Navigating the Waters of Third Party Funding in Arbitration

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Reprinted from:
ARBITRATION: The International Journal of Arbitration, Mediation and Dispute Management
Vol. 82 | No. 3 | August (2016) | Sweet & Maxwell | pp. 222–232.

Registered Charity: 803725

ARBITRATION

The International Journal of Arbitration, Mediation and Dispute Management

Volume 82 Issue 3 August 2016

ISSN: 0003–7877

This volume should be cited as (2016) 82 *Arbitration*.
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Articles

Navigating the Waters of Third Party Funding in Arbitration[1]

James Clanchy[*]

1. Introduction

Third Party Funding (TPF) has become a hot topic in the international arbitration community. It regularly features in conference programmes. The International Bar Association (IBA) devoted an entire day to the subject at a conference in London on 3 December 2015.[2]

The providers of TPF have certainly made their presence felt in recent years. There is no doubt that there is both the demand for TPF from claimants and an appetite for arbitration cases amongst funders. International arbitration can offer TPF providers benefits over domestic litigation in terms of the speed of the proceedings, knowledge of the identities of the arbitrators and of their expertise and, of course, the international enforceability of awards under the New York Convention 1958.

The growth of TPF has been a global phenomenon. States have had to make decisions about legalising it and regulating it. It is legal in most European jurisdictions. In Australia, it has found fertile ground but the picture in the US is varied and TPF providers can find that jurisdiction to be hostile.[3]

Hong Kong's Law Reform Commission has recently conducted an in-depth study of TPF in arbitration undertaken by a distinguished committee of practitioners, which has recommended that TPF for arbitration taking place in Hong Kong be permitted under local law. However, it has also recommended that "clear ethical and financial standards" be developed for TPF in Hong Kong and it has invited submissions on various issues which it considers relevant to those standards, including conflicts of interest, confidentiality and privilege, and "control of the arbitration" by the funder.[4]

Meanwhile the International Council for Commercial Arbitration (ICCA) has set up a Third-Party Funding Task Force, a joint project with Queen Mary University of London (the ICCA-QMUL Task Force). Its co-chairs are Professor William W. Park, President the LCIA Court, Stavros Brekoulakis, Professor of International Arbitration at Queen Mary, and Catherine A. Rogers, Professor of Ethics, Regulation and the Rule of Law, also at Queen Mary. The Task Force plans to publish its report by September 2016.

[1] Adapted from a presentation given by the author at the 23rd Croatian Arbitration Days in Zagreb on 3 December 2015. The author thanks Dr Andreas Reiner, Prof Dr Hrvoje Sikirić and the Permanent Arbitration Court at the Croatian Chamber of Commerce for the opportunity to speak at that conference, which was devoted to the theme of Access to Arbitral Justice. Since writing this article, the author has joined the ICCA-QMUL Task Force on Third Party Funding. The views expressed in this article are entirely his own.

[*] The author spent two years (2012–2014) assessing and managing commercial and Bilateral Investment Treaty claims for Third Party Funders and After The Event (ATE) Insurers in his capacity as Senior Legal Advisor at Thomas Miller Legal, a division of Thomas Miller, who are also managers of the UK Defence and UK P&I Clubs mentioned in this article.

[2] *Third Party Funding and Arbitration: a 360 Degree Perspective*, *http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a7eead3b-0e69-4588-93fb-8504fdb397f0* [Accessed 24 June 2016].

[3] Jonathan Goldsmith, "Third-party funding of litigation—views from the US and Australia" (2011) Law Society Gazette, 12 September 2011, *http://www.lawgazette.co.uk/analysis/third-party-funding-of-litigation-views-from-the-us-and-australia/62114.fullarticle* [Accessed 24 June 2016].

[4] The Law Reform Commission of Hong Kong, Consultation Paper, *Third Party Funding for Arbitration*, *http://www.hkreform.gov.hk/en/docs/tpf_e.pdf* [Accessed 24 June 2016].

Professors Park and Rogers reported on the Task Force's initial deliberations in 2014.[5] Their starting point is that TPF "raises a host of ethical and procedural issues for international arbitration, perhaps most notably in connection with arbitrator comportment" and that "the arrival of third-party funders will likely affect a broad range of participants in the arbitral process in addition to arbitrators".

