

THE LAW SOCIETY OF SINGAPORE

GUIDANCE NOTE 10.1.1

THIRD-PARTY FUNDING

1. This Guidance Note takes effect on 25 April 2017.
2. This Guidance Note sets out best practices for lawyers who refer, advise or act for clients who obtain third-party funding. It is intended as a guide only and is neither exhaustive nor legal advice.
3. Various entities, like the Singapore International Arbitration Centre ('SIAC') and the Singapore Institute of Arbitrators ('SI Arb'), have issued related guidelines on third party funding in Singapore. We recommend that legal practitioners should review all of these guidelines together to obtain a comprehensive overview of current issues pertaining to third-party funding in Singapore.

A. Introduction and Overview of Legislative Amendments

4. Third-party funding involves a commercial funder agreeing to pay some or all of the claimant's legal fees and expenses.
5. Should the claimant succeed, the funder takes a share of any sum recovered from the claim's resolution. The funder's return is often calculated as a percentage share of the recovery or as a multiple of the amount the funder invests. The funder may also agree to bear any adverse costs liability and provide security for the respondent's costs.
6. If the claim fails, the funder often receives nothing, and remains liable for the claimant's legal fees and any adverse costs it has agreed to bear.
7. The Civil Law (Amendment) Act 2017 (No 2 of 2017) came into force on 1 March 2017. The new sections 5A and 5B of the Civil Law Act ('CLA') now provide that:
 - (a) the common law torts of maintenance and champerty are abolished (section 5A(1) of the CLA).
 - (b) in prescribed classes of dispute resolution proceedings, contracts providing for a qualifying third-party funder to fund a party's costs are not illegal or contrary to public policy (section 5B(2) of the CLA).
 - (c) third-party funders must meet and continue to satisfy certain requirements to become qualifying third-party funders (section 5B(3) of the CLA). Otherwise, the funder's rights under the third-party funding contract are not enforceable by action (section 5B(4) of the CLA). This does not prejudice any other party's rights as against the third-party funder under the funding contract (section 5B(7) of the CLA).
8. These prescribed classes of dispute resolution proceedings are defined in regulation 3 of the new Civil Law (Third-Party Funding) Regulations 2017 (S 68/2017) ('CLR'). The prescribed classes are:
 - (a) international arbitration proceedings;
 - (b) court proceedings or mediation proceedings arising out of or in any way

- connected with international arbitration;
- (c) application for a stay of proceedings under section 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ('IAA') and any other application to enforce an arbitration agreement; and
 - (d) proceedings for or in connection with the enforcement of an award or foreign award under the IAA.
9. Regulation 4 of the CLR sets out the qualifying criteria which funders must satisfy and continue to satisfy:
- (a) the funder carries on the principal business of funding dispute resolution proceedings; and
 - (b) the funder has a paid-up share capital of not less than:
 - (i) \$5 million; or
 - (ii) the equivalent amount in foreign currency; or
 - (c) the funder has managed assets of not less than:
 - (i) \$5 million; or
 - (ii) the equivalent amount in foreign currency.
10. There are also related amendments to the Legal Profession Act (Cap 161, 2009 Rev Ed) ('LPA') and the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ('PCR 2015'). The new section 107(3A) of the LPA states that section 107 does not prevent a solicitor from:
- (a) introducing or referring a third-party funder to the client, so long as the solicitor does not receive any "direct financial benefit" from the introduction or referral (*NB*, section 107(3B) of the LPA defines "direct financial benefit" as excluding fees, disbursements and expenses payable by the client for the solicitor's legal services);
 - (b) advising on, drafting or negotiating a third-party funding contract for the solicitor's client; and
 - (c) acting for the client in any dispute arising out of the funding contract.
11. Finally, the new rules 49A and 49B of the PCR 2015 impose new duties on lawyers:
- (a) When conducting any dispute resolution proceedings before a court or tribunal, a legal practitioner must disclose to the court or tribunal and every other party to those proceedings the existence of any funding contract, and the identity and address of the funder (rule 49A of the PCR 2015).
 - (b) Legal practitioners and law practices are prohibited from holding any share or ownership interest in a third-party funder which they have referred to a client of their practice, or which has a funding contract with a client of their practice. Legal practitioners and law practices must not receive any commission, fee or share of proceeds from such a funder (rule 49B of the PCR 2015).

