JABATAN PERDANA MENTERI
BAHAGIAN HAL EHWAL UNDANG-UNDANG

ASIAN INTERNATIONAL ARBITRATION CENTRE

Supporting Organisations:

INNS of COURT MALAYSIA

INSTITUT PENIMBANGTARA MALAYSIA

BICAM

ciarb. Malaysia Branch

WORKSHOP ON THIRD-PARTY FUNDING LEGISLATION IN MALAYSIA:

CHARTING A PATH FORWARD

SPECIAL RAPPORTEUR REPORT

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The common law doctrine of champerty and maintenance was once an impeding factor in the development of litigation finance industry. Third-party litigation funding is certainly of no exception. Often than not, champertous funding arrangements are struck down as void, citing the rationales of Lord Denning in *Re Trepca Mines Ltd (No. 2)* [1963] Ch 199, to safeguard the purity and sanctity of the justice system. Be that as it may, we must not negate a multitude of advantages that third-party funding has brought to the table since its inception, benefiting beyond financially supporting meritorious claims for impecunious claimants.

While we acknowledge that litigation funding broadens access to justice, there exists a need to balance the interests of the parties involved and eradicate any potential abuse of the finance and justice systems. The Government of Malaysia acknowledges the importance and necessity to legalise and permit third-party funding practices in Malaysia, especially in arbitration to keep up with the vitality of this industry globally. Such legalisation should, however, be undertaken in parallel with putting into effect proper regulatory and oversight mechanisms to ensure a sustainably responsible growth of this funding industry.

On that note, as alluded to by the Honourable Dato' Sri Azalina Othman Said (Minister in the Prime Minister's Department (Law and Institutional Reform), Malaysia), the day's Workshop aimed to gather expert insights on each integral aspect of third-party funding practices, including the fiduciary responsibility of the funders, the code of ethics and best practices, disclosure and transparency measures, funders' liability for costs, and the ideal regulatory and oversight mechanisms.

The legalisation coupled with regulation of the funding industry in Malaysia is envisioned to be among the priorities in the upcoming legislative efforts spearheaded by the Government of Malaysia. It merits noting that this legislative agenda comes in conjunction with the ongoing institutional reforms involving the Asian International Arbitration Centre (Malaysia) (AIAC) for bolstering governance, transparency, efficiency, and global competitiveness, thereby valuably contributing to the global alternative dispute resolution community. Fundamentally, this highly anticipated amendment of our Arbitration Act 2005 *[Act 646]* strives to, among others, keep our laws abreast with the global best practices and strengthen Malaysia's standing as a safe and competitive seat of arbitration across the region and internationally.

OPENING REMARKS BY THE HONOURABLE DATO' SRI AZALINA OTHMAN SAID

(MINISTER IN THE PRIME MINISTER'S DEPARTMENT (LAW AND INSTITUTIONAL REFORM), MALAYSIA)

To officiate the inaugural workshop on third-party funding legislation in Malaysia, we were privileged to be graced by the presence of The Honourable Dato' Sri Azalina Othman Said to deliver the opening remarks for the day.

The Honourable Minister first extended her appreciation to the collaborating partners, the Government of Malaysia and the Asian International Arbitration Centre (Malaysia) (AIAC) for their commitments and efforts in organising the day's Workshop, followed by the KL Webinar the next day. In the same vein, she was thankful for the support from the Inns of Court Malaysia, the Malaysian Institute of Arbitrators, the Chartered Institute of Arbitrators (Malaysia Branch), and the Borneo International Centre for Arbitration and Mediation.

In her opening remarks, Dato' Sri Azalina alluded that the gradual liberalisation of the common law doctrine of champerty and maintenance has catalysed the exponential growth of the third-party funding industry in the legal landscape. While she agrees that litigation funding enables greater access to justice, she opined that such funding mechanisms also provided room for undesirable control and influence by the funders in the proceedings, regrettably diluting the dominance of the funded party in the legal gameplay. The growing complexity and diversification of the funding structures has signalled a stronger call for an effective, just and transparent regulatory framework that commensurate with the rapid development of this industry.

Speaking of the above, the Malaysian Government echoed the necessity of liberalising the common law doctrines and concurrently legalising third-party funding to expand the horizon of justice. Nonetheless, there remains a compelling need for devising proper regulations and standard codes of ethics for the litigation funding industry. It is, thus, aspired that the regulation and code of conduct would preserve transparency and cultivate accountability for the responsible growth of the litigation funding industry.

With that in mind, Dato' Sri Azalina applauded the ongoing legislative efforts towards legalising and regulating third-party funding practices in arbitration, through amending the Arbitration Act 2005, subject to certain regulatory and oversight mechanisms. To achieve this goal, she underscored the necessity of equipping ourselves with adequate knowledge of the litigation funding concepts and practices, along with the recent trends and issues, to align our third-party funding-related regulations with contemporary standards and best practices.

EXPERT PRESENTATION ON KEY ISSUES AND CHALLENGES ARISING FROM THIRD-PARTY FUNDING IN MALAYSIA[1]

Speaker: **Mr Philip Koh Tong Kee** *(Adjunct Professor, Faculty of Law, Universiti Malaya, and Senior Partner at Mah-Kamariyah and Philip Koh)*

Mr Philip Koh started his expert presentation by providing a comprehensive overview of third-party funding touching upon its global relevance, the existing legal framework in Malaysia, various funding scenarios, historical context, principles of the legal profession, prohibited legal practices and the nuances of legal fees as damages and costs.

When addressing the global phenomenon of third-party funding, Mr Koh's presentation emphasised on the following three pivotal areas: (a) the attention third-party funding has garnered due to the Malaysia-Sulu arbitration proceeding, (b) the relevance of the Legal Profession Act 1976 *[Act 166]* ("LPA") and the Legal Profession (Practice and Etiquette) Rules 1978. He then discussed whether third-party funding regulation should be left to court decisions, the Legal Profession Act, or the Bar Council enforcement.

Mr Koh provided a case scenario where a family court in England suggested that the issue of champerty and maintenance should be revisited. In contrast to that, he provided a Malaysian case interpreting Section 24 of the Contracts Act 1950 *[Act 136]*, which leans against public policy.

Before addressing third-party funding in a broader context, Mr. Koh provided a concise summary on the evolution of the Malaysian Bar from its colonial and post-colonial origins influenced by the English Bar. He noted that the Legal Profession Act 1976 evolved from the FMS Enactment 22 of 1914, Ordinance 4 of 197 and the Straits Settlement Ordinance 1934. Its principal features are akin to Singapore's Legal Profession Act 1966. He highlighted Hong Kong's reforms as a model worth examining for their balance between ethical litigation practices and the regulation and self-regulation of third-party funding.

Mr. Koh further explained that litigation funding involves third-party financial support for litigation costs in exchange for a share of the proceeds, if successful. Funders typically invest in cases with strong prospects of success and their financial returns are tied to the case outcome. This funding mechanism can include a percentage of the damages recovered, a multiple of the amount invested by the funder or a combination of both.

The presentation also covered the legislative and quasi-legislative nature of the LPA, which governs the legal profession in Malaysia. Mr. Koh argued that the LPA is a subsidiary legislation under Section 77 of the LPA, not mere guidelines or rules. The LPA prohibits advocates from purchasing client interests or entering into contingency fee arrangements, and it forbids fee sharing with non-practicing advocates.[2]

[1] Rapporteur in session: AIAC Senior Case Counsel, Ms Prissilla Ann John (Reviewed by Ms Kho Yii Ting).
[2] Part 6 of the Legal Professional Act 1976 *[Act 166]*.

Mr Koh highlighted the need for amendments in the remuneration section of the LPA to accommodate third-party funding. He further mentioned that there is a very critical part of the law in the remuneration section under the LPA which requires amendments in such a manner to permit third-party funding.

When discussing unauthorised persons and anti-touting regulations, Mr. Koh referred to Sections 37(2A) and 37(3) of the LPA. Section 37(2A) prohibits unauthorised solicitation of legal services, while Section 37(3) criminalises unauthorised persons that offer legal services. Mr. Koh urged senior members of the Bar to reassess these prohibitions in the current context, ensuring that the rationales behind them remain relevant while adapting to permit third-party funding.