This article considers the current discourse around TPF and the issues which it is said to raise for arbitrators and practitioners. It queries whether these are unexplored waters teeming with new dangers or whether, instead, TPF should be welcomed as an incremental development in the longstanding business of assisting parties to meet the expense of international commercial arbitration.

2. Pirates: More than a Hundred Years of Mutual Funding of Maritime Arbitrations

Confronted by the presence of TPF providers, arbitrators in investment treaty arbitrations have formed their own views on them. In his controversial assenting opinion in the state's application for security for costs in *RSM Production Corp v Saint Lucia*, Dr Gavan Griffith QC spoke of "the emergence of a new industry of mercantile adventurers".[6]

It was Dr Griffith's "determinative proposition" that "once it appears that there is third party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs should not be made". That proposition can be, and has been, challenged at several levels.

The notion that the funding of a claim in arbitration is a new phenomenon, and that special treatment should be meted upon parties who have recourse to it, would surprise many practitioners. Maritime lawyers, for example, regularly represent parties whose legal fees are paid by third parties. This has been the norm in their sector for well over a century.

International Protection and Indemnity (P&I) Clubs defend their shipowner members against claims arising from the deployment of their ships worldwide, including dealing with damage and injury caused by pirates (latterly off the coast of Somalia). In addition, their associated Defence Clubs have assisted shipowners in pursuing contractual claims in arbitration and in the courts.

A relatively recent example of such a case is *The Saldanha*,[7] in which the arbitral tribunal had to decide whether detention by pirates entitled the charterers to treat the vessel as off-hire under the charterparty. It decided that the vessel was not off-hire. On appeal to the Commercial Court, Gross J agreed with the tribunal, saying, "Should parties be minded to treat seizures by pirates as an off-hire event under a time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a 'seizures' or 'detention' clause." In concluding his judgment, he added, "The issue of piracy is topical and, I suspect, of interest to the industry, so making this a suitable case for crossing the threshold from the private realm of arbitration into a public judgment at first instance."

The UK Defence Club certainly agreed with that conclusion. In a special issue of its newsletter *Soundings*, published on the day the judgment was issued, it reported that the case was brought by a member and noted, "this is the first English Court judgment which specifically addresses the charterparty implications of piracy and provides welcome guidance from the Court on an issue of great relevance to owners and charterers alike".[8]

[5] William W. Park and Catherine A. Rogers, "Third-Party Funding in International Arbitration: The ICCA Queen Mary Task Force" (2014) Penn State Law Legal Studies Research Paper No.42-2014.

[6] *RSM Production Corp v Saint Lucia* ICSID Case No.ARB/12/10 13 August 2014.The text of the Tribunal's Decision on Saint Lucia's request for security for costs may be found at: *http://www.arbitrationlaw.com/files/free_pdfs/2014-08-13_-_decision_on_saint_lucias_request_for_security_for_costs.pdf* [Accessed 24 June 2016].

[7] *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm); [2011] 1 Lloyd's Rep. 187; [2010] 1 C.L.C. 919.

[8] UK Defence Club, *Soundings*, Special Issue, 11 June 2010, *http://www.ukdefence.com/images/assets/documents/UKDC_Soundings_Special_Issue_June_2010.pdf* [Accessed 24 June 2016].

Shipowners' "freight, demurrage, and defence" (FD&D) clubs were established in the nineteenth century in order to meet a need for assistance with contractual disputes not only with charterers but also with other players in the industry, e.g. shipyards, bunker suppliers and purchasers and sellers of vessels. Their success for over a century derives not only from the cost-effective financial protection which they provide to their members through mutual insurance but also from the significant role they have played in clarifying and developing maritime and commercial law through arbitrations and court proceedings in many jurisdictions.

In its publicity, the UK Defence Club (established in 1888) says that it can cover "The costs associated with bringing and defending proceedings relating to ship operation in any jurisdiction or forum". Another service is "the provision of security for costs in the UK and other jurisdictions".[9]

As funders of commercial claims in the shipping industry, claims which are often pursued in arbitration, whether in London, Paris, New York, Dubai, Singapore, Hong Kong or in another maritime centre, the Defence Clubs are not shy about advertising their services or about offering security for costs where required.

