THE LAW SOCIETY OF SINGAPORE

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Our Ref: LS/RLR/AC/2019/CFA/DL/jt/jl

8 October 2019

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

BY EMAIL AND POST
(MLAW_CFA_Consultation@mlaw.gov.sg)

Dear Sir / Madam,

THE LAW SOCIETY OF SINGAPORE'S FEEDBACK TO THE PUBLIC CONSULTATION ON CONDITIONAL FEE AGREEMENTS IN SINGAPORE

1. We refer to the Ministry of Law's ("Ministry") call for public feedback on the proposal to allow conditional fee agreements ("CFAs") for the following prescribed categories of proceedings:

   (a) International and domestic arbitration proceedings; and
   (b) Certain prescribed proceedings in the Singapore International Commercial Court ("SICC"), including mediation proceedings arising out of or in any way connected with such proceedings.

2. We set out the salient points of the Law Society of Singapore's ("Society") feedback as follows.

Closed-door discussion on 16 September 2019

3. Council is grateful for the opportunity to share the preliminary views of its members and practice committee chairpersons on the public consultation at the closed-door discussion with Senior Minister of State, for Law & Health, Mr Edwin Tong, on 16 September 2019. In sum, several of the attendees noted that different safeguards may be necessary for CFAs relating to international arbitration proceedings on one end of the spectrum, and those where a litigant cannot afford the services of a lawyer on the other end. For the former, the regime should be as flexible as possible, in order not to continue to place Singapore-qualified lawyers at a competitive disadvantage in the commercial arena. For the latter, careful consideration should be given to the need to balance access to justice considerations against potential abuse of CFAs. In this regard, we note that the consultation paper has not delved into these issues and given that the policy intent, as we understand from the closed-door discussion, is to adopt an incremental approach to implementing CFAs in the market, it may be prudent for the Ministry to do a pilot scheme for CFAs at the lower end of the spectrum first and only for a particular category of cases. It may well be that certain types of domestic arbitration proceedings could offer a testbed for CFAs, and the Ministry may wish to, as a starting point, limit the use of CFAs to, say, building claims in domestic arbitration proceedings first.

4. However, the Society has been made aware of exceptional instances where arbitration proceedings have been converted to domestic litigation proceedings. The Society urges the Ministry to consider the implications in such scenarios (even though unusual), given the competing considerations that: (a) the CFA may not be enforceable if it continues to be used in litigation proceedings; and (b) the CFA should not be unnecessarily unravelled given the agreement between the solicitor and client to enter into a CFA at the outset. The Society would be grateful if the Ministry could clarify whether CFAs adopted for arbitration proceedings will continue to apply upon conversion to domestic litigation proceedings.

Society's previous proposals

5. The Society had submitted various proposals relating to contingency fee arrangements in 2016 (see our letters to the Ministry dated 4 January 2016 and 29 July 2016, and the Ministry's response dated 7 November 2016), copies of which are enclosed. We are heartened to note that the Ministry has issued the present consultation on CFAs following its study of event-triggered fee arrangements (see para. 10 of the Ministry's response dated 7 November 2016). We are of the view that the issues raised in the present consultation overlap to some extent with our 2016 proposals, and are pleased to note that in principle, the Ministry has decided to allow alternative fee arrangements in the form of CFAs in international arbitration and certain SICC proceedings. In addition, we would like to revisit our proposals to introduce contingency fee arrangements for international arbitration proceedings as per our letter dated 4 January 2016 in order to level the playing field. Another area worth considering for contingency fee arrangements is corporate insolvency.

Scope of CFA framework

6. With reference to paragraph 9 of the consultation paper, we note that the Ministry intends to conduct a separate study on whether CFAs will promote access to justice for categories of proceedings that are not covered by the scope of the public consultation. The Society would be keen to contribute its inputs to this study.

Members' Consolidated Feedback

7. Please find enclosed, a table setting out our members' consolidated feedback in response to paragraphs 7 to 17 of the consultation paper (the "CFA proposal"), for the Ministry's consideration. The consolidated feedback is based primarily from members of the Council of the Society, Alternative Dispute Resolution Committee, Small Law Firms Committee and Civil Practice Committee.

