LSLC 14 June 2017, Quadrant Chambers

Update on Arbitration – focus on funding issues and apparent bias – can maritime arbitration be different?

Funders, Clubs and Rules: Can Maritime Arbitration be Different?

Regulation of third party funding and its impact on arbitrations supported by traditional insurers in the maritime industry

James Clanchy, FCIArb[1]

Introduction

This paper will bring together topics which have been discussed in both the previous papers this evening.

Simon Kverndal QC has discussed apparent bias of arbitrators and guidelines which have sought to address that issue. Matthew Amey of brokers, TheJudge, has outlined the growing market for third party funding (tpf) and for After The Event insurance.

I shall look at the response to tpf of certain players and niche sectors in the international arbitration community. Tpf has been said to raise new and unique issues, including new risks of apparent bias and conflicts. I shall consider the impact on maritime arbitration of attempts to 'regulate' the conduct of the new funders and of parties who have recourse to tpf.

As I shall explain, there is a danger that the P&I and defence clubs, the traditional funders of claims and defences in the shipping industry, could find themselves caught up in the drive to regulate tpf, to the potential detriment of the wider international arbitration community.

Should tpf be allowed?

Matthew Amey has spoken to us about the *Essar v Norscot*[2] case in which his firm, TheJudge, had been the funding brokers for Norscot, the successful claimant in a long running ICC arbitration seated in London.

The arbitrator, Sir Philip Otton, had awarded Norscot, in addition to its legal costs, the costs of the funding which it had obtained from Woodsford Litigation Funding (WLF). This was three times the amount which WLF had advanced (£647,086). On a challenge to the award (brought under s68, Arbitration Act 1996), the Commercial Court held that the arbitrator was entitled to treat the funding costs as 'other costs' under s59(1)(c), AA 1996 and 2012 ICC Rules, art 37(1).

Norscot had been represented in the arbitration and on the challenge by Chirag Karia QC of these chambers. Nicholas Bacon QC of 4 New Square, a costs specialist, had assisted with formulating the successful arguments on costs.

The Commercial Court's decision caught some members of the international arbitration community by surprise. This was an 'an under-theorised area of the law', protested one commentator. 'The debate on whether or not third party funding should exist in the first place' had been 'overtaken by reality'.

It may seem extraordinary that lawyers should opine on whether commercial funding should be allowed to exist. However, as I shall outline later in this paper, laws against maintenance and champerty have forbidden it at some seats while at others its existence has been made conditional on regulation.

The concerns which I have just quoted were expressed by Maximilian Szymanski, a lawyer in Herbert Smith Freehills, on the Kluwer Arbitration Blog.[3] I doubt that many in this audience will be regular readers of it but this is a highly successful and much read blog in niche sectors such as investor-treaty arbitration, state-to-state arbitration and certain kinds of institutional arbitration, notably LCIA and ICC.

It is unlikely that Norscot's solicitors, who achieved this ground-breaking result in an ICC arbitration, would be readers of the Kluwer blog. They were probably unaware that they were walking into an 'under-theorised' area of the law and that various practitioners in London and at other arbitral seats had not yet decided whether the commercial funding which their client had obtained should be allowed to exist.

Like many of you, they would more probably be readers of *Lloyds List*, *Trade Winds*, i-law, and, I might hope, LexisPSL Arbitration. I say this because Norscot's solicitors were Davies Johnson & Co of Plymouth, a commercial disputes firm with a focus on shipping.

Davies Johnson & Co was acquired in 2015 by Thomas Miller and has become part of TM Law.[4] As noted in its press release at the time of that acquisition, Thomas Miller is an independent and international provider of insurance, professional and investment services. Founded in 1885, its origins are in the provision of management services to mutual organisations, particularly in the international transport and professional indemnity sectors. The firm will be best known to this audience as managers of the UK P&I and UK Defence Clubs, which are themselves major funders of arbitrations.

Until the Jackson reforms of 2013 kicked in, the firm also provided, through Thomas Miller Legal, outsourced case assessment and management services to tpf providers and ATE insurers, including for commercial and investment treaty arbitrations. In other words, services to the funders of maritime and investment arbitrations were being handled under the same roof.