In reference to specific cases, Mr. Koh mentioned:

a. ***Amal Bakti Sdn Bhd & Ors v Milan Auto (M) Sdn Bhd & Ors***, where Section 24(e) of the Contracts Act 1950 was used to strike down a deed of assignment as champertous and illegal.[3]
b. ***Mastika Jaya Timber Sdn Bhd v Shankar a/l Ram Pohumall***, where the court accepted the rationale in *Re Trepca Mines Ltd* (No.2) [1963] Ch 199, emphasising the risks of champertous maintenance.[4]
c. ***Quill Construction Sdn. Bhd. v Tan Hor Teng & Anor***, where it was held that maintenance and champerty are defunct in Malaysia, no longer supporting tortious claims but being confined to void contracts against public policy or illegality.[5]

Mr. Koh also discussed Rule 5 of the Legal Profession (Practice and Etiquette) Rules 1978, which emphasises maintaining professional independence and preventing third-party interference in throughout the conduct of a case. He urged legal professionals to exercise their fiduciary duty and self-discipline, suggesting that these principles need to be realigned as we permit and regulate third-party funding.

The presentation further touched on Section 116 of the LPA, which allows solicitors to conduct actions on credit. At this juncture, it is worth noting that the recent Federal Court decisions have impacted the recoverability of legal fees as damages. Mr. Koh highlighted the need to review and regulate litigation fundings under the LPA and Legal Profession (Practice and Etiquette) Rules. Section 37A of the LPA exempts parties in arbitral proceedings from certain prohibitions, suggesting regulatory flexibility in the third-party funding contexts.

In concluding his presentation, Mr. Koh posed a critical question to the attendees: "*How are we to chart the path forward?*" He emphasised the importance of examining and adapting to the realities of litigation funding while maintaining professional and ethical standards.

[4] [2009] 5 MLJ 95.
[5] [2010] 5 MLJ 707.
[6] [2006] MLJU 120.

SESSION 1: ELIGIBILITY, STATUTORY CRITERIA AND FIDUCIARY RESPONSIBILITY OF A QUALIFIED FUNDER[6]

Speaker: **Ms. Kim M Rooney** *(Chair of the Hong Kong Law Reform Commission's Sub-committee for Third Party Funding of Arbitration (2013-2016))*

Ms. Kim M Rooney, delved into the perspectives from Hong Kong, began her session by shedding light on third-party funding in the context of arbitration, tracing its roots back to the 700-year-old common law doctrines of champerty and maintenance.

Referring the case of *Winnie Lo v Hong Kong Special Administrative Region* (2012) 15 HKCFAR 16, she drew the attendees' attention to Bokhary PJ's definition of maintenance 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*". Champerty, on the other hand, is defined as "*a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share of the subject matter or proceeds thereof, if the action succeeds*".

In her preliminary remarks, Ms. Rooney elucidated how the Hong Kong courts have historically prohibited third-party funding in litigation proceedings, deeming it both as a tort (civil wrong) and a criminal offence, save for three exceptional circumstances:[7]

1. where a third party can establish a legitimate interest in the outcome of the litigation;
2. where a party convinces the court of the need for third-party funding to access justice; and
3. in a miscellaneous category of proceedings, including insolvency proceedings.

As the Chair of the sub-committee tasked to review Hong Kong's position on third-party funding of arbitration from 2013 to 2016, Ms. Rooney led the sub-committee in undertaking in-depth studies on the legal landscape in jurisdictions that permit funding arrangements, spanning across common law and civil law jurisdictions including Australia, England and Wales, Canada, the United States, China, France, Germany, South Korea, and Japan.

---

[6] Rapporteur in session: AIAC Senior Case Counsel, Ms Ooi Wei Qian (Reviewed by Ms Kho Yii Ting).
[7] The Law Reform Commission of Hong Kong. (2015). *Consultation Paper on Third Party Funding for Arbitration, Chapter 6*. Available at https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.hkreform.gov.hk/en/docs/tpf_se.DOC%23:~:text%3DThe%2520legal%2520doctrines%2520of%2520maintenance,prove%2520that%2520it%2520has%2520a&ved=2ahUKEwjX08XX8ZGGAxWxe2wGHWCvBr4QFnoECA4QAw&usg=AOvVaw2vz4itfa9HlET4QLfRziBI

Following this, and in line with the Hong Kong Law Reform Commission Final Report on Third-Party Funding for Arbitration 2016, Hong Kong has amended the Arbitration Ordinance (Cap 609) ("AO") in June 2017, adopting a "light touch" regulatory approach in permitting third-party funding, specifically for arbitration and the related proceedings.

Ms. Rooney diligently guided the participants through the regulatory framework of Part 10A of the AO that came into effect in February 2019, encompassing the statutory definitions for "*arbitration funding*", "*costs*", "*provision*" and "*third-party funder*". Among others, "third-party funding of arbitration" is carved out, under Section 98G of Part 10A, as the provision of arbitration funding for an arbitration proceeding (a) under a funding agreement, (b) to a funded party, (c) by a third-party funder, and (d) in return for third-party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement. It merits highlighting that third-party funding operates on a non-recourse nature wherein the pecuniary consideration is contingent on the successful outcome of the funded proceeding.

Expounding further on the understanding of Part 10A of the AO, Ms. Rooney directed the participants' attention to the fundamental Code of Practice for Third-Party Funding of Arbitration ("Code"), encapsulated under Division 4 *vis-à-vis* Sections 98P to 98S of the AO. The Code, essentially, applies to all third-party funders who fund arbitration proceedings in Hong Kong, and it is intended to safeguard the interest of the funded party.

Key aspects of the Code of Practice include, among others, informed consent of the funded party, capital adequacy requirements, the funder's duty to manage conflict of interest, control by the funders, confidentiality, mandatory disclosure, and the grounds for termination. It is, however, to be remarked that Sections 98S(1) and 98W(1) explicitly negate any liability for non-compliance of the Code, standing in conformity with the notion of light-touch approach. That being said, the Code remains admissible in court or arbitration, and any non-compliance may be taken into account in the decision-making process, if relevant.

To sum up her presentation, Ms. Rooney shared the recorded statistics of the Hong Kong Department of Justice, revealing that 89 cases (approximately 5.5%) involving third-party funding of arbitration proceedings were disclosed between 2 February 2019 and 30 April 2024. The statistical record further indicated that 6 cases involving outcome-related fee structures were disclosed between December 2022 to 30 April 2024.

Before the session concluded, a question arose regarding the legality of the exception to the doctrines of champerty and maintenance in the AO, given that the Criminal Procedure Ordinance in Hong Kong still considers the act of champerty and maintenance as an offence. Ms. Rooney explained that the exception to the doctrines of champerty and maintenance does not apply to the Criminal Procedure Ordinance in Hong Kong.

SESSION 2: CULTIVATING FUNDERS' PROFESSIONAL RESPONSIBILITY: THE IMPORTANCE OF CODE OF ETHICS AND GUIDELINE ON THE BEST PRACTICES[8]

Speaker: **Professor Catherine A. Rogers** *(Department of Legal Studies, Bocconi University and the Co-chair of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration)*

Professor Catherine Rogers commenced her session by commending Malaysia and the AIAC for taking up the important issue of third-party funding. Her discussion centred around her personalised view on the evolution of third-party funding in international arbitration and the ethical issues that beset it.

The session commenced with a reference to the legislations on third-party funding in Singapore and Hong Kong. The second part focused on the evolution of third-party funding in arbitration. This neatly dovetailed with the approach adopted by Singapore and Hong Kong in legalising third-party funding. Reference was made to the significance of the timing of the aforesaid legislations, particularly how it paved the way for arbitral institutions in the two countries to amend their rules in compliance with the same. Finally, the discussion culminated with the issues surrounding potential conflicts of interest between a third-party funder and the arbitral tribunal. Professor Rogers emphasised on the requirement of mandating disclosure of presence and identity of the third-party funder as an answer to the ethical conflict of interest issue.

To initiate the discussion, Professor Rogers referred to the third-party funding legislations enacted by Singapore and Hong Kong, which are of extreme importance and significance. It was important because of the incredibly thoughtful and careful approach adopted by both the jurisdictions. Further, it was significant as the enactment came at a watershed moment in international arbitration.

Evolution of Third-Party Funding in International Arbitration

Speaking of the evolution of third-party funding in international arbitration, Professor Rogers explained how the concept first came to light between the years 2013 to 2015. At that point in time, third-party funding was emerging as a phenomenon in international arbitration. Most of the discussions focused on understanding the concept and meaning of third-party funding.

Notably, there was deep-rooted apprehension about third-party funding. Professor Rogers reasoned that the novelty of the concept coupled with a lack of understanding or misunderstanding of its meaning have resulted to the same. Mention was made of the Forbes Magazine that referred third-party funding as possessing an 'ick factor'.

