Will Alternative Funding Arrangements (such as Third Party Funding or Alternative Fee Arrangements with Counsel) Help or Harm Arbitration Users?

Introduction

With arbitration being one of the most widely used alternative dispute resolution processes in the world, reform has become increasingly important in ensuring efficient, effective and easily accessible arbitration processes. An issue that has plagued arbitration as an alternative dispute resolution process is that of high costs[1]. Arbitration is often expensive to conduct, and this is a key factor behind parties opting for other dispute resolution methods.

In recent years there has been a steep rise in demand for dispute financing, due to four main factors, namely[2]: increasing access to justice for claimants that otherwise could not pursue a meritorious claim; companies seeking to pursue meritorious claims while maintaining enough cash flow to conduct business; worldwide market turmoil inspiring financial investors to seek investments not directly related to volatile financial markets; and companies facing bankruptcy or insolvency seeking funding to pursue claims that could generate cash-flow for the company, or to mitigate the risk of losing disputes that could potentially bankrupt the company. Alternative funding arrangements allow parties to circumvent these issues, thereby increasing access to arbitration for a diverse variety of arbitration users that otherwise could not avail themselves of it.

There are a wide variety of such arrangements available, but this article will focus on two: third-party funding ("*TPF*") and alternative fee agreements ("*AFA*") (such as success fee arrangements and contingency fee arrangements). Analysis of TPF and AFA will reveal that these alternative funding arrangements engender greater access to arbitration for users who may not, in normal circumstances, be able to afford to arbitrate. So, while these arrangements do pose potential harms to arbitration users (such as conflicts of interest and the funding of unmeritorious claims), in the round, such arrangements do help arbitration users rather than harm them. In fact, any potential harms ought to be addressed by legislation, regulations and guidelines that allow TPF

[1] White & Case and Queen Mary University of London School of International Arbitration, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) 7–8 <http://www.arbitration.qmul.ac.uk/research/2018/> accessed 1 June 2021.
[2] Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (2nd edition, Wolters Kluwer 2017) 11.

within certain confines and subject to certain safeguards, as opposed to broad-based restrictions on alternative funding arrangements.

TPF and AFA

TPF involves a party separate from the parties in dispute providing total or partial funding for the dispute in question, in exchange for remuneration dependent on the outcome of the dispute or some other remuneration or reimbursement[3]. AFAs can take a wide variety of forms, dependent on the fee structure envisioned between a lawyer and their client. Two of the most common types of such arrangements are success fee arrangements ("*Success FA*") and contingency fee arrangements ("*Contingency FA*").

Under a success FA[4], counsel receives compensation irrespective of the outcome of the dispute but may charge an uplifted rate if successful. Under a contingency FA, counsel's compensation is entirely dependent on the outcome of the arbitration, in that compensation is not payable until and unless the party receives a favourable settlement or award.

Both forms of alternative funding discussed above (i.e. TPF and AFA) involve funding (or support akin to funding) of a dispute by a party unconnected with the dispute. In this respect, alternative funding arrangements are nearly identical to the common law doctrines of maintenance and champerty.

Maintenance and Champerty

In English common law, maintenance is defined as a party unconnected with the litigation entering into an agreement "*…to support another in bringing or resisting an action*"[5], while champerty is a form of maintenance where the maintainer agrees to take a share of the litigation's proceeds[6]. Maintenance is an ancient doctrine, first arising in medieval England[7]. In its founding stages, it arose to protect against abuses of process common to the medieval English legal system[8], such

[3] Queen Mary University of London and International Council for Commercial Arbitration (Firm), 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration.' (2018) 50 <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf> accessed 3 July 2022.
[4] Gretta Walters, 'Chapter 24: Allocating Costs in International Arbitration: Do Alternative Fee Arrangements with Counsel Require Alternative Considerations?', in Sherlin Tung Fabricio Fortese and Crina Baltag (eds), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy* (Wolters Kluwer 2019) 450.
[5] Tan Y. L., 'Champertous Contracts and Assignments' (1990) 106 L.Q.R. 656, 657.
[6] QC Steven Elliott and QC John McGhee, *Snell's Equity. 34th Edition, Mainwork & 1st Supplement* (Sweet & Maxwell 2020) para 3–038.
[7] Percy H Winfield, 'History of Maintenance and Champerty' (1919) 35 Law Quarterly Review 50.
[8] Jern-Fei Ng, 'The Role of the Doctrines of Champerty and Maintenance in Arbitration' (2010) 76 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 210.