When I worked for Thomas Miller Legal in 2012 to 2014, I may well have been the firm's only reader of the Kluwer Arbitration Blog, having acquired the habit while I was Registrar of the LCIA. Lawyers in other parts of Thomas Miller were looking after hundreds of funded arbitrations in shipping related disputes, as the firm had been doing for more than a hundred years. They might have been unaware that an emerging funding industry in other commercial sectors, not already served by 'before the event' insurance, was causing excitement and debate in international arbitration lawyers' social media.

Third party funding in arbitration: the first 125 years (the defence clubs)

Unlike the modern tpf providers, P&I (liability) and freight, demurrage and defence (FD&D/defence) clubs have been part of the landscape of international commercial arbitration for generations. Through their funding, they have made an immeasurable contribution to the development of arbitration and also to the development of commercial law, particularly English law.[5]

The clubs' not-for-profit mutual insurance model is a simple one. As far as 'before the event' legal expenses ('defence') cover is concerned, a member must satisfy its club's managers and/or its board that its claim deserves support. Just as a modern funder would do, the club will carry out an assessment of the claim to ascertain the prospects of a successful recovery. If it agrees to fund the legal and other costs associated with bringing the claim, it will monitor the proceedings closely to ensure that its money is being well spent.

Starting in England in the 1880s, defence clubs quickly spread around the world. Today, there are clubs based in Norway, in other Scandinavian countries, and in Japan. A wide variety of claims are covered.

There is a common misconception that such claims tend to be smaller than commercial or investment claims funded by the new tpf providers. A reminder of the *Solitaire* arbitration should be enough to dispel that notion. The dispute concerned the conversion of a pipe laying vessel. This was an ad hoc arbitration seated in London. The claimant's costs were funded by its fd&d club, Gard, based in Arendal in Norway. It was reported that the club succeeded in capping its expenditure on the case, in which the combined legal fees of both sides were said to have reached £100 million by 2004.[6] The costs paid by Gard may well have been higher than any sum advanced by any of the new non-recourse funders to a claimant in an investment or institutional arbitration.

Another Norwegian club is Nordisk, founded in 1889, based in Oslo and with an office in Singapore. Nordisk is a pure defence club, not attached to a P&I club. According to its 2016 report, 2,679 vessels were entered with the club and 2,156 new cases were registered last year. The claims which it supports include arbitrations in Oslo, London and Singapore, both ad hoc and institutional. It employs more than 20 in-house lawyers, including English solicitors and barristers.

Before they opened their own offices overseas, the P&I and defence clubs were driving forces in the expansion of London law firms abroad. The fees which they paid on behalf of their members, whether on local litigation and arbitration or on evidence gathering for London arbitrations, were critical to the establishment and financing of new branches for London firms with international ambitions.

Holman Fenwick Willan opened its office in Singapore in 1990, a year before the Singapore International Arbitration Centre (SIAC) was established in 1991. Just two arbitrations were registered in SIAC's first year of operations. Both cases were described by the Registrar as being "Shipping/Marine" and "International".[7] In its fifth year (1996), shipping cases took up more than half of SIAC's entire caseload. SIAC administered the Singapore bunkers claims procedure before it was transferred to the Singapore Chamber of Maritime Arbitration (SCMA) after it broke away in 2009. Bunkers claims are typical of the types of claims funded by defence clubs.

A substantial proportion of SIAC's caseload remains shipping related. According to its 2015 annual report, the shipping/maritime sector accounted for 17% of new arbitrations filed in that year. Shipbuilding and offshore construction arbitrations, some of which run into tens or hundreds of millions of dollars by value, are often handled by the long- established Singapore branches of London shipping law firms. At the other end of the scale from bunkers disputes, these claims can equally fall within defence cover and they can be expensive.

Funding by clubs has a long and evolving history. Many hundreds of new claims are supported by clubs every year, largely without fuss.[8] With all the publicity around the recent reforms in Singapore, which have seen the modern form of tpf legalised for arbitration at that seat, it may be surprising that the traditional funding by defence clubs has been ignored. It has been such an integral part of the arbitration landscape that it is as if it had disappeared into it. As noted in this paper, its low profile may not always be to its advantage in the present atmosphere surrounding the new tpf.

The new tpf: 'climate change in international arbitration'?

The arrival of the new form of tpf has been greeted with suspicion in certain sections of the international arbitration community. Arbitration specialists unfamiliar with cases supported by insurers, like the clubs, have raised concerns about the participation of a new player in the arbitral process.