8. In summary, the feedback to the CFA proposal are as follows:

   (a) **In General:** The Society is generally in support of the CFA proposal, especially as regards its application in international arbitration proceedings, SICC proceedings and mediation proceedings as set out in paragraph 1(b) herein. However, given that the CFA proposal is still being conceptualised and is a novel one, some of our members, who have no working knowledge of how CFAs work in other jurisdictions, are unable to fully assess its merits / adequacy. Moreover, issues such as the level of discounted fees and uplift or success fee will need further thinking and discourse throughout the conceptualisation process. The Society would be keen to participate in subsequent discussions with the Ministry in this regard. Some members have also expressed concerns whether entering into CFAs would be economically viable, as CFAs may impact the collection of fees and/or cash flow of small law firms, and/or affect the quality of work produced by lawyers who take up an excessive number of CFA cases. In particular, as the Society has not gathered feedback on the suitability of CFAs in domestic litigation proceedings, the Society

is unable to support CFAs in areas beyond the scope set out in the CFA proposal at this juncture.

(b) Cooling Off Period: We note that the Ministry referred to the legislation in South Australia (which prescribes a 5-day cooling period). Generally, members are of the view that the cooling off period should not be for an extended period of time, so as to balance the interests between parties. They also suggest that potential clients should be required to pay a token sum to safeguard against abuse. In addition, no mandatory cooling period is necessary in international arbitration proceedings, as the clients are likely to be sufficiently, if not highly, sophisticated.

(c) Cap on Uplift / Success Fee: As the framework for the implementation of CFAs in Singapore is not clear, members are generally against the proposal of a cap on the success fee. Members opine that in international arbitration proceedings, commercial parties are sufficiently sophisticated to manage their rights and finances. As for domestic arbitration proceedings, we have not yet taken a position on the appropriate cap as the framework is still being conceptualised.

We note that the Ministry had considered the position in other jurisdictions, but wish to highlight that there may be different policy considerations for a cap on uplift/success fee in those jurisdictions. For example, CFAs in England and Wales operate on a "no win no fee" basis, which we understand from the closed-door discussion on 16 September 2019 is not the approach taken by the current CFA proposal. Instead, upon further reflection, it appears to the Society that the current CFA proposal is premised on a variant of CFAs known as discounted CFAs ("DCFAs") whereby:

(i) if the action is unsuccessful, the lawyer cannot recover the uplift, but is entitled to the discounted hourly rates agreed with the client; and
(ii) if the action is successful, the lawyer is entitled to recover from the client the balance of the usual hourly rate referred to in the DCFA, together with any uplift.

We would be grateful if the Ministry could confirm that the Society's understanding of the current CFA proposal is correct. If so, we are of the view that imposing a cap on the uplift for DCFAs would not be advisable given that it may deter lawyers from entering into DCFAs as DCFAs are typically entered into where the commercial risks are already higher e.g. the prospects of success are less easy to calculate, or where there is a higher risk to the lawyer of an unsuccessful outcome.

Further, we would highlight that it would be practically difficult to police CFAs to ensure that they are not a "no win no fee" basis (e.g. where a nominal fee is charged in exchange for a high uplift/success fee), but care should be taken to ensure that parties keep to the spirit behind the current CFA proposal. As such, the gatekeeper role should be exercised rigorously and vigilantly.

(d) Basis for Uplift / Success Fee: Further, some members reject the requirement to state the basis of the calculation of the success fee, while others are only in favour of stating the method of calculation of the success fee (i.e. a formula) and not providing a reasoned justification for the calculation. Additionally, members are of the view that there are existing safeguards to protect clients from being overcharged. We would also point out that the calculation of the uplift is not a straightforward matter and may depend on the aggregate number of potential cases that could be funded by CFAs. This can result in lower uplifts for some cases and higher uplifts in others.

