The Legalisation of Third-Party Funding of International Arbitration in Singapore

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I. Introduction

International arbitration is a popular and widespread form of dispute resolution. Sophisticated commercial entities engaged in cross-border transactions often prefer the confidential and bespoke nature of international arbitration, with the flexibility and control over the arbitral process and ease of enforcement of arbitral awards that it entails. As litigants have found to their chagrin, however, international arbitration is an expensive dispute resolution process. Claimants with otherwise meritorious claims but limited operating funds may be wary of taking on the risk of an unfavourable outcome by exposing themselves to protracted and costly proceedings.

Third-party financing of international arbitration is a developing area of specialty corporate finance that addresses this risk. It is permitted (along with third-party financing of litigation) in common law jurisdictions such as England and Australia,[1] although other common law jurisdictions such as Singapore and Hong Kong have traditionally maintained stringent prohibitions on such financing for fears of speculative claims and abuse of the judicial/arbitral process.

However, increasing competition amongst the most-preferred international arbitration venues in the world – London, Paris, Geneva, Hong Kong and Singapore – has recently spurred a change in mindset. In a bid to attract more high value international arbitrations to Singapore, and to take advantage of the increasing growth in Asia's trade and business sectors, the Singapore Parliament passed certain legislative changes in January 2017 to permit third-party funding of international arbitration proceedings. Hong Kong followed shortly after in June 2017, with similar legislative amendments.

This article provides an overview of the landscape of third-party funding for international arbitration, as well as the legislative changes in Singapore, as of 1 March 2017. It then discusses specific problems and how some of these may be ameliorated, particularly in the context of Singapore.

II. Overview

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[1] Lisa Bench Nieuwveld and Victoria Shannon:*Third-Party Funding in International Arbitration* (2nd edn, Kluwer Law International 2017) 2. It also bears noting that arbitration funding in the United Kingdom was given a slight boost by the High Court decision of *Essar Oilfields Services Limited ("Essar") v Norscot Rig Management Pvt Limited ("Norscot")* [2016] EWHC 2361 (Comm). The Court noted in *obiter* that the costs of obtaining third party funding are, in principle, recoverable as 'other costs' under section 59 of the English Arbitration Act: see [68]. This case may, however, have limited general application due to its potentially distinguishable facts. The Court highlighted the "unusual" nature of the case, in that Norscot had "no option" but to obtain third party funding due to Essar's "reprehensible conduct": at [69].

Third-party financing of disputes is not a novel concept. Contingency or conditional fee arrangements are available in some jurisdictions from law firms for parties that are unable to pay for legal fees and expenses.[2] Parties have also obtained funding from banks, insurers or other financial institutions. Some institutions fund litigation or arbitration claims as part of a broad range of investments, while others specialise in litigation or arbitration claims.[3]

As international arbitration finance has evolved in the past decade, it has been used not only by parties that cannot otherwise afford to arbitrate, but also by parties looking to efficiently address their legal costs.[4] Third-party financiers have moved beyond funding on the basis of a single case for a simple return on the results.[5] As noted by Christopher Bogart, CEO of Burford Capital, financiers' activities can include: "finance(ing) portfolios of cases.., finance(ing) activities other than the underlying claim, with high-value claims used as collateral.., obtain(ing) an immediate, discounted payment on an uncollected award.., and cover(ing) premiums on an insurance policy against the risk of an award not being enforced.."[6]

III. Legislative changes in Singapore

In light of the growing trend towards the normalisation of arbitration financing, the Singapore Parliament passed the Civil Law (Amendment) Act ("the CLAA") on 10 January 2017 to put in place a framework for third-party funding for international arbitration. This provides for (i) accepted categories of international arbitration-related proceedings for which third-party funding may be sought; (ii) criteria that third-party funders have to fulfil to qualify to provide funding; and (iii) certain duties and rules in relation to lawyers involved in cases with third-party funding.