For example, in her article, *Ethical implications of third-party funding*, Valentina Frignati notes, "Whatever the form of the final TPF contract, from that moment on, an additional party will come into play, with all the consequences – both positive and negative – that this may cause."[9]

Margareta Habazin has written, "The expansion of third-party funding is quietly bringing a new player directly into the arbitral proceedings. The new player has no direct interest in the substantive issues of the proceedings but instead invests in the arbitration for a share of a successful claim, whether by settlement or an award." She concludes, "in the interest of arbitrators' independence, arbitrators need to be alerted of the participation of third-party funders and specific arbitral rules that will regulate that a party should disclose if it is being funded by a third-party need to be created."[10]

In a chapter entitled *Gamblers, Loan Sharks, and Third-Party Funders* in her book, *Ethics in International Arbitration*, Professor Catherine A Rogers, asserts, "significant challenges exist in determining the best manner and terms by which to regulate third-party funders in international arbitration. First, unlike lawyers, arbitrators, and experts, the presence of third-party funders is a very new phenomenon without clear national precedents or established practices that provide a clear starting point for analysis. The murkiness means that most efforts to understand third-party funding have to date been based on analogical reasoning. For assessing potential conflicts of interest with arbitrators, are funders more like parties, law firms, or like equity investors? Is due diligence into claims the same as corporate due diligence relating to a merger? For assessing extension of the attorney-client privilege, are funders more like co-parties or co-counsel, commercial parties with a shared interest or unrelated third parties?"[11]

The answer to each of Professor Rogers' three questions will be obvious to everyone in this room. It is: "None of the above. Funders are more like insurers. They most closely resemble 'before the event' legal expenses insurers such as FD&D clubs."

Professor Rogers does not mention insurance in her discussion of these issues, which she characterises as 'ethical'. No attempt is made to analyse how insurers, their insured, and the lawyers who work with them both, tackle these issues in the thousands of international commercial arbitrations in which they are involved every year. There is no entry for insurance in her book's index.

The new funders are perceived as invading territory previously only occupied by parties and their lawyers. Calls for regulation of the newcomers are a common feature, even an assumption, in discussions of tpf. Such calls have not been balanced by a recognition that 'before the event' insurers have been present in this landscape since the nineteenth century and that it has never been found necessary for their activities in arbitrations to be subject to regulation by institutions or by other arbitral bodies.

Regulation of tpf is demanded by various lawyers and academics to address potential behaviour which commercial common sense and/or a competent arbitral tribunal would easily deal with.

In an article entitled *Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit*, Gary J Shaw, an attorney with the Foreign Claims Settlement Commission of the US Department of Justice, has expressed the following fear: "There is nothing to stop a funder from using confidential information acquired in one proceeding against his former 'client' in a subsequent proceeding. Nor is there any regulation preventing a funder from funding, and thereby influencing, both parties in a single proceeding in order to maximize profit. After all, third party funders are less interested in justice and more interested in portfolio gains."[12]

Similarly, in an article entitled *Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding*, Nadia Darwazeh and Adrien Leleu have asserted, "TPF also increases the risk of exaggerated claims. Empirical data shows that claimants already have a tendency to inflate their claims beyond their actual value. It is not far-fetched to consider that this problem of inflated claims may be exacerbated when a funder, whose sole motivation is financial gain is involved."[13]

For the purpose of studying a "host of ethical and procedural issues" which tpf is said to raise, the International Council for Commercial Arbitration (ICCA) has set up a task force with Queen Mary University of London (QMUL). The co-chairs are Professors William W Park, Catherine A Rogers, and Stavros Brekoulakis. The issues which the task force is studying include the funders' relationship with parties and counsel in managing the dispute, allocation of costs and security for costs, transparency and disclosure, confidentiality, and arbitrator conflicts of interest.

As noted on the webpage for Queen Mary's Institute for Regulation and Ethics, third party funding has been described as "the climate change in international arbitration." [14] When I asked Catherine Rogers, Professor of Ethics, Regulation and the Rule of Law at QMUL, if she could let me have a reference for that description, her reply was that she had no citation for it; it was a phrase which had been used at conferences and in conversations. The question naturally arises as to the knowledge of people who might use such hyperbolic language and whether, in this instance,

climate change denial might not be the correct response both from academics and from the wider international arbitration community.

