

Third-Party Funding in International Arbitration

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THIRD-PARTY FUNDING

is the arrangement whereby an unrelated party provides financial support to a party (normally a plaintiff) in return for a share of the eventual monetary award.

STRONGEST REASON IN FAVOUR: ACCESS TO JUSTICE

- Provide access to justice to those who could otherwise not afford
- More efficient use of resources
- More objective assessment and management of case
- More savings in costs

Maintenance and Champerty

- Middle ages –
 - nobles instigating law suits, underwriting its costs with promises for a share of the success; often as part of a ‘proxy legal wars’ strategy against an opposing noble.
- Common law
 - an offence for strangers to support litigation in which they had no legitimate concern.
 - Champerty was the maintaining of a suit for a share of the proceeds.
 - Sanctions given by statutes

Maintenance and related matters...

- “barratry” (in this context is understood to mean ‘stirring up law suits, against another or the King’) and
- “embracery” (perverting the course of justice, influencing the jury or judge)
- Such illegal actions are accordingly unenforceable.
- Tortious acts giving rise to damages in common law.

• Helping others

Lord Abinger CB in *Findon v Parker* (1843) 11 M & W 675 at 682-683 [152 ER 976 at 979]

Maintenance is

- "confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make ...
- BUT
... if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance."
(emphasis added)

UK current position...

By ss 13 and 14 of the **Criminal Law Act 1967** (UK), abolished -

“13 (1)(a) ... any distinct offence under the common law in England and Wales of maintenance (including champerty, but not embracery)

“14 Civil rights in respect of maintenance and champerty.

(1) No person shall, under the law of England and Wales, be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect.”

(2) The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty **shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.**”

Public Policy and TPF

- **Trendtex Trading Corporation v Credit Suisse** [1982] AC 679 at 694
- An assignment of a claim of a claim to Suisse Credit was set aside.
- Lord Wilberforce—
- "...this manifestly 'savours of champerty,' since it involves trafficking in litigation – a type of transaction which, under English law, is contrary to public policy".
- **Giles v Thompson** [1994] 1 AC 142 at 164 - the law of maintenance and champerty is
- "a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants".

PUBLIC POLICY AND TPF (POST-2000)

Gulf Azov Shipping Co Ltd v Idisi

[2004] EWCA Civ 292 at [54] per Lord Phillips MR.

—
“[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.”

Labels of 'champerty' and 'maintenance' continue to be used

Jennifer Simpson (As Assignee Of Alan Catchpole) V Norfolk & Norwich University Hospital NHS Trust [2011] EWCA Civ 1149 – Assignment of a personal injury claim.

“...an assignment of a bare cause of action in tort for personal injury remains unlawful and void.” (at[24])

“The assignment in this case plainly savours of champerty, given that it involves the outright purchase by Mrs. Simpson of a claim which, if it is successful, would lead to her recovering damages in respect of an injury that she has not suffered....In my view this is a case of an assignment of a bare right of action, in the sense that it is an assignment of a claim in which the assignee has no legitimate interest, and is therefore void” (at[28])

Australia

Maintenance,
Champerty And Barratry
Abolition Act 1993
(enacted in Aus States)

- **Campbells Cash and Carry Pty Limited v Fostif Pty Limited** (2006)
229 CLR 386. High Court of AUS

The act of “seeking out those who may have claims, and offering terms which not only gave [the funder] control of the litigation” and obtaining a “significant profit” ...

“..[N]one of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.

AUS High Court
Campbells Cash and
Carry Pty Limited v
Fostif Pty Limited

- “Two kinds of consideration are proffered as founding a rule of public policy fears about adverse effects on the processes of litigation and fears about the "fairness" of the bargain struck between funder and intended litigant.
...
- **Neither** of these considerations, ... **warrants formulation of an overarching rule of public policy** that either would, in effect, bar the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation...”

AUS High Court believes that whether a funding agreement is enforceable could be checked by considering it under existing **doctrines of “abuse of process”**.

Check: One of the largest TPF funder IMF – an ASX listed company. <http://www.imf.com.au/about>

Indian courts...(by the Privy Council)

In **Ram Coomar Coondoo v Chunder Canto Mookerjee** 1876 SCC OnLine PC 19, held that the English statutes, which founded the then state of the English law, did not apply in India, ruling that:

"a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner."

INDIAN Court
...(by the Privy Council)

- ***Ram Lal v. Nil Kanth*** ([1893 SCC OnLine PC 7](#)) the Privy Council went so far as to hold that –

“agreements to share the subject of litigation, if recovered in consideration of supplying funds to carry it on, are not in themselves opposed to public policy”.



Indian Supreme Court

**Union of India v Sri Sarada Mills Ltd,
1972 SCC (2) 877**

“Section 6(e) of the Transfer of Property Act states that a mere right to sue cannot be transferred. A bare right of action might be claims to damages for breach of contract or claims to damages for tort. **Assignment of a mere right of litigation is bad. ...**

... The reason behind the rule is that a bare right of action for damages is not assignable because the law will not recognise any transaction which may savour of maintenance of champerty. It is only when there is some interest in the subject matter that a transaction can be saved from the imputation of maintenance. That interest must exist apart from the assignment and to that extent must be independent of it.”