Prior to the CLAA, third-party funding was prohibited in Singapore by way of the common law torts of maintenance and champerty. Maintenance is the provision of financial assistance to a party by a person with no interest in the proceedings, while champerty is a subset of maintenance and entails the maintenance of an action in return for a share in the proceeds of the action. Contracts affected by maintenance and champerty were void as being contrary to public policy.[7]

The CLAA abolishes the common law tort of champerty and maintenance, maintains that contracts affected by maintenance and champerty continue to be contrary to public policy or are otherwise illegal, but carves out an exception for contracts where a "qualifying Third-Party Funder" provides funds for "prescribed dispute resolution proceedings".[8] The categories of "prescribed dispute resolution proceedings" and "qualifying third-party funder" are delineated in subsidiary legislation. These categories may be extended in the future.[9]

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[2] ibid 4-5.
[3] ibid 3.
[4] Leaders League, 'Burford CEO Interview: "The most important trend is the normalization of external financing" (*Burford Capital*, 10 February 2017) <www.burfordcapital.com/newsroom/burford-ceo-interview-important-trend-normalization-external-financing/> accessed 31 March 2018
[5] Christopher Bogart, 'Third-party financing of international arbitration' (*Burford Capital*, 4 October 2016) <www.burfordcapital.com/blog/international-arbitration-financing/> accessed 31 March 2018
[6] ibid
[7] Indranee Rajah S.C., 'Third party Funding – Reinforcing Singapore as a Premier International Dispute Resolution Center' (*Singapore Ministry of Law*, 24 January 2017) < www.mlaw.gov.sg/content/dam/minlaw/corp/News/Civil%20Law%20Amendment.pdf> accessed 31 March 2018
[8] Civil Law (Amendment) Act 2017 (Singapore) (CLAA), art 2.
[9] Rajah (n 7).

Third-party funding is thus permitted for[10]:

(a) international arbitration proceedings;

(b) court proceedings arising from or out of the international arbitration proceedings;

(c) mediation proceedings arising out of or in connection with international arbitration proceedings;

(d) Court applications for a stay of proceedings in favour of international arbitration; and

(e) Court proceedings for or in connection with enforcing arbitral awards.

Third-party funders must also fulfil certain conditions to qualify to provide funds, namely[11]:

(a) To carry on the principle business (in Singapore or elsewhere) of the funding of the costs of dispute resolution proceedings to which the third-party funder is not a party; and

(b) Have a paid-up share capital of not less than SGD$5 million or the equivalent amount in foreign currency or not less than SGD$5 million or the equivalent amount in foreign currency in managed assets.

If their qualification lapses, third-party funders will not be able to enforce their funding agreements.

Lawyers are also subject to certain rules in relation to third-party funding, namely:

(a) They may introduce or refer third-party funders to their clients so long as they do not receive direct financial benefit from the introduction or referral;[12]

(b) They may advise on, draft or negotiate a third-party funding contract for their client, and act on behalf of their client in any dispute arising out of the third-party funding contract;[13] and

(c) They will be subject to a duty to disclose to the tribunal or court and every other party the existence of any third-party funding their client is receiving.[14]

Aside from this, the Singapore Parliament envisages releasing industry-promulgated guidelines and best practices for third-party funders, lawyers and arbitrators in due course.[15]

IV. Commentary

The legislative changes introduced by the Singapore Parliament allow for a welcome infusion of financing to shore up international arbitration-related legal services in Singapore. Nonetheless, these changes raise areas of concern – areas that underlie third-party financing of international arbitration generally, and which arise afresh in the context of Singapore. We look briefly at each in turn, commenting specifically in relation to Singapore where relevant.

(a) Commodification of claims and increase in frivolous legal disputes

A serious objection to arbitration funding is that it commodifies claims. Detractors argue that profit-driven parties that are not affiliated to the disputants in the arbitration should not be allowed to influence the dispute. As mentioned previously, this rationale derives from the common law doctrines of maintenance and champerty. To the extent that these doctrines

[10] Civil Law (Third-party funding) Regulations 2017 (Singapore), regulation 3.
[11] ibid regulation 4.
[12] CLAA, art 3.
[13] ibid.
[14] Rajah (n 7).
[15] ibid.

still apply, it is questionable whether they extend to international arbitration at all, since arbitration is a private, consensual disputes mechanism without the concerns of equal access to justice or sanctity of the judicial process that court litigation might entail.[16] This is largely a matter of public policy choice for each jurisdiction. Singapore has obviously made the call that such doctrines are outdated in light of the need to bolster its position as Asia's premier dispute resolution hub.

Another objection raised is that third-party funding of arbitration will result in an increase in legal disputes.[17] This may not pose a problem in practice. There should be no issue if third-party funding enables meritorious claims that claimants could not otherwise have afforded to bring.