In the introduction to their preliminary account of the task force's work in 2014, Professors Park and Rogers note, "Funders report that upwards of ten percent of their investments are in international arbitration disputes, both commercial and investment-state arbitration." [15]

This ten per cent figure has been confirmed more recently by Susan Dunn of Harbour Litigation Funding, interviewed in *The Lawyer* on 6 June 2016: "The reality is that even a funder of our size (of around £410m in funds) only funds around 25-30 cases a year in 13 jurisdictions and a range of arbitral forums – our average budget nowadays is £4-5m and our minimum claim size is £10m – of which around 10 per cent are arbitrations at the moment. The numbers we fund are tiny relative to the total of litigation and arbitrations." Ten per cent of 30 cases is 3. Even supposing that tpf causes more harm than good, climate change in arbitration will not be made of numbers like that.

Professor Rogers has nevertheless asserted, "The stakes are high. Funders cumulatively have many billions of dollars that they are ready to spend on legal services to pursue claims around the world, and increasingly international arbitration disputes are drawing some of that funding."[16] The numbers provided by Susan Dunn, cited above, and the relatively modest amount of Woodsford's advance to Norscot, in the case with which this paper opened, should be enough to cast doubt on the implicit urgency of that assertion and to confirm that the new funders are still some distance away from causing climate change in international arbitration.

In the meantime, the clubs continue to fund hundreds of international arbitrations annually, as they have been doing for decades.

Is maritime arbitration different?

The task force's draft report was presented to a joint meeting of the Institute of Transnational Arbitration (ITA) and the American Society of International Law (ASIL) in Washington DC on 12 April 2017. Delegates were given copies of the draft report and have been invited to comment on it.

I asked the task force's co-chairs for permission to distribute the draft report to delegates at this LSLC meeting. After all, shipping lawyers have considerable experience of working with traditional insurer-funders and could provide some useful insights. Furthermore, shipping law firms like Davies Johnson & Co are at the forefront of making new law in relation to the new funders. My request was denied.

Unfortunately, it is not unusual for maritime arbitration practitioners to be side-lined by other sections of the international arbitration community.

The otherwise admirable 2015 International Arbitration Survey, conducted by QMUL and sponsored by White & Case, did not reach a representative sample of shipping and commodities arbitration lawyers. As Ian Gaunt (the new President of the LMAA) noted of the survey in the 2015/2016 LMAA Newsletter, "Billed as a survey of international commercial arbitration however, it must regrettably again be questioned whether the contents correspond with the label on the tin. Focussing as it does on

institutional arbitration and no doubt the result of surveying the larger international law firms concerned with engineering and investment arbitration, the survey ignores ad hoc arbitration altogether. It may be questioned of course, why it should matter that the survey ignores ad hoc maritime (and other commodity) arbitration in London. The reason is that it gives the distorted impression that almost all international commercial arbitration is conducted under the auspices of institutions such as the ICC, LCIA, HKIAC and SIAC. This is not so in the field which is probably most productive of international commercial arbitration cases, namely maritime and commodities."

Ian Gaunt was particularly, and rightly, concerned about the misleading picture that the survey gave of the relative importance of London in international commercial arbitration. There is another problem with the survey which is relevant to the issues which we are discussing this evening: it has a substantial section devoted to 'role and regulation of specific actors', including 4 pages on regulation and disclosure of tpf. This section has frequently been cited in articles, blog posts, and at conferences where tpf is discussed. Its finding that 71% of the respondent group wanted to see the area 'regulated' is said to justify proposals for such regulation in arbitration.

The survey found that 39% of the respondent group had encountered tpf in practice and 12% had used it themselves. The report notes, "This data suggests that its use is relatively widespread compared to, for example, insurance products for respondents in international arbitration. Only 15% of the respondent group have encountered such insurance products in practice; 3% have used them and 12% have seen them used."

Insurance to cover legal costs of defending a claim in arbitration must be liability insurance. Thousands of respondents in commercial arbitrations resort to liability insurance. P&I cover is just one example. The results suggest that those surveyed were largely from a rarefied section of the commercial world, i.e. the self-insured.

The impression that the survey did not reach lawyers who handle the mass of ordinary arbitrations arising in international commerce, in which at least one party will have its costs paid by an insurer, finds confirmation in the breakdown of the respondent group. 51% of the respondents had been involved in 10 or fewer arbitrations in the previous 5 years, i.e. an average of no more than two arbitrations a year. The experience of most lawyers who deal with disputes arising from international commerce (buying, selling, and transporting goods between different jurisdictions) will be quite different from that of the majority of this group.