12. The table below summarises the legislative changes.

Legislation	Amendments relevant to third-party funding
Civil Law Act	New sections 5A and 5B
Civil Law (Third-Party Funding) Regulations 2017	Regulations are new
Legal Profession Act	New subsections 107(3A) and 107(3B)
Legal Profession (Professional Conduct) Rules 2015	New part 5A (rules 49A and 49B) Amended rule 2 (definitions) and rule 3 (application of part 5A)

13. This table gives an overview of the matters addressed in this Guidance Note.

Issue	Matters addressed	Part of Guidance Note
Referring or introducing a funder to your client	<p>You must not directly or indirectly hold any share or ownership interest in a funder which (a) you refer your client to, or (b) is funding a client of your practice. (See rule 49B(1) of the PCR 2015.)</p> <p>You must not receive any commission, fee or share of proceeds from such a funder (rule 49B(2) of the PCR 2015).</p>	B
Terms in the funding agreement	<p><u>Confidentiality and privilege</u></p> <p>You should advise your client on the applicability of common interest privilege to documents disclosed to funders.</p> <p>You should also advise your client to enter a confidentiality agreement with the funder before disclosing any documents to it.</p>	C-1
	<p><u>Scope of funding provided</u></p> <p>You should advise your client on the scope of funding provided, especially the funder's liability for adverse costs.</p>	C-2
	<p><u>Managing conflicts of interest</u></p> <p>To avoid conflicts of interest, you should advise that the funding agreement should recognize that you owe your duties to your client and not the funder. Your duty is to the party that retains you.</p> <p>You should advise your client that the funding agreement should let you continue to act solely for the client and not the funder, should any conflict of interest arise.</p>	C-3

	<u>Funder’s level of involvement and dispute resolution</u> You should advise that the agreement should set out the funder’s level of involvement in decision-making, and the dispute resolution procedures should the funder and claimant disagree.	C-4
	<u>Termination of funding agreement</u> You should advise your client that the funder should not have a discretionary right to terminate the agreement.	C-5
Duty to disclose third-party funding	When conducting any dispute resolution proceedings, you must disclose to the court/tribunal and other parties if your client is engaged in third-party funding, and if so, the funder’s identity and address (rule 49A of the PCR 2015). You should check with your client at the start of your retainer if he/she intends to engage third-party funding. You should check with your client again if you become aware of circumstances that strongly suggest he/she is engaged in third-party funding.	D

B. Referring or Introducing a Funder to your Client

14. Your obligations when referring or introducing third-party funders to your clients are set out in sections 107(3A) and 107(3B) of the LPA, and rule 49B of the PCR 2015.
15. You may introduce or refer a third-party funder to your client, so long as you do not receive any direct financial benefit from the introduction or referral (section 107(3A) of the LPA). “Direct financial benefit” does not include any fee, disbursement or expense payable by your client for your provision of legal services (section 107(3B) of the LPA).
16. The relevant parts of sections 107(3), 107(3A) and 107(3B) of the LPA are set out below:

“Prohibition of certain stipulations

107. [...]

(3) A solicitor shall, notwithstanding any provision of this Act, be subject to the law of maintenance and champerty like any other person.

(3A) To avoid doubt, this section does not prevent a solicitor from —

- (a) introducing or referring a Third-Party Funder to the solicitor’s client, **so long as the solicitor does not receive any direct financial benefit** from the introduction or referral;

[...]

(3B) In subsection (3A) —

“direct financial benefit” **does not include any fee, disbursement or expense payable by the solicitor’s client for the provision of legal services** by the solicitor to the client[.]”

(emphasis added)

17. Rule 49B of the PCR 2015 regulates financial and other interests in a third-party funder. The rule applies to any third-party funder:

- (a) which you or your law practice has introduced or referred to a client; or
- (b) which has a third-party funding contract with your client or with a client of your practice.