(e) Professional Conduct Rules on Disclosure of CFAs: Members do not consider that it is necessary to amend the professional conduct rules as (i) the disclosure of

CFAs to the Court and/or opponents is likely to open litigants to more security for costs applications, on the basis of their impecuniosity; and/or (ii) the obligation to disclose is placed only on local lawyers, which defeats the proposed benefit of levelling the playing field vis-à-vis foreign lawyers. In addition, Council observes that the present ethical requirement to disclose the existence of third party funding agreements is premised on possible undisclosed conflicts of interest involving, for example, the law firm and the third party funder. Such concerns do not arise in the case of CFAs, where only the solicitor and client are involved. Current Singapore case law indicates that a conflict of interest (whether actual or potential) does not arise merely because of an interest in the fees charged.[1] The same position should extend to CFAs. Moreover, there is English authority which indicates that the courts cannot ordinarily compel the disclosure of CFAs as CFAs can be protected by privilege.[2]

If the Ministry is inclined to mandate the disclosure of CFAs, the suggestion is for disclosure to take place only at the costs stage to avoid unduly influencing the tribunal, and for disclosure to be limited to the existence of CFAs, and not their terms.

9. Please feel free to reach out to Ms Delphine Loo, the Society's CEO, should you require any clarifications or queries.

10. The Society sincerely hopes that our members' views will be taken into consideration. Further, as the Society intends to model CFA agreements and/or issue guidance to protect the interest of our members and educate the public on CFAs, the Society looks forward to being further consulted during the conceptualisation process, when the Ministry is able to provide more clarification and/or details on the terms of the CFA proposal. We therefore remain available to engage in further discussion and dialogue with the Ministry in this regard, as considered appropriate.

Thank you.

Yours faithfully

Mr Gregory Vijayendran, SC
President, The Law Society of Singapore

(Enclosures)

[1] See e.g. *Law Society of Singapore v Low Yong Sen* [2009] 1 SLR(R) 802 at [31]; *Legis Point LLC v Tay Choon Ai* [2018] 3 SLR 1269 at [61].
[2] *Vinayak v Lovegrove & Eliot (a firm)* [2007] EWHC 90096.

Public Consultation on Conditional Fee Agreements ("CFAs") in Singapore

Consultation Paper Paragraph No.	Topic	Feedback
10	The proposal to introduce CFAs and the present categories of proceedings where CFAs will be permitted	a) Lawyers in other jurisdiction has the capacity to use contingency fee and conditional fee arrangements. Introduction of CFAs in Singapore will help to level the playing field, especially in international arbitration. b) Contingency fee should be recognised in international arbitration to provide equal opportunities for Singapore lawyers to compete. c) CFAs may impact the collection of fees / cash flow of small law firms and the ability of a lawyer to represent the client should not be on the basis on how well he is able to underwrite. d) CFAs may affect the quality of work produced by lawyers who take up an excessive amount of CFA cases.
12(a)	Proposed framework – General formalities (a) That the CFA be in writing and signed by the client	The phrase 'in writing and signed' requires clarification; whether the CFA needs to be signed in person or would it be permissible to form a CFA via e-mail with electronic signatures.
12(b)	*Proposed framework – General formalities* (b) That the client be fully informed of the nature and operation of the CFA and confirm that he has been told of his right	a) The formality is dispensable as the client's right to taxation is preserved. b) May serve as a safeguard for lawyers.