It is hardly surprising that the relatively inexperienced participants in the survey agreed with the idea of regulating tpf when it was put to them. Had more shipping lawyers been consulted, there might not have been such a demand for regulation of tpf. After all, shipping lawyers are well used to dealing with funders in arbitrations, i.e. the clubs and other insurers, whose conduct in arbitration is not regulated.

In the survey, 79% of respondents' arbitrations over the previous 5 years were administered by institutions, not ad hoc, which was noted to be consistent with findings in previous surveys in 2006 (73%) and 2008 (86%). Again, such a high proportion of institutional arbitrations will not correspond to the experience of most people in this room. Nor is it consistent with statistics for international arbitration worldwide.

In his textbook *International Commercial Arbitration,* Gary Born has a table of cases filed with leading arbitral institutions between 1993 and 2013.[17] Of the institutions listed, the London Maritime Arbitrators Association (LMAA) is the only one whose

annual numbers are consistently in the thousands. The total number of international cases in all of the institutions in Mr Born's table in the 5-year period 2009 to 2013 inclusive is 42,102. Of these, 18,307 or 43 % were with the LMAA. For comparison, the International Centre for Settlement of Investment Disputes (ICSID) had 169 cases (0.4%).

Of course, as everyone here knows, the LMAA is not an institution. Arbitrations conducted pursuant to the LMAA Terms are ad hoc.

Gary Born is a partner in the US law firm Wilmer Hale and is based in its London office in Park Lane. He is currently President of the SIAC court in Singapore. His profile on his firm's website states, "Mr Born is widely regarded as the world's pre-eminent authority on international commercial arbitration and international litigation." His books are influential, particularly amongst law students. He has this to say about ad hoc arbitration in his book *International Arbitration – Cases and Materials*: "…most international practitioners decisively prefer the more structured, predictable character of institutional arbitration, and the benefits of institutional rules and appointment mechanisms, at least in the absence of unusual circumstances arguing for an *ad hoc* approach".[18]

No evidence is offered in support of this proposition. Many maritime arbitration practitioners would disagree with it. It is regrettable that Mr Born does not dig deeper and discuss how arbitrations are conducted under the LMAA Terms, bearing in mind their pre-eminence in his table of international arbitrations.

LMAA arbitration is seen by its users to have benefits in terms of speed and costs. A distinctive feature, which may well be copied in institutional rules soon, is the requirement for costs budgeting. Revisions to the LMAA Terms, now in their 2017 edition, have been discussed with the association's supporting members' liaison committees, on which P&I and defence clubs are represented alongside ship-owners, charterers and lawyers.[19] The influence of the clubs on improving the efficiency of the arbitral process should not be underestimated.

In the sense that its traditional funders are accepted as important players as well as in the way that it is almost systematically ignored in surveys and textbooks despite accounting for a substantial proportion of arbitrations globally, maritime arbitration certainly is different.

However, maritime arbitration comes in all shapes and sizes. It is not exclusively ad hoc. As noted above, 17% of new arbitrations filed at SIAC in 2015 were maritime. Similarly, the LCIA has reported that in 2016, 15.42% of new arbitrations were in 'shipping – commodities' while a further 3.95% were in marine construction.

As those figures confirm, maritime arbitration is also different from other types of arbitration through its long and continuing association with the world's leading arbitral institutions alongside its ad hoc traditions. Hence the need for its users, particularly the clubs, to be vigilant when the institutions look to introduce initiatives to address a perceived need to 'regulate' the activities of funders.

Champerty and club rules: the *Excalibur* standard for control by funders

But what is meant by 'regulation' in this context?

Catherine Rogers has defined ‘regulation’ as: ‘a sustained and focused attempt to ensure that the conduct of arbitrators, attorneys, experts, and third-party funders comports with ethical standards in order to ensure the fairness of arbitral outcomes’.[20]

In practical terms, regulation manifests itself in the production of guidelines (‘soft law’) by institutions, professional bodies, and associations of arbitrators. Guidelines increasingly sit alongside an institution’s arbitration rules and their impact on the conduct of the arbitration needs to be borne in mind when its rules are chosen.