In a section of its website devoted to "Unreported Cases" (mainly arbitrations), the UK Defence Club gives an example of the kind of commercial claim which it supports:

> "Following the economic downturn, a Member has a substantial claim of many millions of dollars against a time charterer following the charterer's repudiation of a five year charter. The charterer has no valid reason for repudiating the charter other than his own commercial considerations.
>
> The Club supported the costs incurred by the Member in pursuing its claim in London arbitration proceedings and in reaching an amicable settlement with the charterer.
>
> The Club has supported Members in a number of similar cases where a charterer has repudiated a long term charter … Because the sums at stake are so high, the parties understandably conduct a vigorous pursuit and defence of the claims and as a consequence the costs incurred can run into hundreds of thousands of pounds."[10]

Far from being "mercantile adventurers", these funders of commercial claims in the maritime industry have become part of the legal establishment. They employ in-house lawyers, many of whom go on to have careers as full-time international arbitrators, making awards in seats around the world. They include Fellows and at least one past President of the Chartered Institute of Arbitrators.[11]

The Clubs' claim handlers will often commence arbitrations on behalf of shipowner members and will not have recourse to external lawyers until proceedings are fully under way. For example, requests for arbitration have been filed by Defence Clubs (e.g. from England and Scandinavia) in the names of shipowner claimants at the London Court of International Arbitration (LCIA).[12]

As noted in the leading textbook on P&I and Defence Clubs, "Unlike other forms of legal expenses insurance (which FD&D cover largely predated), the club's managers (who are often qualified lawyers) remain involved with the day-to-day handling of the case, with the assistance of external lawyers where necessary."[13]

[9] See *http://www.ukdefence.com/section/140/4/summary-of-cover* [Accessed 24 June 2016].
[10] See *http://www.ukdefence.com/section/166/5/Unreported_Cases* [Accessed 24 June 2016].
[11] Bruce Harris, FCIArb.
[12] The author was Registrar of the LCIA from 2008 to 2012 and recalls several such requests for arbitration being filed by Clubs.
[13] Stephen J. Hazelwood and David Semark, *P&I Clubs Law and Practice*, 4th edn (London: Lloyds of London Press, 2010), para.26.2.

3. Sharks: Identifying Third Party Funders

In a typical London maritime arbitration brought by a cargo claimant against a shipowner, the claimant's legal expenses will be paid by its insurer and the respondent's by its P&I Club.

If the cargo insurance policy was made in London, the English equitable doctrine of subrogation will apply. According to this doctrine, the insurer stands in the shoes of its insured and must bring the claim in the insured's name, not in its own name. The party funding the conduct of the claim does not therefore appear as a party in the notice of arbitration or subsequently in the proceedings but it is nevertheless this paying party which will have the benefit of a favourable arbitration award.

Likewise the P&I Club, responsible for paying the respondent shipowner's legal expenses, will not appear on the record. The award will name the cargo owner and the shipowner as the parties but neither of them will have paid the costs of the arbitration. Instead, these costs will have been paid by third parties, namely their insurers, who lurk under the surface, invisible to the arbitral tribunal.

In a chapter entitled "Gamblers, Loan Sharks and Third-Party Funders" in her book *Ethics in International Arbitration*, Professor Catherine A. Rogers describes TPF as "a relatively new practice that operates in the shadows of an active case".[14] She says, "Perhaps because of this opacity, significant disagreement exists about the exact nature of third-party funding and, consequently, whether and how it should be regulated."[15]

In seeking a definition, the ICCA–QMUL Task Force has grappled with the difficulty of casting a net with the right mesh to capture TPF. This is the working definition which it has developed:

> "The terms 'third-party funder' and 'after-the-event insurer' refer to any person or entity that is contributing funds or other material support to the prosecution or defense of the dispute and that is entitled to receive a benefit (financial or otherwise) from or linked to an award rendered in the arbitration."[16]