	to seek independent legal advice before entering into agreement	
12(c)	*Proposed framework – Mandatory terms* (c) The provision of a "cooling off period" during which the client may by written notice terminate the agreement	a) The "cooling off period" should not be too long and potential clients should be required to pay a token sum to safeguard against abuse. b) There is no need for a mandatory "cooling off period", especially in the area of international arbitration as clients are likely to be sufficiently sophisticated. Clients are entitled to terminate their engagements even without such mandatory terms. c) Additional "cooling off period" for major amendments to CFAs is dispensable.
12(d)	*Proposed framework – Mandatory terms* (d) Parties' definition of what constitutes a "successful outcome"	Parties should be allowed to amend their initial definition of a "successful outcome".
12(e)	*Proposed framework – Mandatory terms* (e) If there is an uplift or success fee, to state the basis of calculation of the uplift fee and provide an estimate or a range of estimates of the resulting quantum of uplift or success fee	a) Distinction should be drawn between a method of calculation (i.e. a formula) and "basis" in the sense of a reasoned justification. b) Include a mandatory term requiring lawyers to state the formula (e.g. 20% of standard legal fees) and include 'major variables' that might factor into the calculation of the formula. c) Lawyers should not be required to justify the basis for the uplift/ success fee.
14(a)	Whether there should be any cap to the "uplift" or "success" fee and if so, what that cap should be and why	a) A cap should not be placed as regards international arbitration proceedings because commercial parties have the capability to manage their rights and finances. Having a cap would only limit the flexibility and ability of the lawyers to manage CFAs. b) There are existing safeguards to protect clients from being overcharged.

		c) Placing a cap to the fee would protect clients from being overcharged but it is only required when the categories of proceedings are expanded.
14(c)	The consequences of non-compliance with the requirements	a) Consequences of non-compliance should be determined according to the existing contract principles. b) Non-compliance should render a CFA "voidable" (under contract law principles) rather than "void", to provide clients with the option to choose.
15(a)	*Professional Conduct Obligations* (a) Disclosure obligations placed on solicitors to disclose the existence of the CFA, to the Court or tribunal (where relevant), and to every other party to those proceedings	a) It is disadvantageous to place disclosure obligations on Singapore lawyers, and not on lawyers from other jurisdictions. b) Disclosure of CFAs is likely to give grounds for security for costs applications. c) Disclosure obligations should be limited to the existence of a CFA and any disclosure should take place only at the costs stage to avoid undue influence on the Court or tribunal and prejudicing a party. d) Rules of professional privilege may need to be amended to include an exception to allow for the disclosure of the existence of a CFA.
15(b)	*Professional Conduct Obligations* (b) Reinforcing the lawyer's duty to act in the best interests of his or her client and that the client is to retain control over the conduct of the litigation, including the decision whether to settle	It is an existing obligation and there is no need to reinforce it.
17	*Costs Orders Considerations*	a) Law firms should be allowed to record part of the damages payable to the client to be made payable to the law firm for the uplift fee and that the arrangement be stated in the judgment. This will solve the issue of non-payment of fee and increase the take up for CFAs.

		b) As the cost considerations differ at the appeal stage, if a case goes to appeal, the recoverability of the fees may be affected. c) CFAs should be dissociated from party and party costs. Taxation must not be based on the usual taxation principles.

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

4 January 2016

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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

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Our Ref: LS/10/RLR/KM/CON(2)/2016/ADR2.CPC2./DLT/KG/ct

29 July 2016

Ministry of Law
Policy Advisory Division
100 High Street
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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 <u>only</u> 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 <u>all</u> 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

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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:

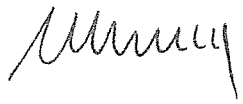
(1) Without the fee arrangement, the client will have difficulty in engaging a lawyer;
(2) The proposed fee is reasonable;
(3) The client qualifies for legal aid in so far as it is relevant to (2); and
(4) Such a fee arrangement would bring the legal profession into disrepute

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

MINISTRY OF LAW
SINGAPORE

Our ref: LAW 32/006/070
Your ref: LS/10/RLR/KM/CON(2)/2016/ADR2.CPC2./DLT/KG/ct

7 November 2016

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Dear Shen Yi,

PUBLIC CONSULTATION ON THE DRAFT CIVIL LAW (AMENDMENT) BILL 2016 AND CIVIL LAW (THIRD PARTY FUNDING) REGULATIONS 2016

1. Thank you for your letter of 29 July 2016 providing feedback on the draft Civil Law (Amendment) Bill 2016 (the "Bill") and Civil Law (Third Party Funding) Regulations 2016 (the "Regulations").