Uncontroversial TPF arrangements

- person maintained was near kin, a servant, or in some like relationship to the maintainer
- support by parent company or affiliate
- trade unions for its members
- motorists by its insurers
- marine insurers - subrogation and rights
- legal defence insurance (P&I mutual insurance associations)
- liquidator of a company in liquidation (funded by other creditors)
- fighting fund (pure funder)

TPF in Arbitration - the Issues

1. Disclosure – by who and extent
2. Conflicts of interests and control of proceedings
3. Liability and Security for costs
4. Confidentiality covenants
5. Ethical issues: lawyer-client-financier.
Who is client?

Disclosure

- Whether and to what extent the existence of TPF agreements should be disclosed in international arbitration proceedings
 - private matter?
 - If disclosable, extent of disclosure
 - When, What, To whom and By whom? should it be disclosed?
 - disclosing certain privileged information or documents to the prospective funder

Conflicts of interest and control

- Introduction of a third-party - *ménages à trois* (household of 3) – lawyer, client and third-party funder, never easy to manage.
- funder meddling in the attorney–client relationship;
- funder making strategic decisions on case strategy and management
- conflicts of interest between client and funder

Conflicts of interest and control

- Independence and impartiality of arbitrator e.g.
 - counsel in one case and arbitrator in another funded by same funder;
or
 - arbitrator holds shares in funder;
 - relationship between the funder and the arbitrator's law firm, or
 - funder has indirectly made multiple appointments of the arbitrator.

Liability and Security for costs

- Security for costs – indication of weak financial sustainability of a party
- Liability of funder for costs in defeat –

Yeheshkel Arkin V Borchard Lines Ltd & Ors [2005] EWCA Civ 655 , CA, Lord Philips MR however took the view that (at [41]) -

“We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.”

Liability and Security for costs

- Recovery of costs of funding if funded party succeeds
 - *Essar Oilfield Services Ltd v. Norscot Rig Management Pvt. Ltd.* (2016) EWHC (Comm) 2361] held that the costs of funding a legal proceeding may be recoverable in arbitrations. The upholding the arbitral award, which allowed a successful claimant to recover nearly £2 million in arbitration funding costs from the defendant, as “other costs” (even though it is not “legal costs”).

INDIA

Security for costs in Litigation

- Some Indian States amended their Civil Procedure Code, 1908, (CPC) Order 25 Rule 1
- Giving courts the power to secure costs for litigation by asking the financier to do so, e.g. adding as a ground for ordering security :
 - “or that any plaintiff is being financed by a person not a party to the suit” (Madhya Pradesh)
 - “or that the plaintiff is being financed by another person.” (Allahabad)
- May not extend to arbitration

INDIA

Conciliation and Arbitration Act 1996 (as amended 2015)

- No specific mention of TPF
- 5th Schedule, para 19 which considers an arbitrator's indirect interest hints to a recognition of TPF in arbitration –

“The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute”

Developments in Other jurisdictions

Singapore

- Civil Law (Amendment) Act (Bill No. 38/2016), which entered into force in March 2017.
- Civil Law (Amendment) Act 2017 - abolished the common law tort of maintenance and champerty
- Regulations prescribe only matters relating to “international arbitration”
 - Funders must be in the business of “third-party funding – min capital of about USD 4 mil.
 - Lawyers representing funded parties are required to disclose:
 - existence of any third-party funding
 - Identity and details of the funder

Developments in Other jurisdictions

- *Hong Kong*
- Made similar changes to that in Singapore.

Rules and Best Practices

IBA - 2014 IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION

- “General Standard 6(b) states that:
 - “any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in. . . the award to be rendered in the arbitration, may be considered to bear the identity of such party.”
- Explanatory Note states that it refers to third-party funders which it defines as -
 - “any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration

Rules and Best Practices

- International Court of Arbitration of the ICC
- 12 February 2016 - “Guidance Note of a reference to third-party funding” advises that arbitrators should consider, when evaluating whether to make a disclosure,
 - “relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.”
- This definition of TPF tracks, word for word, the definition of TPF found at General Standard 7a of the IBA’s 2014 Guidelines on Conflicts of Interest, which requires the party in receipt of TPF to disclose any such entity “at the earliest opportunity”.

Rules and Best Practices

- **SIAC Practice Note “ON ARBITRATOR CONDUCT IN CASES INVOLVING EXTERNAL FUNDING”** (PN-01/17 (31 March 2017))
 - Requires an arbitrator to:
 - disclose of any direct or indirect relationship with external funder;
 - conduct enquiries and order disclosure of external funding arrangements;
 - take into account funding arrangement when apportioning costs of arbitration and when ordering reimbursement of legal or other costs

Rules and Best Practices

- UK adopts a Self-regulatory regime:
- Code of Conduct for TPFunders

<http://associationoflitigationfunders.com/code-of-conduct/>

Thinking through...

- Should TPF be permitted in arbitration?
- Are there public policy reasons against such a development?
- Should TPF be promoted as part of the pro-arbitration, pro-business economic strategy?
- Should there be regulatory safeguards against any downsides to its use?
- What could, or should the courts do?