Professors Park and Rogers note that there was "considerable debate and disagreement on the Task Force about whether this definition should include ordinary insurers".[17] Some members of the Task Force considered that the question of potential arbitrator conflicts applied also to insurers and should therefore be considered in conjunction with taking up the issue of third-party funding. Others suggested that "exclusion of traditional insurers was a structural feature of dispute settlement and should not be tampered with".[18]

It is explained in the report that one reason why TPF providers should be treated differently is that "before-the-event insurers do not specifically and intentionally identify an existing case as a specific target of their investment". Professors Park and Rogers do not explain what the members of the Task Force had in mind or cite any examples. If they are suggesting that TPF providers set about targeting cases, which look to them to be good investments, and that they approach prospective claimants to cut a deal, that is not a *modus operandi* which would be recognised by funders in the international commercial arbitration market.

Whilst certain litigation funders have acquired reputations for pouncing on opportunities for class actions, international commercial arbitrations, by their very nature, do not come to the attention of TPF providers through the media. They are generally confidential. Before an arbitration is commenced, the existence of a claim and details about the forum in which

[14] Catherine A. Rogers, *Ethics in International Arbitration* (Oxford: Oxford University Press, 2014), p.183.
[15] Rogers, *Ethics in International Arbitration* (2014), p.183.
[16] Park and Rogers, "Third-Party Funding in International Arbitration: The ICCA Queen Mary Task Force" (2014) Penn State Law Legal Studies Research Paper No.42-2014, p.5.
[17] Park and Rogers, "Third-Party Funding in International Arbitration: The ICCA Queen Mary Task Force" (2014) Penn State Law Legal Studies Research Paper No.42-2014, p.6.
[18] Rogers, *Ethics in International Arbitration* (2014), p.6.

it will be determined may only be known to a small circle, including the claimant's law firm.

Approaches to funders (and funding brokers) for financial assistance with the costs of a claim in arbitration are generally made by law firms already instructed by claimants. This may not be at the beginning of the case but at a later stage when the claimant's initial budget has proved to be insufficient. Applications for funding are sometimes made, for example, shortly after the arbitral institution has directed payment of a substantial deposit towards the arbitrators' fees and its own administrative charges.

Unlike a "traditional insurer", such as a cargo insurer or a P&I Club, a commercial TPF provider will rarely be in a position to dictate the claimant's choice of counsel because it will usually be the claimant's counsel who will have approached it in the first place. In contrast, the tradition in the world of "before the event" mutual insurance in the international maritime community is that the insurer takes charge.

The rules of Defence Clubs usually allow the Club's managers to appoint lawyers on behalf of their shipowner members. Rule 6 of the UK Defence Club Rules 2015 provides:

> "All persons appointed by the Association on behalf of the Member or appointed by the Member with the approval of the Association shall be or be deemed to be appointed on the terms that they have been instructed by the Member at all times (both while so acting and after they have ceased so to act): (a) to give advice and to report to the Association in connection with the claim, dispute or Proceedings; (b) to seek and act on the instructions of the Association; and (c) to produce to the Association any documents or information in their possession or power relating to the claim, dispute or Proceedings, as if such persons had been appointed to act and had at all times been acting on behalf of the Association."[19]

In exercising this level of control over the claimant's lawyers, the Defence Clubs benefit from an exemption under the Insurance Companies (Legal Expenses Insurance) Regulations 1990.[20] The Regulations in reg.3(2) state that provisions conferring on an assured the right to select its own lawyers do not "apply to legal expenses insurance contracts concerning disputes or risks arising out of, or in connection with, the use of sea-going vessels".

In their report on the ICCA-QMUL Task Force's preliminary work, Professors Park and Rogers say, "before-the-event insurers may be presumed to be less directly involved in the specifics of case management than third-party funders are".[21] They do not explain the basis for this presumption. Their distinction does not apply in the case of Defence Clubs; on the contrary, as their rules confirm, these insurers are directly involved in managing cases from the outset, including in choosing the lawyers to represent members whose claims they fund.

The report describes the ICCA–QMUL Task Force's dual perception: (i) that TPF providers "target" existing cases; and (ii) that before-the-event insurers are less directly involved in the specifics of case management as a "definitional issue". The implication is that if this perception was false, the Task Force might extend its remit to "traditional insurers" too. After all, the behaviour of P&I and Defence Clubs in their handling of arbitrations over the last century and more can include, as outlined above: (i) the non-disclosure of their participation; (ii) control of the conduct of proceedings; and (iii) appointment of the

[19] See *http://ukdefence.com/images/assets/documents/UKDC_A5_RuleBook_2015_vW.pdf#page=21* [Accessed 24 June 2016].