[8] Rapporteur in session: AIAC Senior International Case Counsel, Ms Sneha Ravi Iyer (Reviewed by Ms Kho Yii Ting).

The concern of the community was that third-party funding commodified justice. Elucidating on the same, Professor Rogers stated that the idea of people trying to make profit out of justice seemed incompatible at a visceral level. Adding a personal note to the discussion, she shared that people are often surprised by her perspective on third-party funding, particularly because the mainstay of her work focuses on ethics and professional conduct. She explained that most of the actors in international arbitration, including lawyers, arbitrators, expert witnesses and often arbitral institutes remain in this field due to economic gain. Whilst they may be passionate in their profession, they might be disinclined to pursue further in the absence of any pecuniary benefit. Hence, it would be fair to put that concern aside.

The Singapore and Hong Kong Approach to Third-Party Funding

The above provided the perfect segue to the serious regulatory issues that arise with third-party funding. Professor Rogers opined that third-party funding is an integral part of the world of international arbitration and regulating the same is therefore important. By regulating third-party funding, one may choose to control, eliminate or limit it.

The discussion then proceeded to consider the approach adopted by Singapore and Hong Kong. Both these countries did two main things. Firstly, they removed the legal barriers that prohibited the use of third-party funding in international arbitrations seated within their jurisdictions, thereby effectively legalising the practice of third-party funding. Secondly, they put in place regulations for third-party funding. While these regulations are strategic and involved thoughtful consideration, Professor Rogers, however, viewed that these regulations may be due for revisions at some point. By legalising third-party funding, both countries thought how best to regulate this phenomenon without impeding the growth of this industry. Among the first things instituted was the statutory requirement of disclosure of both the presence of third-party funding and the identity of the funder.

The discussion then proceeded to elaborate on the reasons necessitating disclosure. A driving factor was the avoidance of potential conflict of interest with the appointed arbitrators. Disclosure of the identity of the third-party funder would enable the arbitrator to diligently carry its duty to investigate and determine if there is a need for disclosing any potential conflict of interest situation. Professor Rogers referred to a third-party funder who, during the emergence of the concept, would begin his presentations by declaring in a rather "bombastic" manner that that there has never been an arbitral award that was refused recognition or enforcement because of conflict of interest (Her response to the same is elaborated later in the discussion on conflict of interest).

Back in 2013, there was no requirement for disclosure of third-party funding in the rules of most arbitral institutions. Professor Rogers opined that the disclosure requirement would possibly prove detriment to the arbitral institutions that were vying in a competitive market to attract more international arbitration cases. Indeed, third-party funders would not choose to fund an arbitration at an institution that mandates disclosure of third-party funding. Hence, mandating disclosure would prove a competitive disadvantage to the arbitral institutions.

The legislations in Singapore and Hong Kong were passed at a pivotal moment. They discovered that if a party who has a claim cannot get funding because the seat is Singapore/Hong Kong where third-party funding continues to remain illegal, then the effort of promoting these jurisdictions as attractive seats for international arbitration would be undermined. In effect, Singapore/Hong Kong may lose all the cases which involved third-party funding. Hence, the two-step amendment, the first being the removal of prohibition and the second step mandating disclosure of the third-party funding. This paved the way for arbitral institutions situate in Singapore/Hong Kong to amend their rules in compliance with the law. Notably, these arbitral institutions had a "legal excuse" to amend their rules, as opposed to other arbitral institutions that lacked legal backing for the amendments. SIAC and HKIAC were among the first institutions in the world that required third-party funding disclosure in arbitration cases. Whilst other arbitral institutions recognised the potential conflicts of interest between third-party funder and arbitrator, Professor Rogers opines that they did not wish to alienate business that might come with being perceived as third-party friendly and therefore did not amend rules providing for disclosure. It was a strategic decision by most arbitral institutions.

The other institutions that followed suit were the ICC and ICSID. The ICC's practice note stated that it was advisable for arbitrators to confirm the participation and identity of a third-party funder in the case. The same would lie within the power of the arbitrator who wants to investigate a potential conflict of interest. However, the ICC's practice note was not mandatory, rather more in the nature of good advice about best practices. The other institution that mandates the obligation of disclosure is ICSID. Third-party funding in investment arbitration raises a host of distinctive issues which are dissimilar to the ones in commercial arbitration. The focus shifts from ethics to security for costs particularly on questions of the ability of States or responding parties to recover the costs if they prevail in the ultimate underlying dispute.

Potential Conflict of Interest between the Third-Party Funder and the Arbitrator

The next part of the session focused on the debate surrounding potential conflict of interest between a third-party funder and an arbitrator. According to Professor Rogers, a conflict of interest between a third-party funder and an arbitrator is as obvious as one between a party and an arbitrator. The latter was illustrated by Professor Rogers with the example of a party who repeatedly appoints the same arbitrator within a certain period of time. This would attract the IBA Guidelines on Conflict of Interest. However, some third-party funders argued that given their non-involvement in the appointment of an arbitrator, they cannot have the same conflict of interest with the arbitrator that a party may have.

Professor Rogers opined that the argument is very narrow and fails to capture the realities of appointing arbitrators. Drawing an analogy with the role a law firms appointed by a party plays in the appointment process (given their knowledge and experience); Professor Rogers argues that technically, in such a case, the party has not chosen the arbitrator. This does not, however, translate to the non-application of the rules of conflict of interest. Similarly, insofar as third-party funders are concerned, a conflict of interest may arise given that they are among the beneficiaries of the proceedings.

Additionally, there may be situations where a third-party funder considers funding a party after the constitution of the arbitral tribunal. Notably, at this stage, third-party funders often consider the composition of the arbitral tribunal before deciding to fund the case. In such instances, it is apparent third-party funders tie their fate to the identity of the arbitrator. Therefore, the argument that there cannot be a conflict of interest between a third-party funder and an arbitrator does not hold good. At least when it comes to multiple appointments, one can safely infer that there is a potential for conflicts of interest between third-party funders and arbitrators. Taking the above into consideration, the presence and identity of the arbitrator should ideally be disclosed.

Another reason for mandatory disclosure requirement relates to the time when third-party funding in international arbitration was in the nascent stages. At that point in time, all the stakeholders were considering how the involvement of third-party funders would affect their prospects of success in international arbitration. Equally, the third-party funders were trying to understand international arbitration. Interestingly, one of the methods employed by them was to hire well-known arbitrators in their Board of Directors. One may assume that if an arbitrator is appointed in a case which is funded by the same third-party funder of which the arbitrator is part of the Board of Directors, then the arbitrator shall recuse itself. There lies the conundrum; for in the absence of disclosure of third-party funding, the arbitrator is unlikely to know the presence and identity of the third-party funder and consequently, be oblivious to the potential conflicts of interest.

According to Professor Rogers, the easy solution to such a situation lies within the duty of an arbitrator to investigate and inquire whether there is a potential conflict of interest. Ordinarily, this duty encompasses researching past cases to ascertain if there is any conflict of interest. According to Professor Rogers, this duty includes an obligation to ascertain whether there exists third-party funding arrangement in the case and if so, the identity of the funder. Such an inquiry will ensure that there is no conflict of interest and if there is any such conflict of interest, the same is disclosed to the counterparty.

Reason for arbitrators to systematically include questions on third-party funding as part of their duty to investigate is precisely because if some arbitrators feel the pressure to include whilst others do not, it will create a distortion in the market. Professor Rogers recommends that be it an ad-hoc arbitration or an administered one (including cases where institutional rules do not mandate disclosure of third-party funding); arbitrators ought to inquire the presence of third-party funding. This not only aligned with their duty to investigate but also eliminates the issue of potential conflicts. Most third-party funders are in agreement with the same. Indeed, knowledge of the rules and its clarity helps a third-party funder to make a strategic informed decision. However, any ambiguity of the rules in this respect will negatively impact the business model of third-party funders.

Professor Rogers then proceeded to elaborate how it may be unfair to wholly leave the inquiry pertaining to third-party funding on the arbitrators as part of their duty to investigate for potential conflict of interest. While arbitrators should make such an inquiry, it anticipates some challenges. The first being the lack of awareness among arbitrators. The second is that the inquiry under the duty resonates with the value of courage. This is further explained by stating how the degree of investigation to ascertain conflict of interest is a subjective one.

Professor Rogers, nevertheless, terms that the extent of such an inquiry is a "conflict within a conflict". She explained this by stating that the extensiveness/degree of inquiry proportionally relates to the possible areas of conflict of interest and consequently the inability to serve as an arbitrator. In that lies the tension as the arbitrator is seemingly put in such a position to act against their interest. This is more pronounced in administered arbitrations where the institutional rules do not require disclosure of third-party funding. For that reason, to the extent that the Government of Malaysia is considering legalising third-party funding, Professor Rogers remarked that the Singapore and Hong Kong models are the ideal regulatory models.