Toby Landau QC has identified a new disease, which he has called ‘legislitis’ and which he has described as ‘a virulent affliction that manifests itself in an involuntary urge to publish A6 booklets of rules, guidelines, or principles’.[21] If it moves, codify it. This condition, he says, derogates from the flexibility of arbitration.

Sometimes it is governments which instigate the production of regulations. Hong Kong and Singapore have recently introduced reforms to legalise tpf in international arbitration. Its development at those seats had been hampered by the old doctrines of maintenance and champerty, which had survived therte in fuller form than they had in England.[22]

Maintenance is 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. Champerty is a kind of maintenance in which the maintainer receives a share of the subject matter or proceeds of an action The doctrines are associated with the inflammation of damages, the suppression of evidence and the suborning of witnesses.

As recently as 2007, the Singapore Court of Appeal, in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*, decided that champerty applied in both arbitration and court proceedings: “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. Thus the natural inference is that champerty is as applicable in the one as it is in the other… 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.”[23]

The combination of funding an action and receiving a share of proceeds, if it succeeded, was enough to give rise to these concerns. When the government of Singapore decided in 2016 that it should relax its laws against maintenance and champerty in arbitration, it did so on the basis that various professional bodies would introduce regulations by way of safeguards.

On 18 May 2017, the Singapore Institute of Arbitrators (SIArb) published its Guidelines for Third Party Funders.[24] These include a rule that a funder shall not “seek to influence the Funded Party’s legal practitioner to cede control or conduct of the dispute to the Funder except where and to the extent expressly permitted by the Funding Contract” (paragraph 6.1.4). This wording is similar to wording in the English Association of Litigation Funders’ (ALF) code of conduct of January 2014.

However, since the ALF published its code, we have had the infamous *Excalibur* litigation in the English courts, in which third party funders were ordered to pay indemnity costs. Both the judge at first instance and the Court of Appeal criticised the funders for failing to assess and monitor the case rigorously. Christopher Clarke LJ

said this about his decision to make a third party costs order on the indemnity basis: "If it serves to cause funders and their advisors to take rigorous steps short of champerty, i.e. behaviour likely to interfere with the due administration of justice, - particularly in the form of rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals - to reduce the occurrence of the sort of circumstances that caused me to order indemnity costs in this case, that is an advantage and in the public interest."[25]

Tomlinson LJ in the Court of Appeal went further, rejecting a protest from the Association of Litigation Funders (ALF) that exercising greater control over the conduct of litigation would run the risk that a funding agreement would be champertous. He said, "…rather than interfering with the due administration of justice, if anything such activities promote the due administration of justice. For the avoidance of doubt I should mention that on-going review of the progress of litigation through the medium of lawyers independent of those conducting the litigation, a fortiori those conducting it on a conditional fee agreement, seems to me not just prudent but often essential in order to reduce the risk of orders for indemnity costs being made against the unsuccessful funded party. When conducted responsibly, as by the members of the ALF I am sure it would be, there is no danger of such review being characterised as champertous."[26]

The new SIArb guidelines do not balance their default prohibition against a ceding of control over the conduct of the dispute with a positive duty on the funder to take 'rigorous steps short of champerty'.

Such steps would be routine for a defence club. For example, Rules 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."

The authorities in Singapore, in implementing the government's desire to see 'soft law' for the new funders, appear, ironically, to have set lower standards than the English courts expect from them.

Similarly, in Hong Kong, a draft code of practice for funders, prepared by the Department of Justice for consultation and published with the new Bill for the legalisation of tpf in arbitration at the end of December 2016, contains a section on control, which includes an undertaking by the funder not to "control or direct the funded party as to the conduct of the arbitration including, without limitation, as to the negotiation and conclusion of any settlement".[27] The draft Code does not contain an undertaking that the funder will take rigorous steps short of champerty, including ongoing reviews of progress. Contrary to the *Excalibur* standard in the English courts, a funder could give free rein to the funded party's lawyers while remaining in compliance with the Code.

As both Christopher Clarke LJ and Tomlinson LJ made clear in *Excalibur*, champerty brings with it a risk of interference with the administration of justice but at the same time it is in the interests of the due administration of justice for funders to exercise a certain level of control over the proceedings which they fund (just as insurers do).

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".[28] 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. (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. Section 3(2) of the Regulations states 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".)