[20] Insurance Companies (Legal Expenses Insurance) Regulations 1990 (SI 1990/1160), implementing Council Directive 87/344/EEC of 22 June 1987 on the Coordination of Laws, Regulations and Administrative Provisions relating to Legal Expenses Insurance, cited in Hazelwood and Semark, *P&I Clubs Law and Practice*, 4th edn (2010), para.26.2.

[21] Park and Rogers, "Third-Party Funding in International Arbitration: The ICCA Queen Mary Task Force" (2014) Penn State Law Legal Studies Research Paper No.42-2014, p.6.

claimant's legal representatives. These are amongst the "host of vital issues" which the report says are raised by "funder participation". [22]

Professors Park and Rogers confirm that the definitional issue is one which "the Task Force will continue to explore in its future work".[23]

4. Sea Elephants: Defining International Arbitration

In his John E.C. Brierley Memorial Lecture at McGill University, Montreal, on 28 May 2008, Jan Paulsson, then President of the LCIA Court, posed the question, "You don't think that international arbitration is arbitration because it has 'arbitration' in its name, do you? Do you think a sea elephant is an elephant?"[24]

Professor Paulssson went on to explain, "Sea elephants have no legs. They exist in an environment radically different from that of elephants." That environment is the transnational one where international arbitration is effectively the only option (a "monopoly") offering neutrality in a situation in which each party might actually have preferred its own courts to arbitration if it was in a position to make such a choice.

Shipping is an example of an industry which is, by its very nature, international. It has established processes for the resolution of disputes, which suit it commercially and in which participants have confidence. Since the nineteenth century these processes have been enhanced by the mutual funding of claims through P&I and Defence Clubs. Parties, their lawyers, and their Clubs have traditionally turned to specialist maritime arbitrators, not because, in Professor Paulsson's words, international arbitration is "the only game" but because they trust and respect arbitrators who know and understand their business and who also know the relevant law, international conventions, regulations, and practices.

Shipping arbitrations are usually ad hoc but the institutions occasionally administer them as well. It was in 1960 that a group of arbitrators founded the London Maritime Arbitrators Association (LMAA). This was not to be an institution but an organisation "with the purpose of representing and acting as a mouthpiece of the Arbitrators on the Baltic [Exchange] Approved List".[25]

At a conference held in London in 2010 to celebrate the LMAA's first 50 years, Daniel Evans of Thomas Miller Defence Ltd spoke on behalf of the LMAA's users, thus demonstrating the pre-eminence accorded to funders in shipping arbitrations. He said:

> "Why does the LMAA continue to be held in such regard and be the forum of choice for resolution of disputes? One reason most routinely mentioned is that it is an organisation that is known throughout the shipping markets irrespective of the jurisdiction in which a party happens to be based. That understanding brings with it the confidence that if a dispute occurs there is a tried and trusted forum which has a history of delivering results."[26]

Although the LMAA is not itself an institution, it is included in Gary Born's table of cases filed with leading arbitral institutions between 1993 and 2013 contained in his textbook on international commercial arbitration.[27] Of the 17 institutions listed in that table, the LMAA is the only one whose annual numbers are consistently in the thousands.[28] In the wake of

[22] Park and Rogers, "Third-Party Funding in International Arbitration: The ICCA Queen Mary Task Force" (2014) Penn State Law Legal Studies Research Paper No.42-2014, p.2.

[23] Park and Rogers, "Third-Party Funding in International Arbitration: The ICCA Queen Mary Task Force" (2014) Penn State Law Legal Studies Research Paper No.42-2014, p.6.

[24] Jan Paulsson, "International Arbitration is not Arbitration" (2008) 2 *Stockholm International Arbitration Review* 1.

[25] Simon Everton and Bruce Harris, *50 Years of the LMAA* (London: Lloyd's List Group, 2010), p.3.

