BETTING ON CONFLICT: MAINTENANCE & CHAMPERTY IN SINGAPORE

Introduction

"*A mischief … that a man would buy a weak claim in hopes that power might convert it into a strong one, and that a sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench*" - this was the fear that underpinned the prohibition of maintenance and champerty, in the words of the eminent English jurist and legal philosopher Jeremy Bentham.[1]

Maintenance is defined as officious intermeddling in litigation by a non-party to the litigation, and champerty is a particular form of maintenance in which one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action.[2] Practically, maintenance and champerty commonly refer to the practice of a lawyer agreeing to conduct a client's case and to only be paid if the client wins. It also refers to the increasingly prevalent (in jurisdictions other than Singapore) practice of a third party to the dispute undertaking to pay the costs of the dispute resolution process, in return for a fee and/or a portion of the proceeds if the dispute is decided in the client's favour.

The common law prohibiting such arrangements has its roots in medieval England, in a time when "*the mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits formented and sustained by unscrupulous men of power*".[3] The rationale behind the former recognition of maintenance and champerty as civil wrongs and the view that contracts for maintenance and champerty were contrary to public policy (and thereby unenforceable) was to prevent powerful people or organisations from suborning judges and witnesses or by exploiting worthless claims.

Maintenance, Champerty and Third-Party Funding of Dispute Resolution Processes

Up till January 2017, the law in Singapore was generally that an agreement for third-party funding of litigation was unenforceable for being contrary to public policy for falling foul of the doctrines of maintenance and champerty. Additionally, a party could, theoretically, make a claim in tort against another party for maintenance or champerty.

However, certain exceptions to this general rule had been recognised in Singapore law. Firstly, a liquidator of an insolvent company is permitted to sell a cause of action and/or the fruits of the cause of action to a third-party funder, if such a contract fell within section 272(2)(c) of the Companies Act (Cap. 50, 2006 Rev. Ed) ("**Companies Act**"), or even if it did not, if the funder had a legitimate interest in the litigation and if the interests of justice were not being

1 Jeremy Bentham, "Defence of Usury; Showing the Impolicy of the Present Legal Restraints on the terms of Pecuniary Bargains", 1888, (Theodore Foster, New York)
2 *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] 4 SLR 91 ("***Kurubalan***") at [40]
3 per Lord Mustill in *Giles v Thompson* [1994] 1 AC 142 (House of Lords) ("***Giles v Thompson***") at 153

otherwise subverted.[4]

However, the gradual and growing acceptance of third-party funding is evident. On 10th January 2017, the Civil Law (Amendment) Act 2017 was passed, and it came into force on 1 March 2017. The rationale behind the amendments enacted by this statute was to grow dispute resolution work in Singapore.[5]

The Civil Law (Amendment) Act 2017 enacted a new section 5A of the Civil Law Act, which abolished the tort of maintenance and champerty. Now, no person can be held civilly liable for maintenance or champerty.[6] Nonetheless, agreements that involve champertous arrangements, such as an agreement for third-party funding, might still be held unenforceable on the basis that it is contrary to public policy.[7]

The Civil Law (Amendment) Act 2017 also enacted a new section 5B, pursuant to which the Civil Law (Third-Party Funding) Regulations were enacted and became effective with effect from 1 March 2017. These provisions have the effect of making enforceable third party funding contracts in relation to international arbitration proceedings, as well as court proceedings and mediation proceedings connected with international arbitration proceedings.[8] Only funders that carry on the principal business of funding the costs of dispute resolution proceedings to which the funder is not a party, and funders with sufficient financial resources (paid-up share capital of not less than $ 5 million or the equivalent amount in foreign currency or not less than $ 5 million or the equivalent amount in foreign currency in managed assets) will be allowed to fund dispute resolution proceedings.[9] The intention behind these amendments is to ensure that third-party funding can be 'tested' within the limited sphere of commercially sophisticated parties.[10]

Concomitant amendments have been made to the Singapore International Arbitration Centre's Arbitration Rules 2017, which allow an arbitrator to consider any third-party funding arrangements in apportioning the costs of the arbitration.[11]

Maintenance & Champerty and Lawyers

Although the mechanisms of justice have, in subsequent years, become stronger and less amenable to manipulation, it still remains a fact that a lawyer who has a personal economic stake in litigation and who seeks to enter into an agreement pursuant to which that lawyer is paid only if the claim succeeds faces a potential conflict of interest.[12]

Pursuant to the Legal Profession Act (Cap. 161, 2009 Rev. Ed.) ("**LPA**") and the Legal Profession (Professional Conduct) Rules 2015 ("**PCR**"), a lawyer cannot currently enter into an arrangement with a client in which the lawyer is paid only if the client's claim succeeds i.e. contingency fees. A lawyer also cannot purchase an interest in the outcome of a suit.