Before proceeding to elucidate on other examples of conflicts of interest and the rationale for disclosure requirement, Professor Rogers referred back to the initial instances where the third-party funder who stated that that no arbitral award has been refused recognition or enforcement due to conflict of interest. To that, her response was that the ethics rules are not written for arbitrators after a case has already been adjudicated for conflict of interest. Ethics rules are written, generally, to preclude similar situations from arising.

Different Models of Third-Party Funding

According to Professor Rogers, third-party funding has evolved considerably from the time Singapore and Hong Kong passed their respective legislations. She connoted the importance of carefully designing the definition provision before legislating the same. The challenge with defining third-party funding stemmed from various types of third-party funding arrangements. The traditional model of third-party funding operates on a non-recourse basis. Under that arrangement, the funder pays for the legal fees and obtains a percentage of the winning award. Non-recourse investment would also mean that the funder is disentitled from any reimbursement should the funded proceeding fail.

The recent evolvement witnesses the creation of a Special Purpose Vehicle ("SPV"), by the funders, which is a special corporate entity solely for funding purposes of a particular case. In such a situation, it is not the parent funder but its subsidiary (SPV) that funds the case. This has, however, created peculiar challenges. As discussed, repeated appointments form one of the rationales for mandating disclosure. However, a SPV, by definition, does not involve repeated appointments as it is created for funding of a particular case. Professor Rogers cautioned that the definition of third-party funding, at this juncture, would need to consider how to regulate a parent company of a SPV. Further, a technical definition of third-party will also take within its fold, an insurance company. Therefore, the question arises whether there should be disclosure of insurance and further what happens upon re-insurance of the same.

Portfolio funding is another model of third-party funding. This creates serious regulatory and definitional challenges. According to Professor Rogers, portfolio funding is more likely to exist in jurisdictions which allow contingency fees. On a side note, Professor Rogers expressed that she is a proponent of allowing contingency fees. The reason being that in countries such as the United States, contingency fees has led to very important judicial developments particularly in the area of civil rights, mass toxic torts and product liability. Whilst she acknowledged that contingency fees can also have perverse effects, permitting contingency fees has, on a balance of scale, proved more beneficial in that it has enabled parties with genuine claims access to justice. Under a portfolio funding agreement, the law firm receives funds from a third-party funder and the law firm securitises the money

through cases. Thereafter, the law firm utilises those monies to fund a case based on contingency fee arrangements. Thus, funding in such a situation involves the law firm instead of the party.

Professor Rogers then gave an example of a publicly known case where portfolio funding was involved and there was a conflict of interest. In that case, a partner of a law firm was appointed on behalf of the Claimant as an arbitrator. The law firm had received funding from a third-party funder who was also funding the Claimant. The case never progressed to the stage of award and was consolidated with another case and the arbitrator was then removed. Nonetheless, the said case alerted several questions. Firstly, one may wonder as to how the arbitrator took up the said appointment. The probable defence for the arbitrator is lack of knowledge. Given the case did not reach the courts, there was no judgment on the same. Professor Rogers added that had such a court evaluation taken place, it would have been very helpful. In this context, she emphasised that the only entity that knew about the conflict of interest was the third-party funder. Neither the Claimant nor the law firm or the arbitrator had information on the funding and the conflict of interest. Whilst it is not an indictment of the entire industry, given most responsible funding organisations have internal regulations but as demonstrated from the case, these are not full-proof. She emphasised that situations where the knowledge/information is only with the third-party funder should not arise. In the same vein, it may not be prudent to count purely on the internal regulations of the funders to obviate potential conflicts of interest.

Professor Rogers closed the session by wishing the best to the Government of Malaysia that has indicated its intention to regulate third-party funding. She added that the process is challenging, complex, nuanced but models adopted by the neighboring countries can be followed. Reference was made to Ireland which has also shifted its position to permitting third-party funding. She added that regulation on third-party funding shall create an opportunity for the AIAC to mandate disclosure in their rules.

Question and Answer Session

Two pertinent questions relating to the duty of the arbitrator to inquire on the presence and identity of third-party funding were raised during the session.

The first was in relation to the extent or degree of the inquiry in that, will it extent to ascertaining the terms of the funding agreement particularly to ascertain such terms that may compromise professional independence of counsel conducting the case. Professor Rogers said that a threshold inquiry relates only to the presence and identity of the third-party funder. She acknowledged that third-party funding raises several ethical issues for the counsel, particularly on the independence and loyalty given that the counsel fee is part of the third-party funding agreement.

Professor Rogers opined that arbitrators do not have an obligation to ascertain the terms of the funding agreement. Indeed, such an inquiry may give rise to problems. For instance, some funding agreements can raise questions of attorney-client work product, provisions about expert witnesses, or strategic decision making. According to her, the parties should not be coerced to disclosing the same. Typically, apart from inquiring the presence and identity of the third-party funder, arbitrator may order security for costs. She concluded by stating that ethical issues surrounding counsels in the third-party funding agreements

should be dealt with by legislation regarding the code of conduct for lawyers. Reference can be made to Singapore that has revised its rules on attorney obligations in the light of third-party funding.

The second question was whether it is a good practice for an arbitrator conducting conflict check to inquire from the party if it intends to bring onboard a third-party funder and what is the position if midway through the proceedings there is a change in the funder. Professor Rogers answered the first section by reiterating that an arbitrator ought to always ask, as a threshold question, whether there exists a third-party funding and the identity of the funder. In respect of the second part of the question, she stated that normally the disclosure requirement under the arbitral rules is a continuous obligation. Therefore, as and when a party switches funders, it needs to inform the arbitral tribunal and the institution of the same. It would be an interesting situation if the party brings a third-party funder that creates a conflict of interest with the arbitral tribunal.

Professor Rogers drew a parallel the *HEP vs Slovenia* case where the party brought a new counsel immediately before evidentiary hearing which created a conflict of interest with the arbitral tribunal.[9] The new barrister was from the same chamber as the chairman of the arbitral tribunal. In that case, the question for consideration was the power of the arbitral tribunal to either prohibit appearance of the new counsel or disqualify the new case. It was ruled that the arbitral tribunal had such a power. However, such complexity in relation to third-party funding has not come up, to the best of her knowledge. She emphasised that every arbitrator tries the best to avoid having an arbitral award overturned. Therefore, whatever can be done to prevent that, must be undertaken including early disclosure of a prospective (new) third-party funder. The arbitral tribunal can pass an order for disclosure of any prospective new funding. Thereafter, a conflict check can be undertaken before the operationalisation of the new funding arrangement. Professor Rogers opined that the solution to avoid such a situation would be for the arbitral tribunal to grant an order disqualifying the third-party funder's participation if it potentially creates a conflict of interest. That being said, she concluded by stating that it would be interesting to observe if such a situation would arise in the future.

[9] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24).

SESSION 3: DISCLOSURE, CONFLICT OF INTERESTS AND TRANSPARENCY MEASURES IN THIRD-PARTY FUNDING ARRANGEMENTS[10]

Speaker: **Professor Victoria Shannon Sahani** *(Professor of Law, Boston University School of Law and Member of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration)*

Third-party funding is a very important, timely, and impactful topic. Although the laws are not similar among countries regarding this matter, some form of convergence is observed from the approaches and regulations adopted. Despite their differing approaches, disclosure emerges as one commonality among most jurisdictions that permit third-party funding practices.

Professor Sahani remarked that several international arbitration institutions have adopted disclosure rules in recent years. Distinctively, the UNCITRAL Working Group III which deals with investor-state arbitration is scrutinising third-party funding and providing recommendations that enable State parties to incorporate certain funding regulations or provisions into investment treaties. In international arbitration, there is a potential for third-party funding provisions to be adopted in the newly or potentially renegotiated investment treaties.

Fifteen years ago, the conversation in this field mostly revolved around whether there should be funding for international arbitration. At that time, while third-party funding gradually emerged and developed, no proper disclosure rules were put in place. This consequentially led to instances wherein deposits and bills of the proceedings were paid by entities which were neither the client nor the attorney.

The conversation has now shifted, and third-party funding is essentially here to stay in international arbitration, except for those jurisdictions where it is outlawed.

Safeguards need to be put in place to ensure that third-party funding arrangement operates responsibly, constructive, and supportive of the international arbitration dispute resolution system. To this end, disclosure is, and remains, a fundamental aspect. It is, however, prudent to draw distinctions between litigation and international arbitration as the reasons for disclosure in the latter are slightly different than those that may arise in the former.

