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Asia No Longer 'Third' To Third Party Funding – Meets The Financing World Of Arbitration

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Introduction

Access to justice laid the foundation stone for third party funding (TPF) in litigation, nearly seven centuries ago. While TPF has attained sufficient degree of stability in the United Kingdom (UK), Australia, United States of America (USA) and few European countries, it is gaining momentum in Asia. Traction, however, is being seen in the realm of arbitration as against traditional litigation. On January 9, 2017, Singapore accorded statutory recognition to TPF in international arbitration subject to regulation. In Hong Kong, consultation on TPF for arbitration has culminated into a report of the Law Commission on October 12, 2016, recommending TPF in Hong Kong-seated arbitration and services provided in Hong Kong for foreign-seated arbitration. Commercial eyes are set on Hong Kong as it endeavors to open doors to TPF in 2017.

This article traces the trajectory of growth of this practice in the two popular seats of arbitration in Asia, Singapore & Hong Kong. It also seeks to shed light on the manner in which modern day TPF in arbitration can reconcile with classic principles underlying TPF in litigation.

Definition & Scope of Third-party funding

TPF is commonly associated with non-recourse financing where repayment of funder's fees is contingent upon success. It is a financing method whereby an entity that is not party to a dispute,

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irrespective of having an interest in the dispute, funds the legal or other costs of a party in consideration of a share or percentage of the proceeds of the judgment or award upon success in the proceedings.

The boundaries of this definition vary. For instance, in some jurisdictions, proceedings may include court and arbitral proceedings.² Agreements where funders hold no interest in the dispute may not be enforceable.³ The funder of a losing party may be ordered to pay costs of the winning party i.e. adverse costs.⁴ On the other hand, a court may order the unsuccessful party to pay not only the awarded amount to the successful party but also the fees of its funder.⁵ A myriad mesh of situations may arise out of an apparently simplistic case of TPF.

TPF has wide coverage. It includes costs related to attorney fees, evidentiary hearings, amount under judgment or award, arbitrator fees, institutional fees and adverse costs. Terms of a TPF agreement may include cap on funding, percentage of return or recovery upon success, payment of adverse costs etc. As judicial, cultural and commercial landscape evolved, a host of factors informed the decision for receiving, providing and promoting TPF. Paucity of financial resources remains the key cause. However, the need to maintain cash flow to operate as a healthy concern during proceedings or to manage and allocate risks of proceedings inspires parties to obtain TPF. For funders, volatility of markets, high value claims and alternative avenues for investment has led to exploring non-recourse financing. As for promoters, the present era of growing commercial disputes, ripe with complexities, delays, over-burdened judiciary, uncertainty and risk, is sufficient cause to promote TPF.

Maintenance & Champerty: Origin, evolution or erosion?

At its inception in the UK, TPF was intended to facilitate access to justice for poor litigants. However, the practice witnessed abuse in medieval times by powerful English barons. Buying weak claims as a gamble in litigation, usurping claims in the hope of power-based success; wanton and officious intermeddling or control over others' disputes without any interest therein;⁶ inflating damages, suppressing evidence and suborning witnesses for personal gain⁷ gave rise to doctrines of maintenance and champerty.

Maintenance is defined as the giving assistance to a party by a person who has neither an interest in the action nor any other motive legally / lawfully justifying interference.⁸ Champerty is a particular kind of maintenance in consideration for a share of the proceeds if the action succeeds.⁹ Founded on considerations of public policy, the actions constituting maintenance and champerty attracted criminal and tortious liability in England and Wales.