18. Regarding a third-party funder specified in rule 49B(1) of the PCR 2015:

- (a) You must not directly or indirectly hold any share or ownership interest in that funder (rule 49B(1) of the PCR 2015).
- (b) You must not receive any commission, fee or share of proceeds from that funder (rule 49B(2) of the PCR 2015).
- (c) For clarity, rule 49B(2) of the PCR 2015 does not prohibit you from receiving fees, disbursements or expenses payable by your client for your provision of legal services (rule 49B(3) of the PCR 2015).

19. Rule 49B of the PCR 2015 is set out in full below:

“Prohibition against financial and other interests in Third-Party Funder

49B.—(1) A legal practitioner or a law practice *must not, directly or indirectly, hold any share or other ownership interest* in a Third-Party Funder —

- (a) which the legal practitioner or law practice has ***introduced or referred to a client*** of the legal practitioner or law practice in relation to dispute resolution proceedings; or
- (b) which has a ***third-party funding contract*** with a client of the legal practitioner or law practice.

(2) A legal practitioner or a law practice ***must not receive any commission, fee or share of proceeds*** from the Third-Party Funder mentioned in paragraph (1).

(3) Paragraph (2) ***does not prohibit receiving any fee, disbursement or expense payable by the client mentioned in paragraph (1) for the provision of legal services*** by the legal practitioner or law practice to that client.”

(emphasis added)

20. When referring or introducing a funder to your client, it is good practice to advise your client that he/she should independently assess whether to engage a funder.

C. Terms in the Funding Agreement

21. Various entities, such as the SIAC and the SI Arb, have issued best practices guidelines in relation to third-party funding in Singapore.

22. When negotiating the funding agreement, it is good practice to advise your client to incorporate such guidelines as terms of the funding agreement or to ensure that the funder agrees to comply with such guidelines.

23. You should pay particular attention to the following issues in the funding agreement:

1. Confidentiality and privilege for documents disclosed to funder.
2. Scope of funding provided and funder's liability for adverse costs orders.
3. Managing conflicts of interest.
4. Funder's level of involvement in proceedings and dispute resolution.
5. Termination of agreement by funder.

24. Each issue will be addressed below.

1. Confidentiality and privilege for documents disclosed to funder

25. A funder may request information or documents relating to the claim in order to perform due diligence and decide whether to fund the claim. You must comply with your duty of confidentiality to the client under rule 6 of the PCR 2015 when providing information about the claim to the funder.

26. Rule 6 of the PCR 2015 is reproduced for convenience:

“Confidentiality

6. [...]

(2) Subject to paragraph (3) [...] a legal practitioner must not knowingly disclose any information which —

- (a) is confidential to his or her client; and
- (b) is acquired by the legal practitioner (whether from the client or from any other person) in the course of the legal practitioner's engagement.

(3) A legal practitioner may disclose any information referred to in paragraph (2), if —

- (a) the client referred to in paragraph (2) authorises the disclosure[.]”.

27. There may be a risk that legal privilege in documents will be waived when otherwise privileged communications are given to the funder. You should carefully review the position at law, and in particular advise your client on whether common interest privilege applies.

28. In any case, you should advise your client to enter into a confidentiality/non-disclosure agreement at the start of negotiations with the prospective funder before disclosing any documents. The confidentiality agreement should contain terms to the effect that:

- (a) Parties will maintain confidentiality of all documents shared under the confidentiality agreement. You can specify what actions will be taken if there is any unauthorised disclosure.

- (b) Documents shared under the confidentiality agreement are subject to privilege and the nature of the privilege should be clarified. (For example, you can assert that parties have a common interest in sharing information in order to arrange for third-party funding, and a common interest in continuing to share information as the matter proceeds.)
- (c) Documents shared with the prospective funder under the confidentiality agreement are shared with the client's consent, and are solely for the purpose of pursuing the desired dispute resolution proceedings.
- (d) The sharing of such documents and communications with the prospective funder neither impugns their confidentiality nor waives privilege over them.
- (e) The funder is obliged to return all documents shared under the confidentiality agreement if parties do not enter into a funding agreement, or where the funding agreement is terminated.