as powerful persons purchasing a weak claim and using their power and influence to "*strike terror into the eyes of a judge upon the bench*"[9], thereby influencing the litigation in their favour. Initially, it included both the purchase of a chose in action[10] and the giving of evidence without being subpoenaed[11]. It was for this reason that maintenance was initially prohibited in English common law[12]. Essentially, the doctrine arose to protect against an unconnected party, having a financial interest in the litigation, influencing the litigation in their favour through "…*wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse*"[13]. As both Singaporean[14] and UK[15] Courts have highlighted, these concerns are equally important in arbitration.

However, the tort of maintenance has now been relegated to only certain limited situations, and has been abolished in Singapore[16]. Recent decisions have considered that the tort, ancient as it is, needed to adapt to suit modern litigation. As Lord Philips MR said, "*one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice*"[17]. Similar considerations have been upheld in several jurisdictions, including Hong Kong[18] (in the context of arbitration proceedings) and Singapore[19]. Furthermore, civil litigation reforms have led to litigation funding being accepted in the UK[20] and Singapore[21].

For TPF in arbitration, Hong Kong recently passed its Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance[22] ("*HK TPF Ordinance*") along with the HK Code of Practice for Third Party Funding of Arbitration[23] ("*HKCP*"). The HK TPF Ordinance allows disputes to be

[9] Jeremy Bentham, *The Works of Jeremy Bentham*, vol 3 Letter XII, 19 <https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1922/0872.03_Bk.pdf>.
[10] *British Cash and Parcel Conveyors, Limited v Lamson Store Service Company, Limited* (1908) 1 KB 1006, 1013.
[11] ibid.
[12] ibid.
[13] ibid 1014.
[14] *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2006] SGCA 46 [36].
[15] *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch. 239 249
[16] Civil Law Act (Singapore) 1909 s 5A.
[17] *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) (No2)* (2002) EWCA Civ 932 [36].
[18] *Unruh v Seeberger & Anor* 2 HKC 609 [119].
[19] *Otech Pakistan Pvt Ltd V Clough Engineering Ltd And Another* [2006] SGCA 46 [38].
[20] Courts and Tribunals Judiciary, 'Third Party Funding - Code for Conduct for Litigation Funders' <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/archive/costs-funding-and-third-party-funding/third-party-funding-2/> accessed 3 July 2022.
[21] Civil Law Act (Singapore) 1909 s 5B.
[22] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.
[23] Code of Practice for Third Party Funding of Arbitration (HK) 2018.

funded by third parties provided that certain safeguards[24] are complied with (as will be explored below). While the acceptance of such alternative funding arrangements is encouraging in that such arrangements increase access to arbitration, commentators have highlighted several potential harms posed to arbitration users by alternative funding arrangements. It is therefore necessary to evaluate how best to eliminate or at least mitigate these harms.

Conflicts of interest

One of the key issues plaguing TPF is that of possible conflicts of interest. In a traditional arbitration, conflicts are usually obvious to an arbitrator, as both parties will be known to the arbitrator. In a TPF scenario, however, the funder may not be disclosed to the arbitrator and so possible conflicts between the arbitrator and the funder may arise. If the conflict is discovered during the arbitral process, this may result in the removal of the arbitrator or the challenge of any potential award. In either scenario, both the claimant and the respondent are harmed through the delay and/or costs incurred in either appointing a new arbitrator or in resisting the challenge to the enforcement of the award.

However, this potential harm can be eliminated (or at least mitigated) through adequate disclosure protocols. For example, the HK TPF Ordinance possesses disclosure mechanisms that ensure the disclosure of "*the fact that a funding agreement has been made*"[25] and *"the name of the third party funder*"[26]. This disclosure is made to the arbitrator and to the other parties in the arbitration. Further, the HKCP ensures that third-party funders have an active obligation to monitor potential conflicts of interest that may arise regarding the funding agreement. Placing this obligation on the third-party funder helps arbitration users, in that it offsets the time and costs required to carry out the obligation of continuous conflict monitoring under a TPF scheme.

However, disclosure protocols may create new sources of potential harm in terms of wasted time and costs, such as leading to the other party to the arbitration issuing frivolous challenges to the arbitrator or making unfounded applications for security for costs[27], as the party employing TPF tacitly admits it likely could not pay costs without the help of their third-party funder if they are unsuccessful.