TPF fell within the ambit of the doctrines. The more prevalent attorney-client contingency fee arrangement was considered 'champertous' (sophisticated laws subsequently brought these actions under 'professional misconduct'). However, rising cost of litigation increased the demand

² *Bevan Ashford vs. Geoff Yeandle Ltd.*, [1998] 3 W.L.R. 172 (UK)

³ *Lim Lie Hoa v Ong Jane Rebecca & Ors*, [2005] SGCA 24 (Singapore)

⁴ *Arkin v Borchard Lines Ltd.*, [2005] 1 WLR 3055 (UK)

⁵ *Essar Oilfields Services Limited v Norscot Rig Management Pvt. Limited*; [2016] EWHC 2361 (Comm) (UK)

⁶ *British Cash & Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.* [1908]1 K.B. 1006

⁷ *In re Trepeca Mines Ltd. (No.2)*[1963] Ch. 199

⁸ *Winnie Lo v. HKSAR* (2012)15 HKCFAR 16

⁹ *supra*

for some form of contingency fee agreements for litigation. Gradually, strict application of the doctrines of maintenance and champerty began to water down. In 1866, it was acknowledged that a fair TPF agreement was not per se opposed to public policy, was in furtherance of right and justice and necessary to resist oppression.

Section 13 of the Criminal Law Act 1967 abolished both the offence and the tort of maintenance and champerty in UK. However, Section 14(2) of the Criminal Law expressly preserved the invalidity of champertous agreements by stating that such abolition shall not affect any rule of law in cases where a contract is contrary to public policy or otherwise illegal. Thus, it was accepted that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy.¹⁰

The growing practice of arbitration and the equivalent need for financing of costs therein, raised questions as to extension of the doctrines to arbitration. Arguments in favour of confining the doctrines to court proceedings moor on the original design i.e. protection of integrity of the public civil justice system in England.¹¹ This implies classic court proceedings. Arbitration is a private consensual mode of dispute resolution. In the case of *Giles*¹² in 1993, Lord Steyn J. opined (in a case that did not involve arbitration) that it would involve a radical new step to extend the doctrine to private consensual arbitration – thereby implying that arbitration was free from the clutches of law on champerty. However, in *Bevan*¹³ in 1998, the doctrines were held to apply equally to all proceedings. The Court held:

“The law of champerty has its origins in, and must still be based upon, perceptions of the requirements of public policy. I find it quite impossible to discern any difference between court proceedings on the one hand and arbitration proceedings on the other that would cause contingency fee agreements to offend public policy in the former case but not in the latter...If it is contrary to public policy to traffic in causes of action without a sufficient interest to sustain the transaction, what does it matter if the cause of action is to be prosecuted in court or in an arbitration?”

Further, the Court held that the law of maintenance depends upon the question of public policy and public policy is not a fixed and immutable matter. It is a conception which must be alterable by the passage of time.¹⁴

Presently, the hard terrain of the doctrines has significantly eroded in UK to counterbalance the bedrock of third party funding i.e. access to justice. The mere existence of a third-party funding agreement does not render the transaction unenforceable. It is quintessential to consider the nature and surrounding circumstance of a particular agreement. In considering whether an agreement is unlawful on grounds of maintenance and champerty, the question is whether there is wanton intermeddling in the dispute by the meddler/funder and whether the agreement has a

¹⁰ *Giles v. Thompson* [1993]3 All E.R. 321

¹¹ *Martell v. Consett Iron Company Limited* (1954) Ch 363

¹² *Ibid.*2

¹³ *Ibid.*1

¹⁴ *Supra*, relying on *Hill v. Archbold* [1968] 1 Q.B. 686

tendency to corrupt public justice and integrity of the proceedings. However, statutory recognition has not been given in the UK to TPF in arbitration.

Hong Kong

English common law and rules of equity have been imported into Hong Kong by virtue of s 3 of the Application of English Law Ordinance (Cap 88). As under English law prior to 1967, instances of maintenance and champerty entail tortious liability in present-day Hong Kong. A champertous agreement may be held to be void and unenforceable. Such action also constitutes an indictable offence under Section 101I of the Criminal Procedure Ordinance (Cap 221).