A fundamental concern in international arbitration in relation to third-party funding is the "double hat problem". This happens when an attorney or individual serves as a counsel in some cases, and concurrently as an arbitrator in another proceeding.

[10] Rapporteur in session: AIAC Senior International Case Counsel, Mr Miguel Jaime Carandang Encarnacion (Reviewed by Ms Kho Yii Ting).

By way of illustration, an individual may act as a counsel in a case where his party is funded by a particular funder. In a separate case, the same individual may act as an arbitrator involving the same funder that bankrolls one of the parties. Given the absence of mandatory disclosure obligation, the arbitrator (in the former proceeding) may be unaware of this matter. If a Party to the second case discovers that the arbitrator has worked with the same funder in another case as a counsel, a conflict of interest may arise, prompting a potential challenge against the arbitrator. In case where the arbitrator is removed, a new one would have to be appointed. This may potentially signal the recommencement of proceedings, thereby expending additional time and costs. Alternatively, a losing party may challenge the enforceability of the award, if rendered, on the basis of conflict of interest arising from the connection between the arbitrator and funder.

This "double hat problem" is something that may be avoided through the parties' disclosure of the existence of third-party funding arrangement to the arbitrator at the outset of the proceedings, or at any point during the case when the funder becomes involved. Such disclosure would enable the arbitrator to conduct due diligence, as early as possible, in ascertaining any potential conflicts of interest which may ultimately affect the validity of the award rendered.

Professor Sahani also discussed the issue of repeated appointments. A particular funder may be involved in a case or series of cases, either in the same industry or involving the same party. In these situations, a funder may have suggestions or may attempt to advise the legal counsel on the appointment of the arbitrator. This arrangement has been subject to constant debates, and its appropriateness largely depends on the jurisdiction concerned. However, in this circumstance, if a funder provides advice to the legal counsel, a scenario may arise where it also recommends the same arbitrator repeatedly for multiple cases. This raises questions of independence and impartiality especially in the absence of any existing framework governing disclosure.

Taken together, Professor Sahani explained that these issues impact the legitimacy of international arbitration from the perspective of the parties, the court system, and in respect of the award. They contribute to the view that disclosure is one of the main points of convergence insofar as third-party funding arrangements are concerned. There is a universal agreement that avoidance of conflict of interest is important and this consensus transcends legal systems.

Speaking of the above, Professor Sahani remarked that disclosure is considered the first step of transparency measures in international arbitration. The second possible level of transparency is the disclosure of funding arrangement *per se*. There may be situations where the arbitrators can order the disclosure of the funding arrangement – ranging from a summary of its terms, the actual text of the funding agreement, or confined to specific provisions.

That being said, Professor Sahani underscored that it is very rare that an entirely unredacted agreement is adduced. This is specifically encountered in cases where the funding itself is one of the issues on the merits, or at the stage of costs involving the question of reimbursement of the funder's fees. In the latter circumstances, it is practical for the arbitrator to know the rate of return and transaction structure to properly assess the said request. In addition, there are situations where arbitrators have inquired about other relevant matters such as, but not limited to the control of the funder, the funder's

approvals for settlement, the funder's right to recommend counsel, and the funder's right to withdraw from funding.

Another aspect related to transparency is security for costs. In investor-state arbitrations, security for costs is a common request of the Respondent when a third-party funder is involved. If the funder's identity is disclosed – whether by operation of an international arbitration rule, tribunal order or for some other reason – the funding arrangement may also be apparent. Oftentimes, the Respondent requests security for costs to recover and safeguard against substantial costs in case the Claimant's funded claim is unsuccessful. Taking into account the relatively enormous costs of investor-state arbitration, transparency is essential in determining whether any provision stipulated in the funding agreement that entails the funder's consent to provide security for costs order.

During the session, a participant brought up a scenario-based situation involving litigants and the potential challenges to arbitrators. If a litigant perceives that the arbitrator is not inclined towards its case, could third-party funding be deployed as a tactic to remove the arbitrator on the basis of conflict of interest with the funder?

According to Professor Sahani, a reputable (professional) funder will often engage in pre-funding due diligence to, among others, identify the arbitrator, understand the basis of the claim and records of the proceeding, and analyse the likelihood of success. In this process, any potential conflict of interest and the tactics deployed by the litigant may become apparent, negating the chances of materialising the funding arrangement. Even if a funder is willing to fund the case, it may impose certain restrictions, including the types of transactions and purposes the fund may be utilised, instead of sustaining unscrupulous litigation tactics.

In instances where a non-professional funder is involved, and the party managed to convince the former's intervention, the challenge ahead lies in reconciling the litigation tactic of expunging the arbitrator and the funder's main goal of maximising profits. While the successful challenge against the arbitrator results in the appointment of a new arbitrator, it does not alter the nature of any unmeritorious case with a relatively high chance of being dismissed.

There is always a possibility of abuse in the dispute settlement system, and third-party funding is no exception. In the investor-state arbitration context, States parties are sceptical of the unfairness as funders only (and regularly) provide funds to the investor Claimants. The presence of a funder, which often conducts pre-funding due diligence, may become a tactic to influence the arbitrator by implying a meritorious case at hand.

As a concluding note, Professor Sahani emphasised the constant evolution of third-party funding. One notable challenge involves carving the definition of third-party funding from a regulatory standpoint. As the industry grows and changes, Professor Sahani remarked that the working definition must be considerably expansive and flexible to ensure that the regulations remain relevant and applicable to the diverse transaction and structures developed by the funders.

SESSION 4: FUNDERS' LIABILITY IN ARBITRATION PROCEEDINGS: COSTS, ADVERSE COSTS, AND SECURITY FOR COSTS[11]

Speaker: **Dr. Patricia Živković** *(Senior Lecturer in Law, University of Aberdeen)*

Introduction and Objectives

Dr. Patricia Živković initiated the discussion with her remarks that certain characteristics of international commercial arbitration have diluted the effective development of allocating costs, adverse costs, and applications for the security for costs insofar as third-party funding of arbitration is concerned.

The objective of this session is to analyse the underlying causes of the same, and to gain a more nuanced understanding of the topic through addressing the following questions:

1. **Reimbursement of the Funders' Fees:** Third-party funding arrangements ordinarily include the funders' fees, being the professional fee that funders charge for the services rendered, in addition to the funds invested throughout the proceedings. In cases where a funded party succeeded in its claims, questions arose as to whether the funded party can seek these fees to be paid to the funder as a part of the arbitration costs. As a corollary to this, do arbitral tribunals have such power, and if so, and will the tribunals allocate funders' fee as costs?
2. **Adverse Costs:** Is it reasonable to expect a third-party funder to be held liable for the adverse costs that might be allocated against the funded party?
3. **Security for Costs:** To what extent should the existence of a third-party funding arrangement be taken into account in deciding the security for costs application?

Reimbursement of the Funders' Fees

Dr. Patricia Živković explained that the question of whether the third-party funder fee can be reimbursed or allocated to the losing party in arbitration varies across jurisdiction. She highlighted that this question was answered positively in England and Wales, as demonstrated in the case of *Essar Oilfields Services Limited v Norscot Rig Management Pvt Ltd*.[12] In this case, a sole arbitrator ordered the allocation of the funder's fee as costs and it is payable by the losing party as a part of the adverse costs allocation.

Dr. Živković noted that in the sphere of international commercial arbitration, there is no specific restriction preventing the application of the "*loser pays*" principle *vis-à-vis* the "*costs follow the event*" principle, as different factors are often taken into account in determining the allocation of costs.

During the setting aside proceeding of the *Essar Oilfields* case, Dr. Živković alluded that the national court upheld the decision of the sole arbitrator to allocate the funding fee as costs given that it was well within the discretion of the arbitral tribunal to direct the same. In response to the questions of public policy raised in this respect, the court remarked that such concerns are now outdated given the progressive development in the context of funding arbitration proceedings over the past few decades.

[11] Rapporteur in session: AIAC International Case Counsel, Ms Bhavini Singh (Reviewed by Ms Kho Yii Ting).
[12] *Essar Oilfields Services Limited v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm).

While she has not found any similar decision in other jurisdictions, Dr. Patricia Živković expressed her consensus with the approach undertaken by the court in *Essar Oilfields*. The arbitration rules in this particular case, similarly reflected in almost any set of arbitration rules and national arbitration acts, afford wide discretion to the tribunals in deciding the allocation of costs. As such, it appears that the approaches traditionally practised in litigation do not necessarily translate directly into the realm of arbitration.

