THE LAW SOCIETY OF SINGAPORE

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29 July 2016

Ministry of Law
Policy Advisory Division
100 High Street
#08-02, The Treasury
Singapore 179434

Attention: Ms Crystal Tan
Senior Assistant Director, Policy Advisory Division

Dear Ms Tan

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

A. Feedback on Third Party Funding

1. We refer to proposed legislative amendments to enact a framework for third party funding for international arbitration proceedings.

2. We note the Ministry's proposal to permit third party funding for "prescribed dispute resolution proceedings" described in Regulation 3 of the proposed Civil Law (Third Party Funding) Regulations 2016.

3. The proposed legislative amendments were referred to the Law Society's Alternative Dispute Resolution Committee ("ADR Committee"). The ADR Committee would like to propose an amendment to expand Regulation 3 of Regulations 2016 to include the following:
   a) Mediation proceedings arising of out or in connection with the proceedings set out in the current Regulation 3(b), (d) and (e) of Regulations 2016; and
   b) Mediation proceedings conducted prior to the commencement of international arbitration proceedings.

   The ADR Committee's views, including the proposed amended Regulation 3 of Regulations 2016 are set out in **Annex A**.

4. We also note that apart from the proposed legislative amendments, there will be related amendments to the Legal Profession (Professional Conduct) Rules 2015. The Law Society will be happy to provide its views and suggestions on the appropriate safeguards including any amendments to the Legal Profession (Professional Conduct) Rules.

5. The Law Society agrees with the Ministry's proposed legislative amendments that will enact a framework for third party funding for international arbitration proceedings, subject to the views of the ADR Committee, and with appropriate safeguards.

6. In view of the developments in other jurisdictions and the developing case law in Singapore in relation to third party funding, the Law Society's Civil Practice Committee and ADR Committee had also considered whether third party funding should be allowed for litigation and arbitrations seated in Singapore. These two committees were largely in favour of permitting third party funding in Singapore in connection with litigation, and arbitrations where the seat of arbitration is Singapore, subject to regulatory safeguards.

7. The Law Society is of the view that third party funding should be permitted for international arbitration proceedings as proposed by the Ministry and that a graduated approach should be taken in expanding the third party funding framework to include litigation and domestic arbitrations governed by the Arbitration Act (i.e. where the place of arbitration is Singapore and where Part II of the International Arbitration Act does not apply). The Law Society would be happy to discuss this further with the Ministry at the appropriate juncture.

B. Feedback on Contingency Fee Arrangements

8. In addition, the Law Society will be grateful if the Ministry can review the position on contingency fee arrangements. The Law Society had written to the Ministry by letter dated 4 January 2016 proposing that the following be allowed:
   (a) Contingency fee arrangements for (i) matters that fall under the International Arbitration Act, and (ii) matters that are brought for mediation before the Singapore International Mediation Centre which result in a successful mediation settlement.
   (b) Contingency fee arrangements for access to justice cases and where consent from the Council of the Law Society is given.

A copy of the letter is attached as **Annex B.**

9. The Law Society suggests that it is appropriate to review the existing prohibitions against contingency fee arrangements, given that the proposed Civil Law (Amendment) Bill aims to:
   (a) Abolish the common law tort of maintenance and champerty; and
   (b) Clarify that third party funding contracts for international arbitration proceedings, a species of champertous agreements notwithstanding, will not be found contrary to public policy or illegal.

10. In light of the above, the Law Society suggests that contingency fee arrangements in the limited categories enumerated by the Law Society above, being conceptually similar to third party funding contracts, should also be considered as not being contrary to public policy or illegal.

11. Therefore, we would appreciate it if the Ministry could also consider legislative amendments to permit such contingency fee arrangements.

Yours faithfully

Mr Thio Shen Yi SC
President, The Law Society Of Singapore

ANNEX A

FEEDBACK ON CIVIL LAW (THIRD-PARTY FUNDING) REGULATIONS 2016

Feedback on Civil Law (Third-Party Funding) Regulations 2016 ("Regulations 2016")

S/N	Provision	Comments
1.	**Regulation 3: Prescribed dispute resolution proceedings**	**Alternative Dispute Resolution Committee** In line with the objective of allowing restricted third-funding in "prescribed dispute resolution proceedings" (ie. international arbitration proceedings or proceedings connected with it) and with a concurrent emphasis to promote, encourage and facilitate the resolution of disputes by mediation, the ADR Committee would like to propose an amendment to expand Regulation 3 of Regulations 2016 to include the following: a) Mediation proceedings arising of out or in connection with the proceedings set out in the current Regulation 3(b), (d) and (e) of Regulations 2016; and b) Mediation proceedings conducted prior to the commencement of international arbitration proceedings. Pursuant to the proposed sections 5B(1) and 5B(2) of the Civil Law Act, a contract for the purpose of funding the costs of a party in certain "prescribed dispute resolution proceedings" is declared to be not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty. Regulation 3 of Regulations 2016 defines "prescribed dispute resolution proceedings" as follows: "*For the purposes of section 5B(1) of the Act, the following classes of proceedings are prescribed dispute resolution proceedings:* *(a) international arbitration proceedings;* *(b) court proceedings arising from or out of international arbitration proceedings;* *(c) mediation proceedings arising out of or in connection with international arbitration proceedings;* *(d) application for a stay of proceedings referred to in section 6 of the International Arbitration Act;* *(e) proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act*."