However, third-party funding agreements are not completely prohibited in Hong Kong. Three exceptions have been drawn: (a) where a third party can prove that it has a legitimate interest in the outcome of the litigation (the common interest category), (b) where a party can persuade the court that it should be permitted to obtain Third Party Funding to enable it to have access to justice (access to justice category), and (c) in a miscellaneous category of proceedings including insolvency proceedings (insolvency category).¹⁵

Law on TPF in litigation holds a place of certainty in Hong Kong, drawing sufficient sustenance from the law of maintenance and champerty in UK. In 1994, the judiciary was first seized with the question on whether the law of champerty applied to arbitration. In the case of *Cannonway Consultants Ltd v Kenworth Engineering Ltd*,¹⁶ the court relied on the obiter dicta in *Giles* and held that it was not appropriate to extend champerty from the public justice system to the private consensual system of arbitration. In relation to arbitration proceedings, it acknowledged that the role of the courts therein had diminished substantially in England (when provisions requiring leave to appeal an arbitral award were introduced in 1979). Similar provisions in Hong Kong gave supremacy to party autonomy and substantially curtailed the powers of the court in relation to arbitration proceedings. The Court therefore held that the doctrines could not be extended to arbitration.

This judgment could have the effect of having unopposed third-party agreements in arbitration. This question arose again in the case of *Unruh v Seeberger*.¹⁷ However, this case involved enforceability of a third-party funding agreement entered into in Hong Kong for funding an arbitration seated outside Hong Kong. In addition to the issue of applicability to arbitration, it was argued that even if the agreement was considered champertous locally, it was not against public policy of Hong Kong to enforce such an agreement involving funding outside Hong Kong, where maintenance and champerty were not contrary to public policy. The Court focused on the evolving, yet shrinking, scope of maintenance and champerty. It acknowledged that the content of value judgment in assessing the doctrines had changed fundamentally, reflecting the radical development of society and the legal system over centuries. Since the doctrines were founded on public policy, the Court held that it should not strike down performance of an agreement in relation to judicial or arbitral proceedings in a jurisdiction where such public policy objections did

¹⁵ *Unruh v. Seeberger* [2007]2 H.K.L.R.D. 414

¹⁶ [1995] 1 H.K.C. 179

¹⁷ [2007]2 H.K.L.R.D. 414

not exist. However, the issue of application of the doctrines to agreements concerning Hong Kong-seated arbitrations was left open.

Recognizing the worldwide practice of TPF for litigation and arbitration, permissibility of TPF by almost all arbitral institutions and the growing popularity of Hong Kong as a seat of arbitration, the Law Reform Commission of Hong Kong released a consultation paper on TPF in arbitration, and consequently a report on October 2016. The key proposed amendments state that the doctrines do not apply to arbitration to which Arbitration Ordinance of Hong Kong applies, proceedings before emergency arbitrators, and mediation and court proceedings relating to arbitration. However, the doctrines have been preserved akin to the UK. Their non-application does not affect any rule of law in which a contract is to be treated as contrary to public policy or otherwise illegal. The proposed amendments apply to services provided in Hong Kong, even for foreign seated arbitrations.

Singapore

The law in Singapore also prohibits TPF in litigation on grounds of maintenance and champerty. Such agreements entail tortious and criminal liability. However, such funding is lawful if it is demonstrated that the funder has commercial interest in the proceedings.¹⁸ The courts have also preserved agreements where it finds that there is little risk of inflaming of damages, suppression of evidence and suborning of witnesses by the funder. The third exception lies in insolvency cases, provided again that the funder has genuine commercial interest in the proceedings. The commercial interest category thus forms a key exception to non-enforceability of TPF agreements in litigation in Singapore.

The leading case on TPF in litigation is *Re Vanguard Energy Pte Ltd*¹⁹ which confirmed validity of litigation funding arrangements in insolvency cases. Shareholders of the company were funders for claims initiated prior to liquidation. The Court held that assignment of claims to shareholders did not offend the doctrines due to public policy grounds of protecting the purity of justice and interests of vulnerable litigants. In any event, the Shareholders had legitimate interests in the claims. Thus, Singapore and Hong Kong toe the same line in treatment of TPF agreements in litigation, although commercial interest forms the pivot of TPF in Singapore.

The issue of applicability of the doctrines to arbitration arose in the case of *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*.²⁰ The Singapore Court of Appeal stated that public policy considerations designing the law of champerty need to protect purity of justice and the interests of vulnerable litigants in arbitral proceedings as in court proceedings. The Court expressly adopted the reasoning given in *Bevan*.