Insofar as arbitration is concerned, the principle of "*costs follow the event*" surfaces as a prevalent approach in allocating costs, and the categorisation of costs are generally construed more broadly in arbitration as opposed to conventional litigations. Under such circumstances, the third-party funders' fee is classified as "*other costs*" within the meaning of the rules, and well captured within the mandate of arbitral tribunal.

Adverse Costs

Dr Patricia Živković stated that in the context of funders' liability for adverse costs and payment thereof, it is relevant to note that third-party funders generally scrutinise the likelihood of success of the case, approximately between 60% and 75%, ahead of agreeing to fund the same.

Speaking of this, Dr Živković identified several forms of control that funders often exercise under the funding agreements, among others, the obligation of the funded parties' counsel to inform the stages of the proceeding, the clarification of case details, suggesting alternative legal strategies, selection of the counsel, the handling of claims, and negotiation for amicable settlement.

Dr. Živković proceeded to address adverse costs in litigation in light of the courts' perspectives in England and Wales. She referred to the case of *Arkin v Borchard Lines Ltd and others*[13], where the court decided that third-party funders were jointly and severally liable to pay the defendant's costs on an indemnity basis. The court, however, limited the funder's liability to the extent of the funding provided.

In arbitration, Dr Živković observed that the question revolved around the funders' access - either to enforce their rights or to being subjected to certain obligations in the proceedings. This is taking into account the cornerstone of international commercial arbitration that hinges purely on the existence of, and privity to, the arbitration agreement. In other words, the inclusion of any third party in the arbitration proceeding would require the development of multi-party, joinder and consolidation theories.

Dr Patricia Živković noted that while these do exist, in practice, the inclusion of non-signatories in the international commercial arbitration procedure is rather complex. Although funders are not a party to the arbitration agreement, a theory could be constructed that they are the real party with interest in the proceedings on the basis of the success fee they ordinarily receive from the successfully funded claims.

Notwithstanding the absence of specific regulations, Dr Živković concluded that it is not entirely impossible to hold funders liable for adverse costs, especially when they exercise considerable control over the funded proceedings. In her opinion, it would be prudent and relevant to consider bringing certainty to this aspect through legislation instead of conferring discretion to the arbitral tribunals and eventually, national courts.

[13] *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655.

Security for Costs

For the final issue of the session, Dr Patricia Živković spotlighted on whether the grant of the interim measure of security for costs is contingent upon the existence and involvement a third-party funder. This is particularly relevant, as alluded to above, given the prevailing challenges to hold funders liable.

The counterparty (non-funded party) may stand in a relatively unfavourable position between the possibility of the funded party's impecuniosity, and on the other hand, the challenges in enforcing an award against the funder. Such a dilemma ought to be taken into account in deciding whether or not to grant the non-funded party's application for security for costs as an assurance of the recovery of damages after the proceedings conclude.

While the existence of the funding arrangements may be relevant, Dr Živković emphasised that it should not be the most decisive factor in deliberating the adverse costs order. Often, she remarked that third-party funding arrangements may not necessarily be associated with financial difficulties but rather for monetisation purposes.

Dr Patricia Živković concluded that since pre-funding scrutiny is often conducted by the funders (eyeing mostly meritorious claims with a fairly high chance of success), this would, in one way or the other, steer third-party funding away from becoming the prime decisive factor in determining the security for costs order.

Questions and Answers Session

The first question raised by the participants was whether it would be preferable for legislation on third-party funding to specifically outline the powers of the arbitral tribunal with respect to cost allocation of funders fees, in avoiding questions of existence and scope of such power.

In response thereto, Dr Živković stated that such inclusion would be a policy decision, encapsulating a blend of benefits and disadvantages. While express legislation would bring more clarity, conversely, it may impede the growth of the funding industry in a particular jurisdiction. This could potentially lead to the funders' hesitation to fund proceedings unless there is an increased likelihood of success, or the parties' deliberate avoidance to arbitrate in a particular jurisdiction. She noted that while the answer is not straightforward, Malaysia may consider taking the lead as the first jurisdiction to begin such a trend, as it happened with Hong Kong and Singapore when it comes to regulating third-party funding in arbitration.

The next question raised highlighted that while there is no third-party funding legislation in Malaysia, unofficially, there exists litigation funding practices in arbitration proceedings. For instance, if a subsidiary company is a Claimant in an arbitration proceeding, the parent company in their auditors' report makes a general statement indicating funding for the subsidiary's arbitration costs. Assuming this parent company experienced financial distress, the Respondent consequently filed an application for security for costs in the arbitration proceedings. Will the parent company be deemed a third-party funder in enabling the tribunal to direct it to provide security for costs?

Dr Živković addressed the question by making reference to the "group of companies" doctrine in international commercial arbitration. She stated that while the doctrine is not very popular, however, it is not impossible to use it to include a non-signatory to the arbitration agreement in the arbitration process. In her opinion, the reasonable approach would be to include the parent company as a potential party in dispute in the capacity of a funder. In this context, the extent of control and powers that the funder has would assume relevance. It serves to bring them into the procedure itself, as the arbitral tribunal has jurisdiction over granting certain measures or imposing certain obligations on the funders are often dependant on the control that the non-signatory exerts over the procedure. In the absence of any control, inclusion of the parent company in the proceedings or holding the parent company liable for costs would be fairly difficult.

In continuation of the above, it was highlighted by the participant that under company laws, every company is a separate legal entity and there would be no specific agreement drawn between the parent company and its subsidiary for the funding of the arbitration proceedings. The participant asked how would this impact the decision to order security for costs if the parent company is financially distressed.

Dr Patricia Živković explained that ideally, any funding disclosed, including indications of financial distress should be taken into account by the arbitral tribunal in determining the security for costs order. While it is within the discretion of the arbitral tribunal to factor in any relevant considerations, financial distress and litigation funding arrangement ought not be categorised as the decisive factor.

SESSION 5: ACCESS TO JUSTICE OR DENIAL OF JUSTICE: THE ROLE OF OVERSIGHT AND REGULATORY MECHANISMS IN THIRD-PARTY FUNDING[14]

Speaker: **Mr James Clanchy** *(London-based Independent Arbitrator, former Hon. Secretary of the London Maritime Arbitrators Association (LMAA) and former Registrar of the London Court of International Arbitration (LCIA))*

Introduction

This was the final session of the day-long *Workshop on Third-Party Funding Legislation in Malaysia: Charting a Path Forward*. The discussion commenced with Mr Clanchy delving into a comprehensive examination of the landscape surrounding third-party funding within international commercial arbitration, focusing mainly on arbitrations in the shipping and international trade sectors. Mr Clanchy remarked that he had observed a notable increase in the prominence of third-party funding suppliers in recent years and that its global proliferation in the arbitration domain has prompted nations, including Malaysia to deliberate on the legalisation and regulation of this practice.

Solitaire Arbitration Case

The presentation began with a reference to the renowned *Solitaire* arbitration case[15], which revolved around the conversion of a pipe-laying shipping vessel. This arbitration, based in London, garnered significant attention due to the substantial legal fees arising from the involvement of a battery of lawyers on both sides and the duration of the proceedings. It is estimated that the combined legal expenses of both parties in the arbitration exceeded £100 million. Gard, the claimant's Freight, Demurrage and Defence (FD&D) club, headquartered in Arendal, Norway, bore the financial burden.

Despite numerous hearings and awards being issued by the tribunal, a resolution remained elusive. Consequently, Gard advocated for an expeditious resolution. The case concluded through a settlement between the parties for €350 million. Gard's contribution to the eventual settlement of the claim was colossal.