2. The Society had consulted its Alternative Dispute Resolution Committee ("ADR Committee") and the Civil Practice Committee ("CP Committee") which commented on various aspects of the Bill and Regulations, which we will address in this note.

a. Categories of prescribed dispute resolution proceedings

3. The ADR Committee has asked if we could consider expanding the prescribed classes of dispute resolution proceedings in the Regulations to include (a) mediation proceedings arising out of or in connection with the proceedings set out in draft regulations 3(b), (d) and (e); and (b) mediation proceedings conducted prior to the commencement of international arbitration proceedings.

4. We have noted the ADR Committee's feedback and have worked closely with the legislative draftsman to incorporate these suggestions on the "prescribed classes of dispute resolution proceedings" into the Regulations.

b. Legal Profession (Professional Conduct) Rules 2015 ("PCR")

5. The Society has indicated that it will be happy to provide its views and suggestions on the appropriate safeguards, including any amendments to the PCR.

6. Pursuant to section 71(2) of the Legal Profession Act, the PCR is made by the Professional Conduct Council ("PCC") chaired by the Chief Justice, the members of which include representatives from the Society. The PCC Secretariat has consulted the PCC (including representatives of the Society) on the draft amendments to the PCR.

c. Possibility of extension of the third-party funding framework to other categories of proceedings

7. The Society has also shared feedback from the ADR Committee and CP Committee that they are largely in favour of permitting third party funding in Singapore in connection with litigation, and domestic arbitrations governed by the Arbitration Act, subject to regulatory safeguards. The Society has also indicated that a graduated approach should be taken in expanding the third-party funding framework to include the aforementioned categories of proceedings.

8. We agree with the Society that a graduated approach should be taken in respect of any extension of the categories of dispute resolution proceedings. Initially, the proposed third party funding framework will provide that third party funding contracts for international arbitration proceedings as well as court and mediation proceedings arising out of or in connection with international arbitration proceedings are not contrary to public policy or illegal. The current intention is to cover international commercial arbitration (and related) proceedings, where we believe the greatest utility is presently. Potential extensions to other categories of proceedings will be kept under review.

d. Feedback on Contingency Fee arrangements

9. The Society has asked if MinLaw can review the position on contingency fee arrangements in Singapore, specifically for: (a) matters that fall under the International Arbitration Act; (b) matters that are brought for mediation before the Singapore International Mediation Centre which result in a successful mediation settlement; and (c) access to justice cases and where consent from the Council of the Law Society is given.

10. The Ministry is undertaking a broad-based review of our civil justice system. To this end, event-triggered fee arrangements, including contingency fee arrangements, will be studied. More information will be released in due course.

11. Until such time, lawyers and law firms will continue to be prohibited from entering into contingency fee arrangements. A related amendment to section 107 of the Legal Profession Act will be made to clarify that lawyers may recommend funders

to their clients so long as they do not receive direct financial benefit from the recommendation and can act for their clients in relation to any third party funding contract. This excludes any fees received for the provision of legal services by the lawyer to the client in respect of acting in the funded matter. Legal practitioners and law practices are prohibited from directly or indirectly holding any share or other ownership interest in a funder. However for this reason, s107 (deletion of which was raised in a separate email from the Society dated 29 July 2016) is being retained.

e. Guidelines for legal practitioners

12. By way of update, the Society may also wish to note that the proposed framework for third party funding will be supplemented by best practice guidelines for arbitrators and funders (promulgated by the Singapore International Arbitration Centre and the Singapore Institute of Arbitrators respectively) and these will give guidance on other issues that may arise from third party funding such as confidentiality, privilege, costs and withdrawal of third party funding. As part of a multi-pronged approach in enhancing the proposed framework for third party funding, we would like to invite the Society to consider whether it would be interested in working on guidelines for its members. These will help to further enhance the legislative framework for third party funding and promote Singapore's growth as a leading venue for international arbitration. If so, we will be pleased to explore this further with the Society.

Conclusion

13. We thank the Society for the feedback given and we look forward to working closely with the Society on the reforms.

Yours faithfully,

Joan Janssen
2Director-General
Legal Group
For Permanent Secretary
Ministry of Law