In its Public Consultation in June 2016, the Ministry of Law recognized that introducing TPF in Singapore for international arbitration will allow international businesses to use the funding tools and promote Singapore's growth as a leading venue for international arbitration. On January 9, 2017, the Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016

¹⁸ *Lime Lie Hoa*, Ibid.1

¹⁹ [2015] AGHC 156

²⁰ [2006] SGCA 46

were passed. As recommended in Hong Kong, the tort of maintenance and champerty has been abolished in Singapore. However, any rule of law rendering an agreement contrary to public policy or otherwise illegal - has been preserved.

The key highlight is that the amendments will only be permitted for international arbitration and related mediation and court proceedings. Subsidiary legislation will prescribe proceedings wherein TPF will not vitiate public policy or law. It will also provide qualifications and requirements for funders. Failing this, TPF would not be enforceable. However, this would not affect the rights of a party - the funder would be required to perform its obligation under the agreement. Lawyers would be duty-bound to disclose existence of TPF to avoid conflicts of interests. Consequent amendments are also made to the Legal Profession Act.

Can India follow suit?

In the last couple of years, another jurisdiction in Asia that has seen a surge in arbitration is India. Armed with its new arbitration regime under the Arbitration & Conciliation (Amendment) Act, 2015, host of arbitration-friendly judgments, and institutional arbitration centres such as the Mumbai Centre for International Arbitration, India has turned a fresh leaf in the world of arbitration. It is therefore of interest to the commercial and legal world to keep an eye on the Indian jurisdiction for matters relating to and incidental to international arbitration.

Akin to its Asian counterparts, can India adopt or formally recognize TPF in international arbitration? The answer could be in the affirmative. Although third party funding is not expressly provided under any enactment, the stage for third party funding has been set in India through decisions of the Privy Council in the 19th century - thereafter adopted and interpreted by several courts in India. Based on the broader umbrella of public policy encompassing champerty and maintenance - coupled with several court decisions - it can be safely stated that TPF is not prohibited by law in India.

In India, agreements between parties are governed by the Indian Contract Act, 1972 (ICA). Section 23 of the ICA provides a negative list of objects and considerations that are unlawful and render an agreement void. Section 23 provides that the consideration or object of an agreement is lawful, unless (a) it is forbidden by law; (b) is of such nature that if permitted, it would defeat the provisions of any law or is fraudulent; (c) involves or implies injury to the person or property of another; or (d) the Court regards it as immoral or opposed to public policy.

Since champerty and maintenance fall under the scanner of public policy, any determination on legality or otherwise of TPF in India would be analyzed on the parameters of public policy under Section 23 of the ICA. It is difficult, almost impossible, to lay out a list of unlawful objects opposed to public policy. Hence, this has been left to practice and judicial precedent - underpinned by the fact that public policy is evolving in nature and must pass the test of time and objectivity when called into question.

However, it must be noted that there is a distinction between English Law and Indian Law on the subject of champerty. The earliest reported decision on an agreement in the nature of TPF in India - *Chedambara Chetty v. Renga Krishna Muthu Vira Purchaiya Naicker*²¹ – brought out this distinction. The Privy Council held that the statute of champerty, being part of the statute law of England, had no effect in India; and that the Courts of India admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the Courts in England. On the other hand, Indian Courts will not sanction every description of maintenance. In the subsequent case of *Ram Coomar Coondoo v Chunder Canto Mookerjee*,²² the Privy Council recognized that champertous agreements are void in England, being contrary to public policy. However, it held that the principle is not applicable in toto to India.

In both the cases, the Privy Council rejected allegations of champerty. However, it laid out the principle for assessing transactions involving elements or allegations of champerty. The Privy Council held that in such cases, Courts would consider whether the transaction involved mere acquisition of interest in the subject of litigation bona fide entered into, or whether it is an unfair or illegitimate transaction for the purpose of spoiling litigation and carried from a corrupt or improper motive. Such agreements carrying an inkling of champerty needed to be watched carefully and that improper objects - such as gambling in litigation or oppressing others by encouraging unrighteous suits - were not to be effectuated.