[26] Daniel Evans, "LMAA Arbitrations: Observations of a User" (2010) 76 *Arbitration* 399.

[27] Gary Born, *International Commercial Arbitration*, 2nd edn (The Hague: Wolters Kluwer, 2014), p.94.

[28] It should be noted that the LMAA's statistics are for its members' appointments as notified to it, not for individual arbitrations, the numbers of which would be somewhat lower.

the global financial crisis, the institutions saw a significant increase in filings in 2009. As Mr Born's table records, the LCIA saw 272 arbitrations filed in that year while the LMAA saw 4,445 appointments.

Gary Born was appointed President of the Court of Arbitration of the Singapore International Arbitration Centre (SIAC) in 2015. His appointment was widely seen as confirming that, despite its relative youth, SIAC had become one of the world's elite international arbitral institutions. When SIAC was founded in 1991, just two arbitrations were registered in that first year. Both cases were described by the Registrar as being "Shipping/Marine" and "International".[29]

According to the institution's report for 2015, 17 per cent of the 271 cases filed at SIAC in 2015 were in the "Shipping/Marine" sector. In the meantime, however, the Singapore Chamber of Maritime Arbitration (SCMA) broke away from SIAC in 2009, reflecting a desire in the maritime community for "de-administered" arbitration. As the SCMA's commentary on its 2015 Arbitration Rules explains:

> "The SCMA last changed its Rules in May 2009. The most significant change then was from an institution administrating the arbitration process to a maritime industry driven entity providing a framework for maritime arbitration which gives party autonomy. It is therefore more akin to the traditional approach to maritime arbitration as exemplified by the London Maritime Arbitrators Association than the approach taken by the International Chamber of Commerce for commercial arbitration."[30]

It is now the SCMA which manages the Singapore Bunker Claims Procedure, which had contributed to SIAC's caseload in its early days. Disputes with bunker suppliers are typical of the types of claims which are funded by shipowners' Defence Clubs. The contribution of the Clubs more generally to the development of SIAC should not be underestimated. However, it is clear from the SCMA commentary cited above that SIAC came to be viewed as too similar to the ICC, too bureaucratic and too expensive. Whilst the arbitrations which the SCMA handles are both international and commercial, it prefers to call them "maritime".

The recent history of SIAC and of the SCMA illustrates the difficulty of defining "international arbitration" by reference only to the parties' nationalities and their wish to avoid each other's courts. The parties' business sector and traditions, including the funding of claims and the funders' own preferences, can also play important roles in dictating choices for dispute settlement. Parties may avoid institutional arbitration and opt instead for ad hoc, thereby escaping extra layers of "soft law" which increasingly accompany institutional rules and which could soon include attempts to regulate TPF.

Whether or not it is possible to herd sea elephants, those who would seek to regulate TPF could take into account the long and successful history of maritime arbitrations worldwide and the part played in it by the funding of claims by traditional insurers.

5. Barratry: Control of the Arbitration

The assumption of risks is essential in every new enterprise, whether in a commercial voyage or in the funding of a commercial claim. Whatever the level of control that might be exercised by those investing in it, the enterprise could be scuppered by the acts of an individual or a group.

In maritime law, barratry is a crime committed by the master or crew of a vessel against its owner. In *The "Ikarian Reefer"*,[31] the shipowner claimed for constructive total loss under a marine insurance policy after a fire broke out on the vessel. If the court found that the fire was a deliberate act of the master and crew, the owner claimed a loss by barratry. The Court

[29] See *http://www.lawgazette.com.sg/2000-1/Jan00-23.htm* [Accessed 24 June 2016].
[30] See *http://www.scma.org.sg/pdf/rules_201510_commentary.pdf* [Accessed 24 June 2016].
[31] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1995] 1 Lloyd's Rep. 455.

of Appeal concluded that there was clear evidence of motive and a good reason to dispose of the vessel by scuttling; the overwhelming inference was that the owner itself authorised the scuttling.

The case is well known for the principles Cresswell J set out in the judgment at first instance in relation to expert evidence.[32] These were adopted in the English Civil Procedure Rules in 1998 and went on to inform the *IBA Rules on the Taking of Evidence in International Arbitration* in 2010, an example of the important role played by English maritime law in the evolution of international arbitration.