		From the express wording in Regulation 3(c) of Regulations 2016, "prescribed dispute resolution proceedings" include mediation proceedings arising out of or in connection with only international arbitration proceedings. In particular, Regulation 3(c), in its current form, does not capture the following kind of mediation proceedings: a) mediation proceedings arising out of or in connection with "court proceedings arising from or out of international arbitration proceedings" (ie. the proceedings mentioned under Regulation 3(b)); b) mediation proceedings arising out of or in connection with an "application for a stay of proceedings referred to in section 6 of the International Arbitration Act" [ie. the proceedings mentioned under Regulation 3(c)]; c) mediation proceedings arising out of or in connection with "proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act" [ie. the proceedings mentioned under Regulation 3(e)]; and d) mediation proceedings conducted prior to the commencement of international arbitration proceedings, whether on an ad-hoc basis or pursuant to a multi-tiered dispute resolution clause. This interpretation is supported by the fact that the express wording of Regulation 3 distinguishes international arbitration proceedings on the one hand (see Regulation 3(a)), from the other proceedings set out in Regulation 3(b), (d) and (e) on the other. This means that Regulation 3(c) refers to mediation proceedings arising out of or in connection with only international arbitration proceedings but not those other proceedings. Since the Ministry's proposal is to include all proceedings in Regulation 3(a), (b), (d) and (e) of the Regulations 2016 as "prescribed dispute resolution proceedings", there is no reason to exclude mediation proceedings arising out of or in connection with all of those proceedings from the class of "prescribed dispute resolution proceedings". In addition, the Committee notes the increasing popularity and awareness of using mediation to resolve disputes. Coupled with the launch of the Singapore International Mediation Centre and its promotion of the Arb-Med-Arb regime, the Committee anticipates an increased occurrence of mediation conducted pursuant to a multi-tiered dispute resolution clause and/or ad-hoc mediation conducted prior to the commencement of international arbitration proceedings. Therefore, the Committee suggest that such pre-arbitral mediation proceedings be also included in the definition of "prescribed dispute

		resolution proceedings" in Regulation 3. This is in line with the aim to develop Singapore into a centre for international commercial mediation by promoting, encouraging and facilitating the resolution of disputes by mediation. In the circumstances, the Committee would suggest that Regulation 3 be replaced with the following: " *For the purposes of section 5B(1) of the Act, the following classes of proceedings are prescribed dispute resolution proceedings:* *(a) international arbitration proceedings;* *(b) court proceedings arising from or out of international arbitration proceedings;* *(c) application for a stay of proceedings referred to in section 6 of the International Arbitration Act;* *(d) proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act;* *(e) mediation proceedings arising out of or in connection with any of the proceedings in (a) to (d) above; and* *(f) mediation proceedings arising out of or in connection with a dispute arising out of an arbitration agreement governed by the International Arbitration Act.*" In conclusion, these changes to the phrasing and re-numbering of the proposed Regulation 3 and the inclusion of a new Regulation 3(f) will better achieve the dual objectives of the Civil Law (Amendment) Bill and proposed Mediation Bill which was circulated for public consultation earlier in 2016.

ANNEX B

LETTER TO THE MINISTRY OF LAW ON THE PROPOSED INCLUSION OF LIMITED EXCEPTIONS TO THE RULE AGAINST CONTINGENCY FEES DATED 4 JANUARY 2016

THE LAW SOCIETY OF SINGAPORE

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Our Ref: LS/10/RLR/Gen/2015/COU(S107LPA)/DLT/ct

4 January 2016

Legal Industry Division
Ministry of Law
100 High Street, #08-02
The Treasury
Singapore 179434

BY EMAIL & POST
(gloria_lim@mlaw.gov.sg)

Attn: Ms Gloria Lim
Director, Legal Industry Division

Dear Gloria,

Proposed Amendments to the Legal Profession Act (Cap. 161) and the Legal Profession (Professional Conduct) Rules 2015 to include Limited Exceptions to the Rule against Contingency Fees

1 The Council of the Law Society ("Council") would like to propose amendments to the Legal Profession Act (Cap. 161) ("LPA") and the Legal Profession (Professional Conduct) Rules 2015 ("PCR") to include limited exceptions to the rule against contingency fees. Currently, both section 107 of the LPA and Rule 18 of the PCR collectively state the general prohibition against contingency fees and thus prohibit lawyers and their clients from entering into champertous agreements.