These underlying principles were applied in several other cases.²³ Few effective determinants of champerty can be identified from Indian case law. Underlying object of the transaction,²⁴ control by the funder, expenditure incurred, risks borne by the funder and advantage received²⁵ have been considered. A weighing of the proportion of costs incurred by the funder and advantage received in the event of successful litigation is also an essential determinant.²⁶ An agreement providing 50% of the decretal amount to the funder,²⁷ as well as an agreement providing 75% of share to the funder, was not held to be a fair and reasonable bargain²⁸ opposed to public policy.

Thus, through judicial precedence, it can be stated that agreements for funding litigation are not invalid per se in India,²⁹ and that the champertous nature of an agreement by itself does not render the agreement void. Courts have held that as far as India is concerned, they are bound to scrutinize the terms of the agreement before extending the authority of the judicial branch of the State for enforcement of such agreements.³⁰ If the same are extortionate and unconscionable so as to be inequitable against the party; or are not made with a bona fide object of assisting a claim believed to be just and obtaining a reasonable recompenses therefor - but for improper objects such as gambling in litigation, or injuring or oppressing other by abetting and encouraging unrighteous suits - such transactions will be invalidated as champertous.³¹

²¹ (1874) L.R. 1 I.A. 241.

²² (1876) L.R. 41. A. 23,46.

²³ *Raja Rai Dayal Singh v Debi Dayal Sahu*, 35 IA 48; *Marina Viranna v Valluri Ram*, AIR 1919 Mad. 437; *Rammamma v Viranna*, (1931) Bom LR 960, *Suganchand and Ors v Balchand and Anr.*, AIR 1957 Raj 89, *Damodar Kilikar & Ors. v Ossman Abdul Gani and Ors.* 1961 KLJ 356.

²⁴ *Ibid*; *Suganchand and Ors v. Balchand and Anr.*; AIR 1957 Raj 89

²⁵ *Harilal Nathalal Talati v. Bhailal Pranlal Shah*, AIR 1940 Bom. 14

²⁶ *Husam Bakhsh v. Rahimat Husain*, I.L.R. (1888) All. 128; *Lala Ram Sarup v. Court of Wards through Deputy Commissioner, Delhi*, AIR 1940 PC 19

²⁷ *Babit Ram v. Ram Charon Lal*, AIR 1934 All. 1023

²⁸ *Nuthaki Venkataswami v. Kalia Nagi Reddy*, AIR 1962 AP 457

²⁹ *Unnao Commercial Bank Ltd. v. Kailash Nath*, AIR 1955 All 393

³⁰ *Khaja Moinuddin Khan And Others vs S.P. Ranga Rao And Others*, 2000 (2) ALT 596

³¹ *Suganchand and Ors v. Balchand and Anr.*, AIR 1955 All 393

Thus, it is evident that TPF in litigation is well-rooted in Indian law. However, it awaits inroads into arbitration in India and legal formalization. At the time of writing, no record of Indian court cases has been found wherein an award involving TPF in arbitration proceedings or an interim order for deposit of security based on TPF has been assessed. However, with the institutionalization of arbitration in India and the landmark steps taken by Indian judiciary in this arena, it is not impossible to envision that TPF will soon spread its wings onto international arbitration in India - akin to its counterparts in Hong Kong and Singapore.

Conclusion:

Development of TPF in arbitration in Asia is not an unforeseen event. The 2015 Arbitration Survey conducted by Queen Mary University of London and White & Case recognized Singapore and Hong Kong as the third and fourth most preferred seats of arbitration, after London and Paris. Singapore and Hong Kong have left no stone unturned in adapting to dynamic global trends, commercial needs, and best business practices.

TPF in litigation is a well-settled practice grounded stably in law and rooted in historic considerations of public policy which nurture and evolve with time. It must be stated that attorney-client contingency fee agreements will continue to be stationed in the legal landscape of professional conduct, unaffected by evolution. Conditional fee agreements envisaging discounted fees and success fee are permitted in few circumstances. However, agreements between a neutral funder and a party will witness greater saving in modern times.