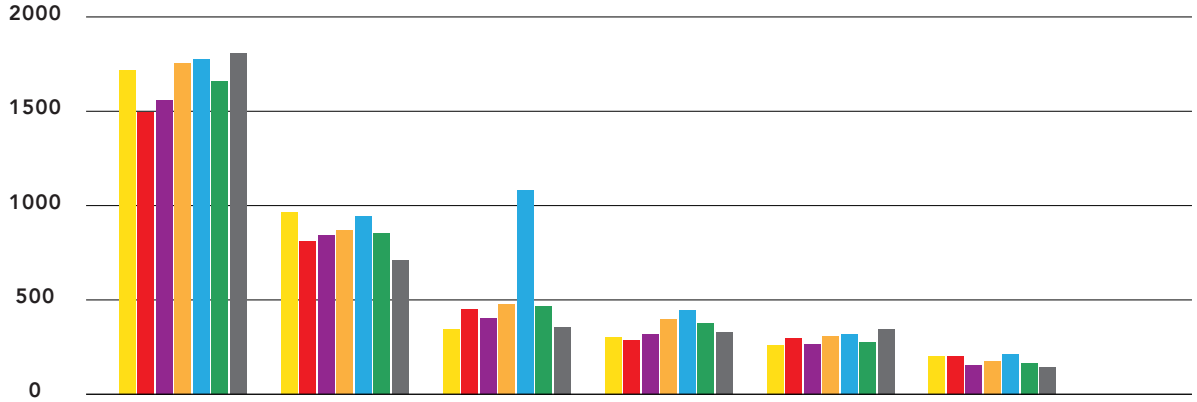
Mr Clanchy brought out that shipping disputes routinely have at least one party that an insurance company covers. Defence coverage was designed to safeguard ship owners, who often possessed a single vessel. Presently, ship owners have more significant financial resources, yet legal costs insurance remains prevalent as a means to mitigate legal expenses and maintain financial discipline. These insurers operate under various regulations, including those pertaining to insolvency. Still, an important point is that they are not subject to any regulations despite their involvement in international arbitration.

[14] Rapporteur in session: AIAC International Case Counsel, Mr Vishnu Menon (Reviewed by Ms Kho Yii Ting).
[15] *Pacific Ocean Shipping and Société d'exploitation du SOLITAIRE SA v. Sembawang Corporation Limited.*

A Comparison between Arbitral Institutions

Mr Clanchy underscored the often-underestimated role of defence clubs in enhancing the efficiency of the arbitral process. Drawing from his tenure as Registrar at the London Court of International Arbitration (LCIA), he expressed his astonishment at the prevalence of cases conducted without funding. While large multinational parties could self-fund, others often faced challenges as an unfunded Claimant could pose significant difficulties. According to Mr Clanchy, the business sector, traditions, and preferences of funders typically influence the choices in dispute settlement, with parties sometimes opting for *ad hoc* arbitration to avoid additional layers of "soft law," which could potentially include the regulations on third-party funding.[16]

Arbitration caseloads 2016 - 2022



	LMAA	ICC	SIAC	LCIA	HKIAC	SCC	TOTAL
2016	1720	966	343	303	262	199	**3793**
2017	1496	810	452	285	297	200	**3540**
2018	1561	842	402	317	265	152	**3539**
2019	1756	869	479	395	308	175	**3982**
2020	1775	946	1080	444	318	213	**4776**
2021	1657	853	469	377	277	165	**3798**
2022	1807	710	357	327	344	143	**3688**

[17]

The prevalence of funding by insurers explained why the London Maritime Arbitrators Association (LMAA) handles a greater volume of international commercial arbitrations than any other arbitral institutions, with its annual caseload consistently reaching thousands.[18] This is, of course, with the caveat that the LMAA is not an arbitral institution *per se*. The numbers speak for themselves, which is clearly illustrated in the table above. Comparatively, the Singapore International Arbitration Centre (SIAC) attracts numerous international commercial arbitrations in commodities disputes but appoints far fewer arbitral tribunals.

Parties may be deterred from referring their disputes to international arbitration centres due to the substantial costs incurred prior to the constitution of an arbitral tribunal. According to Mr Clanchy, this can be mitigated through various types of insurance coverage, including legal expenses insurance, trade credit insurance, contract protection insurance, political risk insurance, liability insurance, and general risks insurance.

[16] J. Clanchy. (2016, August). Navigating the Waters of Third Party Funding in Arbitration. *The International Journal of Arbitration, Mediation and Dispute Management, 82(3)*, 228. Available at https://d16k7u6c7cc6m2.cloudfront.net/James-Clanchy-Navigating-the-Waters-of-Third-Party-Funding-in-Arbitration.pdf [Accessed on 27 May 2024].
[17] This graph was provided by Mr. James Clanchy in his presentation materials during Session 5 of the Workshop entitled "*Access to Justice or Denial of Justice: The Role of Oversight and Regulatory Mechanisms in Third-Party Funding*".
[18] Supra 16.

The speaker asserted that insurers can play a pivotal role in facilitating the referral of cases to arbitral institutions by providing financial support and risk mitigation mechanisms. Given the substantial costs of administering disputes through arbitral institutions, insurers can offer a crucial avenue for parties to manage financial burdens effectively. Furthermore, an insurer's involvement often extends beyond monetary support, including proactive case management, and ensuring adherence to budgets and professional standards. This comprehensive support not only enhances parties' confidence in pursuing arbitration but also increases the efficiency and effectiveness of the arbitral process. The above-mentioned *Solitaire* case is a classic example of this.

Pertinently, the UK Law Commission proposed the relaxation of laws regarding maintenance and champerty, acknowledging the beneficial influence of insurers on litigation, which aligns with the interests of justice administration.[19] In Mr Clanchy's view, this recognition dated back to 1967, when the Commission recommended reforms, noting the widespread practice of third-party liability insurance, wherein insured individuals were indemnified against damages and costs in actions based on negligence, nuisance, or breach of statutory duty, with insurers typically managing the proceedings.

To Include or Not to Include Insurers Within the Definition of "Third-Party Funder"?

The speaker highlighted that the involvement of funders in international arbitration introduces a multitude of intricate procedural, structural, and ethical considerations, encompassing issues such as security for costs, cost allocation, potential conflicts between funders, arbitrators, and counsel in dispute management, transparency, confidentiality, attorney ethics, and tribunal authority.

Many experienced commercial arbitration practitioners routinely encounter these issues in arbitrations where an insurer finances the party's costs. However, contrary to a common presumption, insurers often exert more, rather than less, involvement in case management compared to modern funders.[20] Insurers typically monitor proceedings, ensure adherence to budgets, and uphold high standards of professional conduct. This proactive approach has proven successful, with hundreds, if not thousands, of claims and defences funded by insurers annually in international commercial arbitration.[21] According to Mr Clanchy, given insurers' effective management, the emergence of a small number of modern funders is unlikely to disrupt the status quo significantly, even if they aspire to exert similar levels of control over arbitrations in their preferred sectors.

Despite the successful track record of insurers, the International Council for Commercial Arbitration (ICCA)-Queen Mary Task Force, of which Mr. Clanchy was a member, decided to include insurance within its definition of third-party funding and recommended subjecting insurers to similar regulations, such as disclosure requirements for modern third-party funders. The rationale behind this decision was to acknowledge that insurers may influence arbitrator selection or case management decisions, rendering them functionally similar to modern third-party funders.[22]

---

[19] J. Clanchy. (2016). *Singapore and Hong Kong Open their Doors to Arbitration Funders.* Available at https://www.lexisnexis.co.uk/blog/dispute-resolution/singapore-hong-kong-open-their-doors-to-arbitration-funders [Accessed on 29 May 2024].
[20] Supra 16.
[21] *Id.*
[22] J. Clanchy, (2017, June 14). *Funders, Clubs and Rules: Can Maritime Arbitration be Different?* Paper presented at the London Shipping Law Centre (LSLC) seminar, London. Available at https://d16k7u6c7cc6m2.cloudfront.net/LSLC-14-06-2017-J-Clanchy-Funders-Clubs-and-Rules.pdf [Accessed on 28 May 2024].

The AIAC Arbitration Rules 2023

While analysing the existing definition of TPF under the Asian International Arbitration Centre (AIAC) Arbitration Rules 2023, Mr Clanchy stated that the funded party would be required to disclose both the existence of funding and the funder's identity. Mr Clanchy regarded the definition provided as overly broad, encompassing insurers without carving an exception for maritime cases. Consequently, a party might be compelled to disclose the involvement of, for instance, a trade credit insurer (despite typical trade credit insurance policies prohibiting such disclosure). According to him, the AIAC, akin to other arbitral institutions, had followed the path taken by the ICCA-Queen Mary Task Force.

Excessive Demand for Regulation

In Mr Clanchy's view, the push for regulation has extended beyond reasonable bounds, prompting an inquiry into the reasons behind such fervour, particularly concerning third-party funding, distinct from insurance in its profit-seeking nature, whereby the funder seeks a share of arbitration proceeds. Third-party funding possesses distinctive features that have sparked concerns, leading various entities to advocate for regulation. This inclination toward regulation can be attributed to what Mr. Clanchy termed the "three C's":

a) ***Conflict of Interest***
Mr. Clanchy briefly addressed this point, acknowledging its extensive coverage by Professor Victoria Sahani in the previous session titled "*Disclosure, Conflict of Interests, and Transparency Measures in Third-Party Funding Arrangements*". He noted that conflicts of interest are not necessarily remedied through statute or regulation alone.