There is a second definition of barratry: incitement to vexatious litigation, often grouped with champerty and maintenance. In the common law tradition, these doctrines have acted as brakes on the commercial funding of proceedings, both in court and in arbitration.

Maintenance has been defined as

> "the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference".[33]

Champerty is a kind of maintenance in which the maintainer receives a share of the subject matter or proceeds of an action.

In England, these were originally criminal offences. Gradually exceptions were introduced and by the 20th century they had ceased to be crimes. In 1967 the Law Commission recognised that insurance and trade union funded litigation had changed the picture. A contract for the funding of litigation should only be struck down for breach of the rules against maintenance and champerty if it is contrary to public policy or otherwise illegal or improper (e.g. if it confers disproportionate control of the claim upon the funder).

The doctrines survive in other jurisdictions. The recent consultation paper in Hong Kong notes that it is "undecided in Hong Kong whether or not the application of the doctrines of maintenance and champerty prohibit Third Party Funding for arbitration".[34]

In Singapore, where "traditional insurers" have funded claims in shipping arbitrations for many years and have made an important contribution to the development of SIAC, commercial TPF remains subject to strict rules against champerty. The Singapore Court of Appeal, in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*, considered whether the doctrine applied in both arbitration and court proceedings.[35] It decided that it did:

> "As we see the position, the purity of justice and the interests of vulnerable litigants are as important in such proceedings as they are in litigation. … The concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation."

The Singapore Court of Appeal cited with approval Lord Denning's condemnation of champerty in *Re Trepca Mines Ltd (No.2)*[36]:

> "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses."

[32] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep. 68; [1993] F.S.R. 563.
[33] *Massai Aviation Services v Attorney General* [2007] UKPC 12.
[34] The Law Reform Commission of Hong Kong, Consultation Paper, *Third Party Funding for Arbitration*.
[35] *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR 989.
[36] [1963] Ch. 199.

None of these traditional fears of champerty is on the ICCA-QMUL Task Force's list of "vital issues" said to be raised by "funder participation" in international arbitration.[37] Instead, the issues which are on the Task Force's list are ones which feature equally in arbitrations in which one or more parties is funded by an insurer. These issues are

> "the funders' relationship with parties and counsel in managing the dispute, allocation of costs and security for costs, transparency and disclosure, confidentiality, attorney ethics, arbitrator conflicts of interest, tribunal powers and potential relations with institutions".

The first of these issues, the relationship between a funder and a party, is seen as potentially problematic because it is unknown to the tribunal and because the tribunal may have a suspicion that the funder is controlling the conduct of the claim, motivated by the financial return it seeks. However, in practice, a TPF provider will typically be less closely involved in "managing the dispute" than an insurer.

Funders often take a back seat, sometimes out of a conscious concern not to be accused of maintenance or champerty, sometimes out of deference to the international law firm which has brought the case to them, and sometimes for straightforward commercial reasons, their own share of the overall funding of the costs, alongside the claimant itself, the lawyers' contingency arrangements and other co-funders, not being sufficient to justify any sort of control.

6. Shipwrecks: Avoiding Total Losses

As noted above, it is usually the claimant's lawyers who will approach a funder, sometimes after proceedings have already commenced. If sufficiently interested in the case, a funder will conduct due diligence on the claim. Usually the claimant's lawyer will be expected to provide a factual summary and a legal analysis of the case, including all anticipated defences, together with a budget for the costs of the arbitration through to conclusion. The funder's in-house team and/or its external advisers will review these summaries, together with the essential documents, and will study the legal, evidential and enforcement risks. The realistic size of the claim and of the potential net recovery will be critical.

A Non-Disclosure Agreement will be signed between the claimant and the funder to preserve the confidentiality of the documents which are shared with the funder's assessors. This may be combined with a Common Interest Agreement with a view to preserving legal privilege. As noted above, these issues of confidentiality and privilege are not unique to TPF. They arise also in cases in which a claim is taken over by and/or jointly run with an insurer. The precautions taken by funders are similar to those taken by insurers and by other parties who assist a claimant.