Despite abolition of maintenance and champerty as torts and crimes, one cannot countenance that the underlying roots of public policy and legality continue to govern agreements that will be called 'champertous' if found to fall foul with the modern evolved definition of these doctrines.

TPF in litigation can be expected to have sufficient black and white outlines of certainty. However, arbitration differs from litigation. Indeed, it is a final and binding adjudication process, resulting in an outcome at par with that of the court. However, the process makes it distinct from court-based litigation. The proceedings stem from party consent to arbitrate i.e. to opt out of court-based litigation. The tribunal is a creation of such an agreement – not bound by principles of civil procedure but by party autonomy. While court based litigation is conducted in public, arbitrations are private across-the-table adjudications.

A host of issues that plague TPF in litigation also plague arbitration, albeit differently. Duty to disclose TPF & the funder's identity gains greater relevance in arbitration to avoid conflicts of interests with arbitrators. The intensity of this duty is abundantly low in litigation where appearance of bias and justifiable doubts as to independence and impartiality do not hold water against judges. Confidentiality faces greater risk since a party to a potential arbitration shares details of the dispute with the potential funder - at the preliminary stage of engagement - to enable him to assess the merits and inform his decision on funding. This deserves greater significance in arbitration since parties choose to arbitrate predominantly to maintain confidentiality of disputes, as against open-to-public litigation in court.

Apart from patent differences in litigation and arbitration, international arbitrations demand additional focus and distinct treatment in light of implications ensuing from seat and applicable law. If an arbitration proceeds at a seat where TPF is considered illegal, the respondent may object to the proceedings on grounds of abuse of process. Parallel actions may be initiated by the respondent to affix tortious or criminal liability on the funded party. An award rendered in favour of the funded party may be challenged, and even objected to for enforcement, on grounds of violation of public policy of the law of the seat or the place of enforcement which disallows TPF. Further, subjecting parties at the seat to a rule of law not applicable in their jurisdictions will greatly reduce the desirability and financial viability of a seat of arbitration. In such a scenario, it is only beneficial to lift the strict application of the doctrines of maintenance and champerty on arbitration.

Giles and *Conanway* rely on a trend in recent years to apply the doctrines to court proceedings; based on history of the doctrines and their underlying foundation to protect the integrity of the civil justice system. They recognize that a private consent based resolution ought not to be governed by principles that, albeit evolution, cater to a mischief that originated and perpetrated predominantly in the domain of public civil justice. Thus, the courts stitched an invisible thread between the doctrines and court proceedings to hold that a self-standing autonomous mode of resolution could not tie into this relation.

While absence of commercial interest may render a TPF agreement in litigation un-enforceable in Singapore owing to application of the doctrines, such agreements for funding international arbitrations seated in Singapore would be free from the clutches of the doctrine. Similar analogy can be drawn for Hong Kong if it finally abolishes the doctrines in favour of arbitration. However, this measure may not make a substantial difference in jurisdictions where the doctrines have dissolved and integrated with the modern, flexible considerations of public policy and law. For instance, in the UK, the doctrines exist with considerably reduced gravity. The application to court would not differ in content against their application to arbitration, unless the preservation clause saving public policy ad legality (in determining validity of contracts) is abolished for one out of the two species of proceedings.

Practice, judicial interpretation, culture and evolution are known to add wings and/or cut the feathers of legal doctrines and their application. Hence, the principles underlying TPF today can no longer be rejected at first sight but stand anchored to countervailing factors of access of justice and common interests of the stakeholders involved. As rightly observed by Ribiero J. in *Unruh*, it may be right to strike down the arrangement in some cases but, in others, doing so in reliance on the law of maintenance and champerty may be to use too blunt an instrument as it may result in a litigant being left with no means to pursue a good claim. Asia recognizes that third party funding is more so relevant in arbitration where costs can be humongous and where the loser-pays principle may apply, posing significant risks and placing immense burden on a non-funded party. Thus, third-party funding may not be a mere need of the party but also a strategy for healthy businesses desiring to manage and allocate risks effectively as they engage in dispute resolution.

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