A closely related objection is that increasing the amount of available funding will encourage frivolous claims.[18] This objection, however, is ameliorated somewhat because funders undertake extensive assessments before funding the case.[19] Singapore's requirements that qualified third-party funders must be principally in the business of third-party funding and have minimum capital adequacy requirements ensure that permitted funders will be sophisticated and established market players. Such third-party funders would be discerning as to which arbitration cases to invest in. Factors to consider would include an evaluation of the merits of the case, the quantum of the claim, the estimated time taken before a favourable award or settlement is reached, the wherewithal of the respondent(s) to pay and the enforceability of the award.[20]

As observed by von Goeler, funders generally look for a probability of success of 60% or higher before agreeing to fund the arbitration.[21] He further notes a study undertaken by the ICC France which shows that funders typically agree to fund only 5-10% of cases that they review.[22] Additionally, third-party funders will only fund cases in which respondents have substantial assets, against which an arbitration award can be enforced.[23] Further, a rigorous due diligence procedure must be undertaken by third-party funders in setting up a binding funding agreement.[24] All these factors militate against a proliferation of frivolous claims.

It may also be argued that the involvement of a third-party funder could change settlement dynamics between the parties. A claimant may be unlikely to settle if it has a funder, while a respondent may be more willing to settle if it is aware that the claimant is supported by a funder with enough financial muscle to see the case to its conclusion.[25] This is subject to the same comments in relation to the funder's incentive to back meritorious cases. There is nothing wrong in principle with a claimant with a meritorious claim being unwilling to settle. It bears noting that a respondent may also avail itself of third-party funding in relation to meritorious counterclaims.

Additionally, frivolous claims may also be ameliorated by institutional procedural rules, such as those promulgated by the Singapore International Arbitration Centre (the "SIAC"). These rules are generally applicable to arbitrations administered by the SIAC. The 2016 SIAC rules for international commercial arbitration have a novel "summary judgment" procedure that allows for a party to apply to the tribunal for the early dismissal of a claim or

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[16] Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* (Kluwer Law International 2016) 89-90.
[17] ibid 91.
[18] ibid 92.
[19] ibid.
[20] ibid 16-21.
[21] ibid 25.
[22] ibid.
[23] ibid 20-21.
[24] Nieuwveld and Shannon (n 1) 22-23, 38.
[25] Goeler (n 16) 95.

defence that is "manifestly without legal merit" or "manifestly outside the jurisdiction of the Tribunal".[26] The 2017 SIAC rules for international investment arbitration have a similar procedure in relation to investment arbitrations. These procedural innovations are likely to forestall frivolous claims – be they third-party funded or otherwise.

(b) Attorney-client relationship and confidentiality

A major issue with third-party funding is the potential to complicate the attorney-client relationship. There is a fear that arbitration funders will take oversight of the claim away from the counsel.[27] Additionally, because the third-party funder is the counsel's paymaster, the counsel might not be able to advise the client in an independent and objective manner.[28] Singapore's legislation addresses these fears somewhat by preventing lawyers from receiving any financial benefit from third-party funders, while maintaining existing legal professional rules that require lawyers to act in their clients' best interests. Future regulation in these areas is expected, as discussed below.

Further, the counsel's obligation of confidentiality to the client could be potentially affected by the involvement of a third-party funder. Funders need a complete understanding of the prospective claims when assessing if the case is worth funding.[29] A client must expressly authorise the disclosure of such information by the counsel to the funder, so that the counsel does not breach his or her confidentiality obligations.[30]

(c) Disclosure to tribunal and counter-party of third-party involvement

At present, guidelines such as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 ("the IBA Conflicts Guidelines") and the International Chamber of Commerce (ICC)'s 2016 "Guidance Note for the disclosure of conflicts by arbitrators" ("the Guidance Note") impose no legal obligation for the disclosure of the involvement of a third-party funder. In contrast, Singapore's legislation will impose a duty on lawyers to disclose to the tribunal or court and every other party the existence of any third-party funding their client is receiving. This includes the identity and address of the third-party funder.[31] These requirements are designed to minimise conflicts of interest, and will allow for better identification of arbitrator-funder conflict. Such conflicts are discussed below, in relation to the promulgation of industry-wide conflict guidelines.