However, a lawyer may act, and indeed, is encouraged to act, for a poor client in the event that the lawyer knows that the client would not ordinarily be able to afford legal representation and have adequate access to judicial redress and would only be able to pay the lawyer's fees

4 *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at [29], [43] - [49]
5 Singapore Parliamentary Reports (10 January 2017), Vol. 94
6 Civil Law Act (Cap. 43, 1999 Rev. Ed.) ("**Civil Law Act**"), s. 5A(1)
7 Civil Law Act, s. 5A(2)
8 Civil Law (Third-Party Funding) Regulations 2017, r. 3
9 Civil Law (Third-Party Funding) Regulations 2017, r. 4
10 Singapore Parliamentary Reports (10 January 2017), Vol. 94
11 Investment Arbitration Rules of the Singapore International Arbitration Centre Rules (1st Ed., 1 January 2017, rr. 33 and 35
12 *Kurubalan* at [43]

if the claim succeeds, out of the proceeds of that successful claim or if there was a costs order obtained against the other side.[13]

This can be reconciled with the LPA in that the LPA contemplates a formal agreement between lawyer and client in which a legal obligation to pay the lawyer only arises if his client's claim succeeds, whereas the situation of a lawyer acting for an impecunious client contemplates an ordinary arrangement in which the client must pay the lawyer regardless of the outcome, but, as a practical matter, the lawyer knows that the client will not be able to pay him unless the claim succeeds.[14] However this quasi-exception to the prohibition against maintenance and champerty is likely to apply in a narrow range of circumstances, in which the lawyer's motivation is to allow his client access to justice[15] and the lawyer has thoroughly examined his client's case and has honestly concluded that the client had a good cause of action.[16]

How the Changes to the Law Affect Clients

The most obvious benefit of the changes in the law are that disputants in international arbitration (and related court proceedings and mediation) who would otherwise be unable to afford to commence or sustain arbitration proceedings now have the option of obtaining third party financing.

Such funding is also a way to hedge the risk of dispute resolution proceedings. International arbitration results in a claim either succeeding or failing. A claimant (the party bringing the claim) gets either everything he has asked for, or nothing at all. Obtaining third-party funding allows to reduce their risk.

A Possible Future for the Law on Champerty and Maintenance in Singapore

The original rationale for the prohibition against maintenance and champerty – the fear of a "*sword of a baron*" – no longer applies with the force that it once did. Jurisdictions such as the UK and some states in Australia have removed the prohibition against maintenance and champerty and have allowed third-party dispute resolution funding. Third-party funding has become a feature of several other leading arbitration venues such as London, Paris and Geneva. Singapore seems to be following the example set by these jurisdictions, albeit in a limited sphere for now. However, Parliament has indicated that the scope of the third-party litigation funding framework may be broadened in future.[17]

The removal of maintenance and champerty as a civil wrong in Singapore follows the approach that the UK took in 1967. The gradual acquiescence to third-party funding and the cautious attitude of parliament towards such arrangements shows that any further changes in Singapore will depend on the effect that third-party funding has i.e. the government will adopt a 'wait and see' approach.

To this end, the Ministry of Law of Singapore initiated a public consultation to seeking views and any other feedback on the operation of the current third-party funding framework thus far, including any suggestions to improve the framework. The consultation period was from 3rd April 2018 to 15th May 2018.[18]

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13 *Kurubalan* at [82]
14 per Chao Hick Tin JA in *Kurubalan* at [83]
15 *SATS Construction Pte Ltd v Islam Md Ohidul* [2016] 3 SLR 1164 at [15]
16 per Lord Russell of Killowen in *Ladd v London Road Car Co* (1900) 110 LT 80, as cited in Jeffrey Pinsler SC, "Legal Profession (Professional Conduct) Rules 2015: A Commentary", (2016, Academy Publishing, Singapore) at [18.007].
17 Singapore Parliamentary Reports (10 January 2017), Vol. 94
18 Ministry of Law, Singapore, online: https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-third-party-funding.html, accessed on 28thJune 2018.

As for the possibility of lawyers being allowed to enter into contingency fee arrangements with clients, outside of the narrow scope of the quasi-exception mentioned above, it is unlikely that the legal position will change any time soon. The Court of Three Judges has stated that changes to the law ought to be made by Parliament. Given that there has not been any serious discussion on any change of the law in this regard, we do not think such a change is likely soon.

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