Whilst it is interesting that the ICCA-QMUL task force has proceeded on the basis of a false presumption about bte insurers and that the new SIArb and Hong Kong guidelines have apparently done likewise, these initiatives have no direct impact on the clubs because their respective definitions of tpf do not encompass them. The situation may be different with other regulation.

Apparent bias: the IBA Guidelines and SIAC's Practice Note on Arbitrator Conduct in Cases Involving External Funders

One of the 'vital issues' which the ICCA-QMUL Task Force has been studying is the potential for conflicts of interest arising from relationships between funders and arbitrators. Articles quoted earlier in this paper have raised concerns about such conflicts. Commentators have urged disclosure of funders, and even of funding terms, with a view to reducing risks.

As noted by Simon Kverndal QC in his paper this evening, we have the IBA Guidelines. The 2014 revisions to the International Bar Association (IBA) Guidelines on Conflicts of Interst in International Arbitration (2014) provide at General Standard 6(b): "If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party."

The explanation to General Standard 6(b) says, "Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration."

Does a bte insurer, whose remuneration is by way of a premium or club call paid in advance, have a 'direct economic interest' in an award? Does the prospect of recovering some of its expenditure through a costs award constitute such an interest?

The wording is opaque. Of course, the IBA Guidelines are only a voluntary code. Some courts have confirmed them to be no more than guidelines. Last year, in a well-received judgment, demonstrating the common sense of the English Commercial Court, Knowles J even held that the non-waivable red list could be set to one side if the factual circumstances were such that a fair-minded observer would not find that the arbitrator was apparently biased.[29]

Furthermore, as far as orange list repeat appointments are concerned, the Guidelines have always contained an exception for maritime and commodities arbitrations.

The situation could be different and more onerous with an institutions' own guidelines.

In response to the new legislation in Singapore, SIAC has introduced a practice note, dated 31 March 2017, for arbitrator conduct in cases involving 'External Funding', in which the definition of 'External Funding' departs from the definition in the legislation and extends to insurance:

- *"'External Funder' means any person, either legal or natural, who has a Direct Economic Interest in the outcome of the arbitration proceedings"*

- *"'Direct Economic Interest' means an interest in the arbitration proceedings resulting from the provision by a non-Disputant Party to a Disputant Party of funding for or indemnity against the award to be rendered in the arbitration proceedings"*[30]

This wording is clearly drawn from the 2014 revisions to the IBA Guidelines on Conflicts of Interest cited above. It brings both liability and ATE insurance within the ambit of the practice note. It may or may not include bte insurers, depending on whether the recovery of expenditure is a 'direct economic interest' in the outcome.

The inclusion of insurance is surprising, particularly in view of the issues which the practice note seeks to address and the language it uses. For example, the notion that recourse to insurance might not have SIAC's 'endorsement or approval' is bizarre. Insurers have been funding claims and defences in SIAC arbitrations ever since the institution was established. Likewise, recourse to insurance could not be taken as a negative indication of financial status for the purposes of an application for security for costs.

In relation to conflicts and disclosure, FD&D clubs would be surprised by the idea that an arbitrator should be entitled to 'conduct such enquiries as may appear to the Tribunal to be necessary or expedient', including whether the 'External Funder' has committed to undertake adverse costs liability.

All of these issues may be ones which the P&I and defence clubs should consider and be prepared to discuss. However, they have not had an opportunity to do so. SIAC's practice note came out of the blue. It may be that its more extensive definition was drafted in error and was not supposed to include the clubs. However, it was not accompanied by an explanatory note and SIAC has not yet clarified it.

Conclusion

There has been something of an over-reaction to tpf from sections of the international arbitration community. Issues common to all types of funders, traditional and modern, and which do not relate directly to champerty, have been declared to be new, unique, and vital.

Of course, public policy considerations attach to the participation of undisclosed funders in investment treaty arbitrations. It is right that those should be explored. However, the world of commercial arbitration is essentially private. It has its own traditions and a long and successful history of funding by insurers. Those traditions should not be disturbed without good reason and without consultation. Maritime lawyers and the clubs must be vigilant.

At the same time, those who would seek to 'regulate' tpf could recognise, and learn from, the diversity of the wider international arbitration community and from the diversity of its traditions and practices, many of which have made arbitration efficient and have enhanced its reputation. Education could be the answer before regulation.