Further, the SIAC has already taken steps to facilitate disclosure of third-party funding. The new 2017 SIAC Rules for investment arbitration empowers tribunals to order the disclosure of the existence of a party's third-party funding arrangement and/or the identity of the third-party funder.[32] Where appropriate, the tribunal may also order the disclosure of details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability.[33] Further, the tribunal

[26] Singapore International Arbitration Centre, 'SIAC Rules 2016' (*SIAC*, 2016) rule 29 <www.siac.org.sg/our-rules/rules/siac-rules-2016> accessed 31 March 2018.
[27] Goeler (n 16) 97.
[28] ibid 98.
[29] ibid 100.
[30] ibid.
[31] Rajah (n 7).
[32] Singapore International Arbitration Centre, 'SIAC IA Rules 2017' (*SIAC*, 2017) rule 24(1) < www.siac.org.sg/our-rules/rules/siac-ia-rules-2017> accessed 31 March 2018.
[33] ibid.

may take into account any third-party funding arrangements in ordering that all or a part of the legal or other costs of a party be paid by another party.[34]

(d) Future guidelines

Third-party funding of international arbitration is not regulated by any overarching international convention or body of law. Domestically, Singapore has yet to promulgate specific guidelines for lawyers, funders or arbitrators, but is expected to do so in due course. These are expected to address issues like conflicts of interests, termination of the funding contract and control of proceedings.[36]

Existing bodies of soft (ie. non-binding) law provide guidance as to how Singapore's regulations could be structured. For example, the IBA Conflicts Guidelines were drafted to promote clarity and consistency by setting out general standards of behaviour for arbitrators.[37] They are "increasingly seen as representing good practice" for determining the independence of an arbitrator.[38] The guidelines require the parties to disclose, at the earliest opportunity, any relationship "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."[39]

In a similar vein, the ICC adopted the Guidance Note in February 2016 with the aim of "ensuring that arbitrators are forthcoming and transparent in their disclosure of potential conflicts."[40] The Guidance Note furthers ongoing efforts by the ICC to improve transparency in ICC arbitration proceedings.[41] The Guidance Note specifically states, with reference to when to disclose the involvement of third-party funders, that arbitrators should consider "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award."[42]

It is suggested that Singapore should promulgate guidelines akin to the IBA Conflicts Guidelines, but include lawyer-funder conflicts on top of arbitrator-funder conflicts. This would include concerns as to the control of proceedings and confidentiality. An added benefit of Singapore promulgating such guidelines would be to cement itself as a thought-leader in Asia in this developing area of international arbitration and third-party funding. A particular area of interest would be how confidentiality obligations between parties to the arbitration would be dealt with. For instance, it is unclear whether the release of information about the case to a funder, in order for a funder to decide whether to fund the arbitration, would breach confidentiality obligations between the parties.

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[34] ibid rule 35.
[36] Rajah (n 7).
[37] International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration' (*IBA*, 2014) (IBA Guidelines) 2 <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 31 March 2018.
[38] Audley Sheppard, 'Arbitrator Independence in ICSID Arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP Press 2009) 136.
[39] IBA Guidelines (n 37) general standard 7a.
[40] International Chamber of Commerce, 'ICC Court adopts Guidance Note on conflict disclosures by arbitrators' (*ICC*, 23 February 2016) <https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/> accessed 31 March 2018.
[41] Aren Goldsmith and Lorenzo Melchionda, 'The ICC's Guidance Note on Disclosure and Third-Party Funding: A Step in the Right Direction' (*Kluwer Arbitration Blog*, 14 March 2016) <http://arbitrationblog.kluwerarbitration.com/2016/03/14/the-iccs-guidance-note-on-disclosure-and-third-party-funding-a-step-in-the-right-direction/ > accessed 31 March 2018.
[42] International Chamber of Commerce, 'ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' (*ICC*, 30 October 2017) para 24 <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/> accessed 31 March 2018.

V. Conclusion

Third-party funding in international arbitration is "becoming an industry unto itself".[43] Singapore's legislative changes capitalise on this growing trend, and allow parties arbitrating in Singapore to avail themselves of financing and risk-mitigating measures available in other key international arbitration jurisdictions. These changes strengthen Singapore's position as Asia's leading arbitration centre, and keep it competitive with dispute resolution hubs worldwide. While it remains to be seen how guidelines regulating third-party financing of international arbitration will develop, prospects appear bright for the growth of this innovative form of financing.

[43] Bernardo M. Cremades and Antonias Dimolitsa (eds), *Third party funding in International Arbitration* (Paris: International Chamber of Commerce 2013) 19.