In her book, Professor Rogers is flattering about the manner in which funders conduct due diligence:

> "In assessing claims, funders bring a level of sophistication and precision that is almost shockingly unknown and unmanageable by even large, sophisticated multinational companies and the world's most sophisticated law firms."[38]

The analyses carried out by assessors of claims for TPF and ATE insurance are not beyond the capabilities of international law firms but such firms, less versed perhaps in the ordinary demands of traditional insurers, do not always find it as easy as they should to provide their own calibrated risk assessments or realistic costs estimates.

[37] Park and Rogers, "Third-Party Funding in International Arbitration: The ICCA Queen Mary Task Force" (2014) Penn State Law Legal Studies Research Paper No.42-2014.
[38] Rogers, *Ethics in International Arbitration* (2014), p.186.

Budgets are commonly demanded by insurers and by other commercial parties, particularly by those who have become used to the requirements of the English civil courts. Funders will usually expect to see detailed estimates with contingencies built in for relevant procedural developments such as bifurcation. If their return is based on a percentage of damages, rather than on a multiple of the amount funded, they will be as keen as ATE insurers are to see the costs kept within budget.

The discipline of compiling costs budgets and of reporting on costs on a regular basis is helpful to the claimant as well as to its funders, and to the arbitral process itself. It goes some way to address complaints about the costs and speed of international arbitration.

7. Scylla and Charybdis: Risks for Arbitration

A funder's due diligence should result in the rejection of hopeless and frivolous claims. The notion that funders deliberately support bad claims in order to intimidate opponents into acceding to high settlement demands is contrary to commercial common sense as well as damaging to a funder's reputation. On the contrary, a funder's careful assessment of a case can draw out weaknesses which neither the claimant nor its lawyers had identified. The extra pair of eyes, which a funder brings to bear on a claim, can assist a claimant to make a commercially sound early decision to discuss settlement with the other side.

A factor which will usually weigh against funding a commercial arbitration claim is personal animosity. This can lead to irrational tactical and procedural decisions, a reluctance to settle at a sensible commercial level, and even to steps being taken, the sole purpose of which is to annoy the opponent. If funders do not reject such a claim, their participation in the case can put a brake on such behaviour.

Likewise funders, being more detached from the proceedings and having in-house experience of similar cases, will be more reluctant to allow unmeritorious challenges to arbitrators and other procedural skirmishes, particularly if they are likely to require an additional outlay. Far from causing trouble, the presence of funders can lead to a smoother running of the arbitration and to an adherence to ethical standards by parties and their counsel.

Amongst the factors which a Defence Club will take into account in considering whether to fund a shipowner's claim are "the reasonableness of the member's conduct" and "the cost-effectiveness of the measures taken or which it is proposed be taken on the member's behalf in any proceedings".[39] These sound principles, with their commercial and ethical elements intertwined, have stood the test of time.

In a recent investment arbitration under the UNCITRAL Rules, *South America Silver Ltd v Plurinational State of Bolivia*,[40] the tribunal recognised the legitimacy of TPF, rejected an application for security for costs based on the mere existence of TPF, but ordered the disclosure of the name of the funder (not the terms of the funding agreement) "for purposes of transparency". The tribunal was conscious that the *IBA Guidelines on Conflicts of Interest* (2014) treat third party funders as "the equivalent of the party".[41] In plying this course, it sought to avoid risks of potential conflicts and of challenges to its awards.

8. Conclusion

These are interesting times for TPF. Commercial funders are certainly under scrutiny. Whether all of that scrutiny is being fairly targeted at them, when the issues perceived as being of concern arise equally in insurance and other contexts, is a question which also

[39] Hazelwood and Semark, *P&I Clubs Law and Practice* (2010), para.26.9.
[40] PCA Case No.2013–15 (Procedural Order No.10), 11 January 2016.
[41] Explanation to General Standard 6(b).

needs to be considered by those undertaking the ongoing studies at ICCA, in Hong Kong and elsewhere in the world of arbitration.

Meanwhile funders assist parties to have access to arbitral justice. With their commercial imperatives, they can bring disciplines to bear which are to the advantage of the process and which will enhance the reputation of international arbitration, just as insurers' funding of claims in maritime disputes has benefited arbitration in that sector over the last one hundred years and more.