While such an argument is tenable, it is submitted that the prejudice engendered by a failure to disclose TPF is greater than that faced by potentially frivolous applications or challenges. In any

[24] Anita Natalia and Arif Umar Faruq Bin Faiz, 'Lessons Learned From Hong Kong: The Potential For Third Party Funding In Malaysia's International Arbitration Landscape' (2021) 1 LNS(A) xcix 5–7.
[25] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance s 98U(a).
[26] ibid 98U(b).
[27] Queen Mary University of London and International Council for Commercial Arbitration (Firm) (n 3) 86.

event, the fast-paced nature of arbitration likely means that arbitrators will be able to deal with such applications or challenges summarily and with minimal time and costs spent by either party, especially in light of the trite principles of the *kompetenz-kompetenz* doctrine[28], allowing arbitrators to rule on their own jurisdiction. Therefore, the potential harm of potential conflicts of interest may be mitigated or eliminated by legislation along the lines of the HK TPF Ordinance and the HKCP.

Shallow and/or unmeritorious claims

Another potential harm engendered by TPF is the funding of shallow or unmeritorious claims. In essence, as the arbitrating party need not fund the arbitration themselves, they may be more inclined to arbitrate disputes that they might otherwise have settled or not pursued. In this sense, the other arbitration user is harmed in that they will have to incur costs and spend time defending the arbitration.

While this is theoretically possible, such an argument ignores the fact that third-party funders are extremely unlikely to fund cases that have slim chances of success. Indeed, while TPF is a relatively new industry, many third-party funders undertake extensive evaluation of the claims before determining whether to fund them. As Affaki (vice-chair of the ICC Banking Commission) states:

> "*Each claim is carefully vetted by specialist litigators, financiers and corporate management consultants and allocated a coefficient as to its probability of yielding a favourable award at each stage of the proceedings. The coefficient will determine the amount that a fund is willing to invest in the claim and the terms of that investment as regards pricing and duration. Chances of success need to be at least 60%. No standard litigation funding fee is reported across the market, and funders indicated that each agreement has different terms.*"[29].

Given the extensive nature of the analysis undertaken here, it is highly unlikely that litigation funders would fund shallow or non-meritorious claims. After all, they would receive no proceeds from the litigation if the claim failed, and they therefore have a considerable interest in the claim succeeding. In fact, the extensive analysis undertaken by the funder helps the party seeking funding, in that it provides the arbitration user seeking funding with validation of their claim's probability of success if funding is approved.

[28] Gary B Born, *International Commercial Arbitration* (3rd edition, Wolters Kluwer 2020) 1141.
[29] Bachir Georges Affaki, 'Chapter 1. A Financing Is a Financing Is a Financing…', *Third Party Funding in International Arbitration* (Wolters Kluwer Law & Business 2015) 12.

The same is true of AFA. By accepting a brief wherein counsel will receive no compensation if they are unsuccessful or stipulating an uplift if they win indicates to arbitration users their counsel's belief in the claim's probability of success. Therefore, the potential harm of unmeritorious claims being brought is eliminated by the practical realities of the funding market, and the validation provided by third-party funders or counsel is a help to the party in determining their claim's viability.

Investor-state arbitration

TPF is particularly popular in investor-state arbitration ("*ISA*") scenarios[30], largely due to the potentially massive costs incurrable thereunder[31]. Indeed, Lamm and Helbeck[32] list 8 publicly known ISAs wherein TPF was employed by claimants, including: S&T Oil v Romania[33] (funded by Allianz Litigation Funding), Kardassopoulos v Georgia[34] and Teinver v Argentina[35].

In essence, the law giving rise to ISAs involves a complex web of bilateral and multilateral treaties, known as International Investment Agreements ("*IIAs*"). Under those treaties, investors resident in foreign signatory states are provided various degrees and rights. Where those rights are breached, those investors may directly sue the state before an international arbitration tribunal, on the terms of the treaty concerned, through several institutional ISA centres, such as the Singapore International Arbitration Centre or the International Chamber of Commerce and also ad-hoc tribunals[36]. Given the distinct nature of ISA, the arbitration users concerned (i.e. foreign investors and sovereign states) face distinct jurisdictional issues in relation to TPF.