2 Taking into account the recent developments in the law on contingency fees following from the decision of the Court of Appeal in *Law Society of Singapore v Kurubalan s/o Manickam* [2013] 4 SLR 91 (CA) ("*Kurubalan*") and the permissibility of contingency fees for non-contentious work, Council formed the Contingency Fees Sub-Committee. The Sub-Committee was tasked to look into and propose the limited situations in which the prohibition against contingency fees could be waived to meet the justice of the case. The Sub-Committee subsequently submitted a range of proposals and a draft report on conditional fees and damages-based agreements. Based on the feedback received from members of the Bar, including those who attended the dedicated townhall sessions and from the other practice committees of the Law Society, Council concluded that only 2 of the Sub-Committee's proposals for the waiver of the contingency fee prohibitions have received a largely favourable response from the members and warrant further consideration.

Proposal 1: Permitting Contingency Fee Arrangements for International Arbitration and International Mediation

3 Following the liberalisation and internationalisation of the legal industry, Singapore has rapidly developed into an arbitration hub. Many jurisdictions (for e.g. England, the United

States, Australia, Scotland, Canada, South Africa and New Zealand) permit some form of contingency fee arrangement ("CFA") and lawyers from these jurisdictions practising in internationalised legal services are given the competitive advantage because they are able to offer CFAs. Foreign lawyers who operate in firms outside Singapore but appear in arbitrations in Singapore can potentially be retained in a Singapore arbitration on the basis of the CFA as long as the foreign lawyer's home jurisdiction permits it. This advantage is similarly extended to foreign lawyers who are based in Singapore and who only practice arbitration law.

4 However, Singpapore lawyers who practice international arbitration are bound by the Court of Appeal's decision in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR 989 (CA) which held that the law on champerty was just as applicable in the case of arbitrations as it was to regular litigation. The Singapore lawyers are therefore placed at a competitive disadvantage.

5 There is clear room to create a statutory exception for Singapore lawyers to enter into CFAs for international arbitration cases. Council further suggests that the exception may also be widened to encompass matters that are brought for mediation before the Singapore International Mediation Centre which result in a successful mediation settlement. This is to take into account the widespread usage of multi-tiered dispute resolution clauses, where the processes of alternative dispute resolution are interlinked. Singapore lawyers who practice international mediation should thus be allowed to enter into CFAs for international mediation cases as well, since there is a potential for an international arbitration dispute to be carried into mediation by virtue of parties' agreement or through the operation of multi-tiered dispute resolution clauses.

6 Therefore, the Law Society proposes that Singapore lawyers be allowed to enter into unrestricted CFAs for: (1) matters that fall under the International Arbitration Act (Cap. 143A), and; (2) matters that are brought for mediation before the Singapore International Mediation Centre which result in a successful mediation settlement.

Proposal 2: Permitting Contingency Fee Arrangements for "Access to Justice" cases and where Consent from the Council is given

7 In the case of *Kurubalan*, the Court recognized that principles of maintenance and champerty were not "static principles" and affirmed that principles of public policy affecting these areas of law would have to keep with the "state and development of society and conditions of life in a community" (*Kurubalan* at [45]). CFAs should thus be introduced, where appropriate, to promote the overriding public interest in ensuring "access to justice". This will allow for rights-holders who are financially-barred to enforce their rights to access litigation.

8 Currently, there are several initiatives in place (e.g. pro bono services, the expansion of legal aid, the Primary Justice Project etc.) that assist members of the public usually falling into the lowest income group to enforce their legal rights. The Court in *Kurubalan* had clarified that it could be "permissible and even honourable for an Advocate and Solicitor to act for an impecunious client" through a CFA where the Advocate and Solicitor does not get paid if the client does not recover damages (*Kurubalan* at [82]). In the Court's view, such an arrangement was clearly not within restrictions of s107 of the LPA and then r37 of the Legal Profession (Professional Conduct) Rules (Cap. 161, R1, 2010 Rev. Ed.) (*Kurubalan* at [83]). However, the Law Society notes that there is a "lower-middle class", which is a class of the public between the lowest income group and those who can adequately afford paid legal service. The lower-middle class are less able to afford legal services and yet usually fall out of the means test to qualify for legal aid. Extrapolating from the concept of shifting public policy

considerations as enunciated in *Kurubalan*, CFAs are the arguable means to facilitate access to justice for this "impecunious" class.

9 Additionally, the Law Society suggests that CFAs for such "access to justice" cases can only be entered into where the lawyer has obtained written consent from the Law Society. In determining whether to give its written consent to these CFAs, the Council will consider whether:

(1) Without the fee arrangement, the client will have difficulty in engaging a lawyer;
(2) The proposed fee is reasonable;
(3) The client qualifies for legal aid in so far as it is relevant to (2); and
(4) Such a fee arrangement would bring the legal profession into disrepute

10 Further, Council will formulate a workflow to monitor each individual case after written consent from Council had been given for the lawyer to enter into the CFA. This ensures that the element of "access to justice" continues to remain apparent on the facts of each individual case.

Conclusion

11 Going forward, Council envisions that parts of the LPA and the PCR would require amendment to sanction CFAs for the abovementioned categories. Council sincerely hopes that its views will be taken into consideration and remains available to engage in further discussions with the Ministry of Law in this regard.

Yours faithfully

Thio Shen Yi, SC
President, The Law Society of Singapore