Third Party Funding in International Commercial Arbitration

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Hong Kong

1. In October 2016, the Hong Kong Law Reform Commission published the report ‘Third Party Funding for Arbitration’. The report follows the Law Reform Commissions October 2015 consultation on the topic, which proposed that third party funding, should be permitted for arbitrations in Hong Kong.

2. The report recommends that Hong Kong Arbitration Ordinance be amended to make clear that the doctrines of maintenance and champerty (as a tort and as a criminal offence) do not apply to arbitration, with appropriate financial and ethical safeguards.

3. The Hong Kong courts have prohibited the doctrines of maintenance and champerty in litigation, with three exceptions:

3.1. where the third party establishes it has a legitimate interest in the outcome of the litigation;
3.2. where a party in the proceedings persuades the Court that it should be permitted to obtain third party funding on the basis of accessibility of justice; and
3.3. in certain categories of proceedings such as insolvency.

4. The position of third party funding in arbitration however has been unclear. In Cannonway Consultants Limited v Kenworth Engineering Ltd [1], the Court held that arbitration was beyond the reach of champerty as a private consensual process. However, the 2007 case of Unruh v Seeberger [2] did not reference Cannonway Consultants and rather left the question of whether third party funding would infringe the laws of champerty and maintenance open.

5. The Law Reform Commission recommended a ‘light touch’ regulatory approach to third party funding, similar to the approach in Australia, however that funders needed to comply with a code of standards.


7. This bill closely followed the Commission’s recommendations:

7.1. it ensures third party funding of arbitration, both domestic and international, is not prohibited by the common law doctrines of champerty and maintenance, in tort or as an offence;
7.2. it extends this amendment to arbitrations where the seat of the arbitration is not in Hong Kong.
7.3. it authorises a body to issue a code of practice setting out standards with which third party funders are expected to comply, including the possible introductions of standards that ensure:
7.3.1. promotional material by funders is not misleading
7.3.2. funding agreements set out key features, risks and terms including the degree of control of the third party funder in the arbitration, whether the funder is liable for adverse costs, insurance premiums and securities for costs, and the circumstances where parties to funding agreements may terminate the agreement
7.3.3. funded parties must obtain independent legal advice before entering the agreement
7.3.4. funders have sufficient capital and effective procedures for addressing conflicts of interests and complaints made against them
7.3.5. funders provide details of the advisory body to the funded parties
7.3.6. funders provide the advisory body with information it reasonably requires
Due to the recency of the bill, a code of practice has not yet been developed.

Moreover, at this stage the failure to comply with the code of practice does not give rise to proceedings, although the failure may be taken into account if relevant to the arbitration or related proceedings.

The introduction of these laws follows international trends and further maintains Hong Kong’s competitiveness as a seat and venue for arbitration.

### Singapore

On the 1 March 2017, the Civil Law Act was amended to allow for third party funding in arbitration and related proceedings in Singapore through abolishing the tort of champerty and maintenance (although still prohibiting chancery and maintenance in contracts) and expressly providing for its use in international arbitrations and related proceedings.

Previously, third party funding was prohibited in both litigation and arbitration due to the possibility of the interests of vulnerable litigants being damaged.[3]

The Act also introduced the Civil Law (Third Party Funding) Regulations 2017, which provide a detailed framework for third party funding:

- **13.1.** third party funding can only be used in international arbitration proceedings and related proceedings, such as court proceedings to enforce the award or mediation proceedings if an Arb-Med dispute resolution process is undertaken;
- **13.2.** the funder must have as its principal business the funding of costs to dispute resolution proceedings, whether in Singapore or otherwise;
- **13.3.** the funder must have a paid up share capital of $5 million or greater; and
- **13.4.** failure to comply with funder requirements will disallow the funder from enforcing its rights under the funding agreement.

The Senior Minister of State for Law in Singapore, Indranee Rajah SC, has stated that third party funding strengthened Singapore’s competitiveness in international commercial dispute resolution.

#### Disclosure requirements

Australia and England do not provide for mandatory disclosure obligations in relation to third party funding, although in England, the court can compel the disclosure of the identity and address of a funder for the facilitation of a security for costs order.