These jurisdictional issues arise due to the way in which an ISA process arises. Under a traditional arbitration clause, parties simply consent to arbitrate under the relevant contract(s), and it is from that consent that the arbitral tribunal derives its jurisdiction, i.e. the jurisdiction to determine any disputes arising under the clause (which would normally be limited to disputes from the agreement the clause is included under).

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[30] Eric De Brabandere and Julia Lepeltak, 'Third-Party Funding in International Investment Arbitration' (2013) 27 ICSID Review 379, 379.
[31] Noah D Rubins, 'The Allocation of Costs and Attorney's Fees in Investor-State Arbitration' (2003) 18 ICSID Review - Foreign Investment Law Journal 109, 111–124.
[32] Carolyn B Lamm and Eckhard R Hellbeck, 'Chapter 9. Third-Party Funding in Investor-State Arbitration Introduction and Overview', in Cremades and Dimolitsa (eds) *Third Party Funding in International Arbitration* (Wolters Kluwer Law & Business 2015).
[33] *S & T Oil Equipment and Machinery Ltd v Romania, ICSID Case No ARB/07/13.*
[34] *Ioannis Kardassopoulos v The Republic of Georgia (Decision on jurisdiction) ICSID Case No ARB/05/18.*
[35] *Teinver SA et al v Argentina (Decision on Jurisdiction) ICSID Case No ARB/09/1.*
[36] Borzu Sabahi, Noah Rubins and Don Wallace Jr, *Investor-State Arbitration* (2nd edition, Oxford University Press 2019) 2.

Contrastingly, an ISA tribunal derives its jurisdiction from the IIA. As the very basis of an IIA is to facilitate and protect investments between two or more countries, the IIA will most likely stipulate a nationality requirement in any dispute resolution procedure in the IIA[37]. Also, The International Centre for Settlement of Investment Disputes (ICSID), a leading ISA institution[38], holds that its jurisdiction covers only disputes arising out of an investment between a contracting state and a national of another contracting state[39].

This raises a key jurisdictional issue where a third-party funder is not in the same state as the party they are funding, especially where the funder is in the same state as the other party. This issue was raised in *Teinver*. The state argued that under the particular facts of *Teinver*, the third-party funder (a UK corporation) had effectively purchased the claim from the claimant, and this obviously violated the nationality clause of the IIA between Argentina and Spain. Unfortunately, the ICSID dismissed this issue on the basis that the funding arrangement had come into being after the dispute had been filed at the ICSID, and the tribunal could only decide on facts occurring before the dispute was filed. In any event, the jurisdictional concern here may well lead to future meritorious claims being dismissed due to the tribunal's lack of jurisdiction, which would harm future ISA claimants, especially due to the inapplicability of *stare decisis* to arbitral tribunals.

It is submitted that the mere involvement of a third-party funder ought not to oust the tribunal's jurisdiction. The funder's role in a modern TPF scenario does not involve the purchase of the claim in its entirety, merely a share of the proceeds. The funded party remains the claimant for the purposes of the IIA, and therefore no jurisdictional issues should arise. For the avoidance of doubt, however, future IIAs and institutional guidelines ought to include provisions regulating TPF in ISA, to ensure that the tribunal's jurisdiction is preserved in that scenario.

Conclusion

While there are potential harms posed by alternative funding arrangements, as discussed above, it is submitted that those harms should not lead to broad-based restrictions on such arrangements. These arrangements allow parties greater access to arbitration through offsetting costs, while simultaneously providing validation of the party's claim. Indeed, the true harm to arbitration users would lie in eliminating these funding arrangements in their entirety, thereby

[37] Angelynn Meya, 'Chapter 10. Third-Party Funding in International Investment Arbitration The Elephant in the Room', in Cremades and Dimolitsa (eds) *Third Party Funding in International Arbitration* (Wolters Kluwer Law & Business 2015) 123.
[38] United Nations Conference on Trade and Development, 'Investment Dispute Settlement Navigator' (*UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 3 July 2022.
[39] International Centre for Settlement of Investment Disputes Convention, Regulations and Rules 2006 Article 25.

severely restricting access to arbitration. Instead, arbitral institutions and state legislatures should pass statutes and/or create guidelines on such arrangements to curb or eliminate the potential harms posed by them while preserving their benefits, as Hong Kong has already done in the TPF context. In an ISA scenario, guidelines and future treaties ought to ensure that the tribunal's jurisdiction is not ousted where TPF is involved in order to eliminate potential harms to ISA users while preserving access to ISA.

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