James Clanchy

13 June 2017

Endnotes

[1]Arbitrator and part time professional support lawyer (solicitor) for LexisPSL Arbitration (LexisNexis UK). Member of the ICCA-QMUL Task Force on Third Party Funding in Arbitration. The author spent two years (in 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 paper. He previously worked for the London Court of International Arbitration (LCIA) and for Holman Fenwick Willan (HFW), both of which are also mentioned. The views expressed in this paper are entirely his own and are not necessarily those of the Task Force, of his current or any former employer or of any other organisation with which he is, or has been, associated.

[2] *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd*, Queen's Bench Division (Commercial Court)15 September 2016, [2016] EWHC 2361 (Comm)

[3] http://kluwerarbitrationblog.com/2016/10/08/recovery-of-third-party-funding-ordered-by-icc-tribunal-and-confirmed-by-the-english-high-court-an-under-theorised-area-of-the-law/ (accessed 10 June 2017)

[4] https://www.thomasmiller.com/news-media/article/thomas-miller-acquires-specialist-marine-law-firm-133366/ (accessed 10 June 2017)

[5] For a more detailed discussion of funding by defence clubs, see James Clanchy, *Navigating the Waters of Third Party Funding in Arbitration,* 2016, 82 *Arbitration*, 222 – 232. This article was reprinted in the LMAA's 2016/2017 newsletter and is available online.

[6] https://www.thelawyer.com/allseas-liable-for-dws-fees-as-pi-club-gard-wins-cap/

[7] http://www.lawgazette.com.sg/2000-1/Jan00-23.htm

[8] Informal enquiries with a few of the larger clubs confirmed that they each registered over 100 new claims in arbitration, mainly London seat, each year.

[9] *Arbitration International*, 2016, 32, 505 – 522

[10] *Third-Party Funding Implications on Arbitrator Independence: The 2014 IBA Guidelines on Conflicts of Interest Cannot Prevent Potential Conflicts of Interest Arising from Third-Party Funding in International Investment Arbitration*, Croat. Arbit. Yearb. Vol 21/22 (2014/2015), pp 183 – 197

[11] Catherine A Rogers, *Ethics in International Arbitration*, Oxford, Oxford University Press, 2014, p213

[12] *Arbitration International*, 2017, 33, 109-120

[13] 33 *Journal of International Arbitration,* 2, 2016, 125 – 149 at p130

[14] http://www.ccls.qmul.ac.uk/research/regulation-ethics/ (accessed 11 June 2017)

[15] 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

[16] https://pennstatelaw.psu.edu/news/professor-rogers-speaks-findings-task-force-third-party-funding-international-arbitration (accessed 11 June 2017)

[17] *International Commercial Arbitration,* 2nd ed, Wolters Kluwer, 2014, at p94

[18] *International Arbitration – Cases and Materials*, 2nd ed, Wolters Kluwer, 2015, at p72

[19] See Explanatory Note to LMAA 2017 Terms and membership of liaison committees on the LMAA's website (www.lmaa.london)

[20] Catherine A Rogers, *Ethics in International Arbitration*, Oxford, Oxford University Press, 2014,p225, fn 20, adapted from Julia Black, 'Critical Reflections on Regulation', 27 Austl. J. on Legal Phil. 1, 26 (2002)

[21] Toby T Landau QC and J Romesh Weeramantry, *A Pause for Thought*, in Albert Jan van der Berg (ed) 'International Arbitration: The Coming of a New Age?', ICCA Congress Series Vol 17 (Kluwer 2013), 496 – 537, p503

[22] James Clanchy, *Rigorous steps short of champerty,* New Law Journal, 17 March 2017

[23] [2007] 1 SLR 989

[24] Published on SIArb's website (www.siarb.org.sg)

[25] *Excalibur Ventures LLC v Texas Keystone Inc and other companies* [2014] EWHC 3436 (Comm)

[26] *Excalibur Ventures LLC v Texas Keystone Inc and other companies* [2016] EWCA Civ 1144

[27] http://www.legco.gov.hk/yr16-17/english/bills/brief/b201612301_brf.pdf (accessed 13 June 2017)

[28] 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 at p6

[29] W Ltd v M SDN BHD [2016] EWHC 422 (Comm)

[30]http://www.siac.org.sg/images/stories/articles/rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf (accessed 13 June 2017)