The importance of transparency in arbitration processes however means that there is pressure on jurisdiction to provide disclosure requirements. The Queen Mary International Arbitration Survey 2015 highlighted a strong desire for increased regulation of third party funding, mainly in terms of disclosure.

The IBA Guidelines on Conflicts of Interest, for instance, requires parties to disclose “any relationship, direct or indirect between… the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration”.

The ICC in 2016 similarly adopted a Guidance Note that arbitrators should consider relationships with such parties when evaluating whether to make a disclosure.

These guidelines however do not compel a party to make the tribunal or other parties aware of the existence of third party funders, meaning that tribunal members could potentially have a conflict of interest of which they are unaware.

Disclosure requirements are contentious, and the argument has been raised that disclosure allows the opposing party to cause delays through filing security for costs applications and similar processes. Disclosure is also not required for similar services by insurers and lawyers working on a contingency basis, and so funders have seen the requirements as unfair.

#### Disclosure in Hong Kong

Hong Kong’s proposed bill prescribes disclosure requirements in relation to third party funding.

These require written notice by the funded party to the arbitral tribunal and other parties in the arbitration of the fact the third party funding agreement has been made and the name of the funder, upon commencement of the arbitration, or if the agreement was entered after commencement, within 15 days of the agreement.

Similarly, if the funding agreement ends for reasons other than the conclusion of the tribunal, the funded party must give written notice to the arbitral tribunal and other parties in the arbitration of the fact that the funding agreement has ended and the date that it ended.

However, failure to disclose does not render the person liable to judicial or other proceedings, but the failure may be taken into account by any court or tribunal if it is relevant.

The proposed bill does not give tribunals express power to award costs against third party funders, nor does it allow for tribunals to order security for costs against the funder. These issues were raised by the Law Reform Commission and will be considered in the three year period post implementation in which further regulations are to be developed.

#### Disclosure in Singapore

Like Hong Kong, Singapore introduced rules requiring the disclosure of third party funding in arbitration, consistent with prior statements by the Ministry of Law that described disclosure obligations as a “central tenet” of the reforms.
These were in the form of requirements in the professional conduct rules for legal practitioners. The new rules require legal practitioners whose clients are being funded through third party to disclose this fact to the tribunal or court and all parties involved, as well as the identity and address of the funder.

Legal practitioners are also prevented from having an interest in, or receiving a commission from, third party funders.

The Singapore International Arbitration Centre (‘SIAC’) also issued new Investment Arbitration Rules, which came into force 1 January 2017. In arbitrations administered under the SIAC rules, tribunals are empowered to order disclosure of the existence of third party funding arrangements, the identity of the funder and the extent of the funder’s interest in the outcome of the proceedings.

Similarly, the rules allow tribunals to take into account third party funding agreements in the apportionment of the arbitration’s costs between the parties.

Cost of Third Party Funding

Retaining third party funding can impose significant costs on a party. Whether these costs are recoverable by a successful party has been debated.

The recent English High Court decision Essar Oilfields Services v Norscot Rig Management [4] regarded as valid an award that allowed Norscot to recover the costs of obtaining a third party funder on the basis that these costs were included under s 59(1)(c) of the English Arbitration Act as “other costs of the parties”.

The Court found that Essar Oilfields had engaged in conduct that deliberately exploited Norscot’s lesser financial situation through allegations and attacks without foundation in an attempt to exhaust Norscot of its funds and therefore ability to arbitrate.

It was this conduct that forced Norscot to enter in a third party funding agreement and so the costs associated were recoverable.

However, given the particular facts of the case and the extent of Essar Oilfield’s unconscionable conduct, it is not clear whether costs related to third party funding are recoverable in other situations.

At the very least, the case has allowed the possibility of third party funding costs being regarded as “other costs” under the Arbitration Act.

Conclusion: the effect of third party funding costs being ordered on disclosure.

If a losing party is at risk of paying the third party funding costs of a successful party, then there is a good argument that it is entitled to have disclosed to it, the whole of the third party funding arrangement including the “uplift” which the third party funding is taking because, on the basis of Essar Oilfields Services v Norscot Rig Management (ante).

[1] [1995] 1 HKC 179
[2] [2007] 10 HKCFAR 31
[4] [2016] EWHC 2361 (Comm)

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