPF framework, one of the many features cementing Singapore’s attractiveness as an international dispute resolution hub.

GROWTH OF TPF IN SINGAPORE

TPF used to be prohibited due to the common law principles of maintenance and champerty. In short, the concern was manipulation of the legal system arising from frivolous or vexatious litigation if third parties could profit from litigation in which they had no legitimate interest.

However, there is a competing policy concern of access to justice. This is especially important for aggrieved parties who are left with little or no funds to pursue legal proceedings against a counterparty whose conduct led to the former’s lack of finances.

Legislative amendments were thus introduced in 2017 to create a TPF framework where qualified funders were allowed to fund limited types of legal proceedings (i.e. international

arbitration proceedings, and court and mediation proceedings connected with international arbitration proceedings). The TPF framework was later extended to certain insolvency-related proceedings in 2020 (e.g. claims relating to undervalue transactions, unfair preference transactions, and fraudulent trading).

Stakeholders have since expressed favourable feedback to the Ministry of Law for the TPF framework. In particular, commercial parties appreciate additional options for financing their legal proceedings, legal and arbitration communities have likewise responded positively, and professional funders have since increased their presence in Singapore. With the “final catalyst” being the financial disruptions due to the COVID-19 pandemic, further TPF developments were only a matter of time.

THE NEW DEVELOPMENTS

From June 2021, TPF was expanded to include:

1. Domestic arbitration proceedings and court proceedings arising from or connected with domestic arbitration proceedings;
2. Proceedings commenced in the Singapore International Commercial Court (“SICC”) so long as they remain in the SICC, and appeals arising from decisions in such SICC proceedings; and
3. Mediation proceedings relating to any of the above.

We discuss three of the many benefits from these developments.

First, it is increasingly common for disputes to be resolved via domestic arbitration (as compared to international arbitration). Where parties have their place of business within Singapore and a substantial part of their contractual obligations are to be performed within Singapore, it is not uncommon for parties to opt for domestic arbitration to resolve disputes. One example is

domestic construction projects for large public infrastructure (e.g. housing and transport facilities). The stringent labour restrictions and increased material costs during the Covid-19 pandemic have stalled many projects. Aggrieved contractors/suppliers, who are out of pocket from having performed the works/supplied the materials, now have a practical alternative to finance their pursuit of meritorious claims.

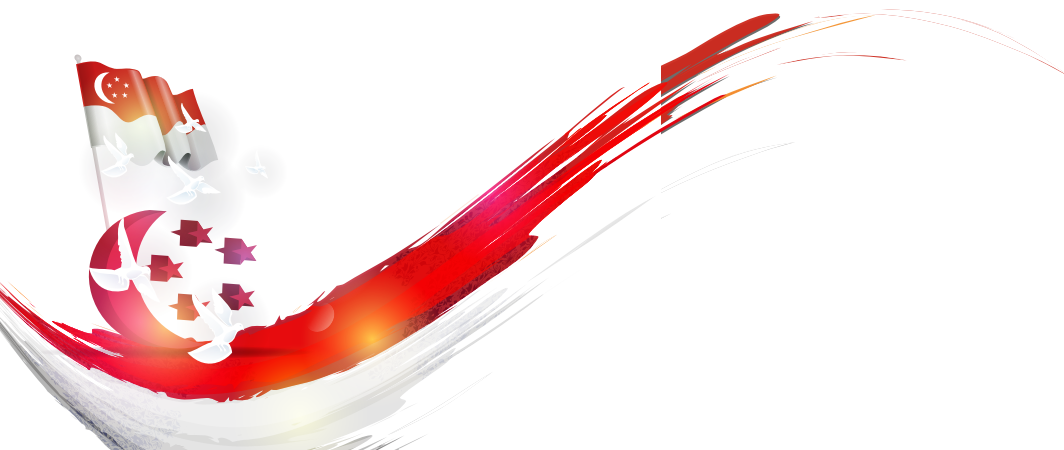
Second, the TPF framework now expressly includes SICC proceedings, which usually involve high-value international commercial disputes. Notwithstanding the availability of international arbitration, as an alternative, parties may prefer resolving disputes in the SICC for its court-based mechanism to avoid certain problems that are associated with arbitrations (e.g. delay in proceedings, less developed precedents/jurisprudence, higher upfront costs, and the general absence of appeals). Further, parties may be drawn to the SICC for its panel of internationally renowned judges from both common law and civil law jurisdictions. TPF for SICC proceedings thus allows parties to manage the financial burdens of pursuing their claims in the SICC, and thereafter moving quickly to enforce the judgment

obtained.

Finally, including mediation proceedings as one of the permitted TPF categories is helpful to parties who prioritise confidentiality and the preservation of commercial relationships. Arbitration/litigation proceedings are commenced for various reasons, one of which includes drawing the counterparty to the “negotiating table” to reach a settlement. It is also common for parties to attempt mediation after commencing arbitration/litigation, and resolving the dispute without going through the entire adversarial arbitration/litigation process. This mode of resolution may be preferred by listed companies (who do not wish to affect investor confidence), especially if they are reliant on the counterparty for future business (e.g. the counterparty is the sole supplier of a certain commodity that is vital for the aggrieved claimant’s business). Even if aggrieved claimants can independently finance their legal proceedings, they may wish to utilize TPF instead so that cashflow can be channelled towards their other ongoing transactions instead of legal proceedings.

CONCLUSION

The developments in Singapore’s TPF framework provide an important but understated tool for all stakeholders especially in the current economic climate. By efficiently allocating the financial risk of legal proceedings to a party with deeper pockets (i.e. third-party funders), commercial parties can maximize their chances of recovery on meritorious claims, i.e. “legal assets” which would otherwise go to waste for want of funds. In turn, professional funders have access to increased business opportunities, while legal representatives and other professionals involved in the legal proceedings (e.g. expert witnesses) can be assured that their fees will be accounted for. Parties involved in dispute resolution proceedings in Singapore should thus engage counsels who not only have deep knowledge of the legal issues, but also the commercial expertise to advise on how to resolve the dispute in the most cost-effective way, which includes taking advantage of the expanded TPF framework.



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