IBA Guidelines
The Task Force responsible for revising the 2014 IBA Guidelines on Conflicts of Interest took on the issue of third-party funding before any arbitral institution addressed it. They adopted a broad definition of funders, as outlined in General Standard 6(b), which mandates arbitrators to disclose relationships between themselves and parties involved in the arbitration or any person or entity with a direct economic interest in or a duty to indemnify a party for, the arbitration award. Specifically, General Standard 6(b) includes a requirement that arbitrators disclose the following relationships:

> *"[…] direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration."*

The Explanation to General Standard 6(b) defines "third-party funder" or "insurer" as:

> *"[…] 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."*

The Explanation to General Standard 6(b) further defines "third-party funder" or "insurer" as any entity contributing funds or other material support to the prosecution or defence of the case and having a direct economic interest in, or a duty to indemnify a party for, the arbitration award. While General Standard 6(b) does not explicitly require the entity to be contributing funds or material support, it is understood that both provisions are meant to be read together, with the definition in General Standard 6(b) being constrained by the additional language in the Explanation to 6(b).

Despite this definition, no reported cases have offered clarification on third-party funding as outlined in the IBA Guidelines. Debate within the Task Force centred on whether the IBA definition extends to the After-the-Event (ATE) and Before-the-Event (BTE) insurance.

Some members argued that the requirement of a "direct economic interest" excludes ATE or BTE insurance, as these insurers do not directly claim proceeds from an award but may receive remuneration depending on the insurance agreement terms and the outcome of the case. Others disagreed, viewing this analysis as overly formalistic, suggesting that ATE and BTE insurers could indeed have a direct economic interest in the award, albeit contingent on specific conditions.

Singapore Institute of Arbitrators (SIArb)

The Singapore Institute of Arbitrators released its "Guidelines for Third Party Funders", which described third-party funding as follows:[23]

> *"Third party funding arises when a third party (the Funder) provides financial support to enable a party (the Funded Party) to pursue or defend an arbitration or related court or mediation proceedings. Such financial support is provided in exchange for an economic interest in any favourable award or outcome that may ensue."*

This defines third-party funding as the provision of financial support by a third party (the Funder) to enable a party (the Funded Party) to pursue or defend arbitration or related court or mediation proceedings. This financial support is offered in exchange for an economic interest in any favourable award or outcome that may result. The SIArb Guidelines are believed to be modelled after the London Association of Litigation Funders' Code of Conduct. From this perspective, After-the-Event (ATE) insurers are considered to have an economic interest in a favourable award.

However, as previously explained, ATE insurers do not provide financial support but rather protection against financial risk. Therefore, it seems that the SIArb Guidelines do not encompass ATE insurers, although it could be argued that they apply to funders who offer ATE insurance (or a similar financial instrument) as part of a broader funding arrangement.[24]

[23] Singapore Institute of Arbitrators. (2017, May 18). *SIArb Guidelines for Third Party Funders*. Available at https://www.siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf [Accessed on 28 May 2024].
[24] International Council for Commercial Arbitration. (2018). Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, *ICCA Reports Series*, 4, 45 – 80. Available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf

b) ***Control of the Claim***

The second C that Mr Clanchy referred to was the "Control of Claim". This is best elucidated in the case of *Excalibur Ventures LLC*.[25] On October 23, 2014, in a decision that had major ramifications for the litigation funding market in the UK and overseas, the English Commercial Court ruled that third parties that had funded the unsuccessful litigation brought by brass-plate Delaware corporation *Excalibur Ventures LLC* should be jointly and severally liable to pay the defendant's costs of the action on the indemnity basis.

The claimant, *Excalibur Ventures*, alleged that it had an agreement with *Texas Keystone Inc.* and others to assist in acquiring oil exploration rights in Kurdistan. *Excalibur* sought significant damages for breach of contract, claiming a stake in the profits from the oil exploration ventures.

However, the English Court of Appeal found against *Excalibur*, dismissing its claim as "speculative and opportunistic". The court ruled that *Excalibur* was not entitled to any relief and ordered it to pay the defendant's legal costs, which amounted to millions of pounds. The court's cost judgment in this case highlights the importance of thoroughly assessing the strength of legal claims before pursuing costly litigation. *Excalibur*'s failure to provide credible evidence to support its claims resulted in a substantial financial burden in the form of the defendant's legal costs. This case underscored the risks involved in pursuing speculative claims and serves as a cautionary tale for parties considering litigation without adequate grounds or evidence.

The court criticised funders for their failure to rigorously assess and monitor cases, leading to an order for indemnity costs. The decision emphasised the importance of funders exercising control without infringing the due administration of justice, echoing the sentiment that such oversight is beneficial rather than detrimental.

The Singapore Institute of Arbitrators' guidelines, discussed above, however, do not impose similar obligations on funders, raising concerns given Singapore's legal framework on champerty differs from that of England. Third-party funders must actively engage in the proceedings rather than merely spectating.

According to Mr Clanchy, those who seek to regulate the activities of the new funders could benefit from studying the practices of the insurer-funders whose close control of their cases meets the *Excalibur* standard. They could look beyond their fields of practice, notably in investment and project disputes, and endeavour to learn from the long experience of practitioners in other types of commercial arbitration.[26] Therefore, the reputation of international arbitration can only be enhanced by efforts to provide access to justice and, at the same time, to ensure that the interests of justice are served. The *Excalibur* standard for control by funders is a good reference point.[27]

[25] *Excalibur Ventures LLC v Texas Keystone Inc. & Ors* [2014] EWHC 3436 (Comm).
[26] J. Clanchy. (2017, January 9). *"Rigorous Steps Short of Champerty": The Excalibur Standard for Control by Funders*. Available at https://www.lexisnexis.co.uk/blog/dispute-resolution/rigorous-steps-short-of-champerty-the-excalibur-standard-for-control-by-funders [Accessed on 28 May 2024].
[27] *Id.*

c) ***Costs***

The third and final C was "Costs". Mr Clanchy stated that legislation can play a pivotal role in regulating costs, particularly by imposing caps on the percentage of success fees that funders can recover. Proposals in England, spurred by cases like *PACCAR*[28], advocate for such limitations. In *PACCAR*, the case centred on whether the costs of third-party litigation funding should be recoverable as "costs" under the Damages-Based Agreements Regulations 2013 (DBA Regulations). The Court held that the costs of litigation funding cannot be recovered as costs under the DBA Regulations, reasoning that the legislative intent did not encompass such funding arrangements. This decision introduces uncertainty for litigation funders operating in the UK, as it may impact the economics of litigation funding and the willingness of funders to invest in claims where cost recovery is uncertain.

The Supreme Court's ruling in *PACCAR* underscored the need for clarity in the regulatory framework governing third-party litigation funding. Litigation funders may face challenges in assessing the viability of funding arrangements and managing the financial risks associated with litigation in light of this decision. Furthermore, the judgment prompted questions about the future of litigation funding in the UK and the potential implications for access to justice, as it may deter parties from pursuing meritorious claims due to the heightening concerns over costs.

Mr Clanchy noted that proposals to significantly reduce the proportion of proceeds that funders can recover align with initiatives in the European Union. In the EU, a draft directive has been introduced, with one of its key provisions being the imposition of caps on funders' recovery. Additionally, the proposed regulation suggested that once a funder has committed to a case, they should not be permitted to withdraw midway to ensure they uphold their obligations to claimants. This regulation aimed to restrict funders' discretion, contrasting with the flexibility enjoyed by entities like the Defence Club.

Conclusion

Mr Clanchy emphasised the need for balanced regulation in third-party funding, considering its potential impacts on access to justice and the administration of justice. Stricter regulations risk undermining third-party funding's appeal to investors, potentially jeopardising its viability as an alternative funding mechanism. He stressed the importance of studying the practices of insurer-funders and learning from other fields of commercial arbitration to enhance the reputation and effectiveness of international arbitration.

The current landscape in the UK lacks regulation governing third-party funding, leaving a void that may soon be filled, particularly concerning consumer actions in courts and the permissible recovery by funders from litigation proceeds. Common law has established clear principles for post-champerty conduct by funders, as demonstrated in court cases. Therefore, Mr Clanchy advised Malaysia to study the developed case law in England rather than adopting the EU proposal, which originates from different legal traditions and viewpoints and may not be applicable in the realm of international arbitration.

[28] *R (on the application of PACCAR Inc and Others) (Appellants) v Competition Appeal Tribunal and Others (Respondents)* [2022] UKSC 10.