29. You should advise your client that the funding agreement should contain confidentiality clauses of a similar nature as set out in paragraph 28 of this Guidance Note.

2. Scope of funding provided and funder's liability for adverse costs orders

30. Regarding the scope of funding provided, you should advise your client on whether the funding agreement states, *inter alia*:

- (a) the maximum amount the funder will provide;
- (b) any provisions for varying the maximum amount as required; and
- (c) the types of costs that the funder agrees to pay (for example, reasonable recovery costs or enforcement proceedings).

31. In particular, you should advise your client on the funder's liability under the funding agreement to:

- (a) meet any liability for adverse costs;
- (b) provide security for costs;
- (c) pay any premium to obtain costs insurance; and
- (d) meet any other financial liability.

32. Similarly, you should advise your client on his/her residual liability under the funding agreement to bear any costs that the funder has not agreed to bear. For example, you should advise your client that he/she must meet any liability for costs, including adverse costs, which the funder has not agreed to bear under the funding agreement.

33. The funding agreement will usually set out the priority of payments should the claimant succeed. For example, the funding agreement may provide for payment of proceeds in the following order:

- (a) The funder is reimbursed for its investment or expenses to date.
- (b) The funder is paid its return.

(c) The balance is paid to the claimant.

34. Payment of proceeds to the funder should not take place until the proceeds are actually recovered. Therefore, any terms that define the proceeds must be clearly drafted, so there is no misunderstanding between the parties as to when the payments are to be made.

3. Managing conflicts of interest

35. Potential conflicts of interest may arise in third-party funding. The risk of conflict is real because:

(a) In many cases, the claimant retains the lawyer but the funder pays the lawyer's fees; and

(b) Funding agreements may provide that the funder can give input on decisions, even where the lawyer is retained by the claimant.

(c) So for example, where the claimant wishes to settle but the funder does not, the lawyer may feel pressure to accede to the funder so as to gain repeat business.

36. It is good practice to advise your client that he/she can retain independent counsel to advise on the funding agreement. This holds true even though, in practice, the client may not have the financial resources to retain separate counsel for the underlying dispute and for the funding agreement.

37. You should advise your client that the following terms be included in the funding agreement:

(a) The funder acknowledges that the lawyer owes his/her professional and fiduciary duties to the claimant.

(b) The funder further acknowledges that if there is a conflict of interest between the funder and claimant, the lawyer acts solely for the claimant and may continue to do so only in that capacity.

(c) The funder shall not induce the claimant's lawyer to breach his/her professional duties.

(d) The funder shall not seek to influence the lawyer to cede control or conduct of the dispute to the funder.

(e) It is the claimant's choice whether to disclose to the funder any written opinion that his/her lawyer has prepared on the merits of the case. The lawyer will share such opinion only if the claimant consents. In any case, funders should engage independent counsel to assess the claim.

38. Regardless of the structure of the funding agreement, you owe your ethical duties to the party that retains you. You should ensure that the terms of the funding agreement are consistent with your ethical duties and with the terms of your retainer.

39. You are discouraged from being jointly retained by both the claimant and funder. There is a high risk that you will not be able to competently advise one or both parties if their interests diverge in the course of proceedings (*NB*, should you decide to enter a retainer with both the claimant and funder, please refer to rule 20 of the PCR 2015

for your duties when advising multiple clients whose interests may conflict). We note that joint retainers may be unlikely to arise in practice as many funders have their own in-house counsel.

40. Rule 49B of the PCR 2015 (which is set out in full at paragraph 19 of this Guidance Note) prohibits holding certain financial interests in funders:

- (a) You must not directly or indirectly hold any share or ownership interest in a funder which you have referred your client to, or which has a funding contract with a client of your practice (rule 49B(1) of the PCR 2015).
- (b) You must not receive any commission, fee or share of proceeds from a funder you have referred your client to, or which has a funding contract with a client of your practice (rule 49B(2) of the PCR 2015).
- (c) For clarity, rule 49B(2) of the PCR 2015 does not prohibit you from receiving fees, disbursements or expenses payable by your client for your provision of legal services (rule 49B(3) of the PCR 2015).

4. Funder's level of involvement in proceedings and dispute resolution

41. You should advise your client that the funding agreement should specify the nature and scope of the funder's role. The funder's involvement could potentially include, *inter alia*:

- (a) assisting with choice of solicitor(s);
- (b) assisting with choice of arbitrator(s) and/or mediator(s);
- (c) assisting with strategic or tactical decisions;
- (d) considering advice from and providing instructions to the claimant's solicitor(s);
- (e) managing litigation expenses; and
- (f) providing input on decisions about whether to settle the claim and on what terms.

42. You should advise your client that the funding agreement should contain a dispute resolution mechanism, in case parties disagree on what decision to make. For example, the funding agreement may state that:

- (a) the parties will refer any differences to an independent arbitrator for an expedited and binding decision; or
- (b) the claimant has the final say, but the funder reserves the right to claim against the claimant if it can show the claimant was acting in bad faith.

5. Termination of funding agreement

43. You should advise your client that the funding agreement should state when the funder may terminate the agreement and what obligations survive after or arise as a result of the termination. Generally, funders should not have a discretionary right to terminate the agreement.

44. You should advise your client that if the funder terminates the funding agreement, the funder should remain liable to pay:

- (a) all costs, such as adverse costs, that have accrued up to the date of termination; and
 - (b) any costs that will accrue as a result of and subsequent to the termination.
45. You should also advise your client on his/her rights to terminate or withdraw from the funding agreement. In particular, you should explain any express contractual restrictions or adverse terms that affect your client's ability to terminate or withdraw from the funding agreement.

D. Duty to Disclose Third-Party Funding

46. Conflicts of interest may arise if an arbitrator who hears the dispute is related, whether directly or indirectly, to the third-party funder who funds a party to the dispute. For example, the arbitrator may have acted as counsel to a party whom the third-party funder previously funded, or be acting as counsel to a party the funder is currently funding in another claim. These examples demonstrate a real risk of conflict on the part of the arbitrator, and may give rise to justifiable doubts as to the arbitrator's impartiality and independence.
47. Hence the new rule 49A of the PCR 2015 imposes a new duty on lawyers to disclose the existence of any third-party funding. This is, amongst others, to enable arbitrators to check for conflicts. Rule 49A is set out in full below:

“Disclosure of third-party funding

49A.—(1) When conducting any dispute resolution proceedings before a court or tribunal, ***a legal practitioner must disclose to the court or tribunal, and to every other party*** to those proceedings —

- (a) the ***existence*** of any third-party funding contract related to the costs of those proceedings; and
 - (b) the ***identity and address*** of any Third-Party Funder involved in funding the costs of those proceedings.
- (2) The disclosure under paragraph (1) must be made —
- (a) ***at the date of commencement*** of the dispute resolution proceedings where the third-party funding contract is entered into before the date of commencement of those proceedings; or
 - (b) ***as soon as practicable*** after the third-party funding contract is entered into where the third-party funding contract is entered into on or after the date of commencement of the dispute resolution proceedings.”

(emphasis added)

48. Therefore, when conducting any dispute resolution proceedings where your client is engaged in third-party funding, you must disclose:
- (a) the existence of that funding contract; and
 - (b) the identity and address of the third-party funder.

49. You must disclose this information:

- (a) at the date the dispute resolution proceedings commence, if your client entered the funding contract before the proceedings started; or
- (b) as soon as practicable, if your client enters the funding contract on or after the date of commencement of proceedings.

50. You should consider informing your client at the start of your retainer that you have a professional duty to disclose whether your client is engaging third-party funding. It is good practice to check with your client at the start of the retainer on whether he/she intends to engage or is already engaged in third-party funding.

51. If your client is not engaged in third-party funding at the start of your retainer, you are strongly encouraged to check with your client again if you become aware of circumstances that strongly suggest that the client is engaged in third-party funding.

52. It is good practice to disclose any termination of the third-party funding contract or any change of the third-party funder.

Date: 25 April 2017

THE COUNCIL OF THE LAW SOCIETY OF SINGAPORE