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# Third-Party Funding of Arbitration: Focusing on Recent Legislations in Hong Kong and Singapore

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*As arbitration is widely used as an alternative dispute resolution mechanism, third-party funding, which is a person or entity with no prior interest in the legal dispute providing non-recourse financing for one of the parties, has become more prevalent with increasing costs of international arbitration. In particular, Hong Kong and Singapore are the first jurisdictions to adopt and implement legislations to specifically permit third-party funding of international arbitration. Thus, in this article, relevant issues with respect to third-party funding of arbitration, such as, conflicts of interest, disclosure, privilege and confidentiality of information, cost allocation, security for costs, and control over arbitral proceedings by the third-party funder are examined with pertinent provisions of the recent legislations. While the respective legislations of Hong Kong and Singapore may not directly address every issue raised by third-party funding of arbitration, as they make it clear that such is no longer prohibited by the old common law doctrines of champerty and maintenance, they have clarified conflicting case law as well as proactively promoted themselves as leading seats of international arbitration.*

Key Words : Third-party funding, International arbitration, Dispute funding, International arbitration in Singapore, International arbitration in Hong Kong.

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# Ⅰ. Introduction

Arbitration is an alternative dispute resolution mechanism with its foundation in parties' arbitration agreement to resolve any dispute(s) that has arisen or may arise between them through arbitration rather than resorting to litigation before national court(s). Arbitration has its well-known advantages, such as, party autonomy in selection of the arbitral tribunal, the decision-makers over the dispute(s) by applying the governing laws and procedural rules agreed to by the parties. Especially where litigation can get very costly in terms of money and time, arbitration has been widely praised for its efficiency in time and costs, thereby attracting many users. Furthermore, due to other key characteristics, such as, finality of arbitral awards and their enforceability in many nations around the world, international arbitration has served as a useful mechanism for parties of foreign jurisdictions to resolve their dispute(s) without having to appear and litigate before foreign national courts.

However, because international arbitration has recently been criticized for its growing inefficiency in time and costs, the use of third-party funding arrangements, which has been more prevalent in investor-state arbitrations, also emerged in international commercial arbitrations. While the concept of a third party providing funds, or investing in another's claim(s) and then benefiting from a successful outcome, has been historically prohibited for a long time by the doctrines of maintenance and champerty, some jurisdictions have relaxed such prohibitions over time. In particular, Hong Kong and Singapore are among the very first jurisdictions to eliminate such prohibitions by adopting specific legislations to permit third-party funding of arbitrations.

Therefore, these recent legislations of Hong Kong and Singapore will be examined in part IV of this article. The concept of third-party funding of arbitration generally will be discussed in part II, and some critical issues raised by third-party funding of arbitration, such as conflicts of interests, disclosure, confidentiality and privilege, as well as decisions relating to cost allocation and security for costs will be examined in part III, with concluding remarks in part V.

## Ⅱ. Third-party Funding of Arbitration

The historical common law doctrines of maintenance and champerty[1] have long prohibited funding of disputed claims and/or defenses by any third party who has no legitimate interest in the claim and/or defense for a return on such investment in case of a successful outcome for the funded party. However, as the business of law is changing over time, dispute funding has become increasingly prevalent in litigation as well as arbitration. While dispute funding has raised many issues ranging from how to define the scope and limits of "third-party funding"[2] to whether it should be regulated, as some jurisdictions have relaxed prohibitions against such, it has become an emerging practice.[3]

Generally, third-party funding involves a person or entity with no prior interest in the legal dispute providing non-recourse financing to one of the parties. The third-party funder has no recourse for repayment of the funds advanced other than claim proceeds recovered, if any, pursuant to the funding arrangement. Third-party funding may include legal fees, out-of-pocket costs (for instance, expert fees, arbitrator fees, arbitration institution fees, discovery-related fees, among others), or costs associated with subsequent enforcement actions, and it may be structured around a single claim or a portfolio of claims.[4]

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1) Maintenance is "assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation," while champerty is "an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds." Black's Law Dictionary (3d pocket ed. 2006).

2) The ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration (hereinafter the "ICCA Report") has defined the term "third-party funder" as "any natural or legal person who is not a party to the dispute and is not a party's legal counsel but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party: a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and b) such support or financing is provided through a donation, or grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute." Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration, p. 81 (2018).

3) It has been suggested that the practice of third-party funding of disputes and its rapid growth was a result of the economic downturn in 2008 as well as rising costs in international arbitration. The ICCA Report, *supra* note 2, p. 18.

4) Also, dispute finance has increasingly been used by claim holders for other purposes, such as for raising working capital for the claimant entity, discharging other financial liabilities, or financing

While the funder has no recourse on repayment of its advanced funding unless there are any recovered proceeds for the funded party, and the specifics of return on its funding would follow the terms of the funding agreement between the funder and the funded party, typically, return on investment is estimated to be closer to four times the amount invested (including repayment of funding).[5] Also, it is common for the funding agreement to link the funder's return to the duration of the case, meaning that the funder's return would be lower if the case settles early.

Some of the arguments in favor of permitting the use of third-party funding in arbitration are access to justice, risk management, claims/case assessment, and fee splitting, among others, while the doctrines of champerty and maintenance, conflicts of interests, confidentiality, and control over conduct of proceedings by third-party funders are some of the primary arguments opposing such.

First and foremost, while historically, third-party dispute funding was a mechanism that allowed access to justice for the financially distressed claim holders, nowadays, third-party funding is not only used by those who are impecunious but also by well-funded ones that seek for ways to manage their financial risks, to reduce legal budgets, and to pursue other business priorities rather than to expend resources on arbitration.[6] Therefore, while "access to justice" traditionally referred to providing financial means to allow a claim holder pursue its otherwise meritorious claim(s) by way of eliminating its obstacle of financial distress, since it is not only impecunious claim holders that seek and obtain third-party funding, the meaning and significance of allowing "access to justice" seem to have been diluted in recent days.

Next, it is believed that the funded cases have been vetted as meritorious claims by prospective funders who have conducted quite vigorous due diligence processes prior to engaging themselves in providing capital for any party. By the same token, because it is assumed that the funded party would not have been able to obtain funding unless the case was investment-worthy to a third-party, who otherwise has no interest in the case, while the claims actually may not be totally frivolous, the very existence of the funding arrangement may affect settlement opportunities for counterparties.

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other litigation that is unrelated to the claim against which the financing is secured. The ICCA Report, *supra* note 2, p. 20.

5) The ICCA Report, *supra* note 2, pp. 25-26. It is also known as the 1:10 ratio, as in, if the funder invests USD 1, and the claimant recovers USD 10, then the funder can recover its investment of USD 1 plus three-fold return, leaving the funded party with 60 percent of the proceeds. *Id.* p. 26.

6) The ICCA report, *supra* note 2, p. 20.

# Ⅲ. Issues Raised by Third-party Funding of Arbitration

## 1. Conflicts of interest

### (1) Potential conflicts of interest with an arbitrator and the third-party funder

Independence and impartiality of each arbitrator throughout the entire arbitral proceedings as well as party autonomy in selection of arbitrators are fundamental characteristics of arbitration.[7] With third-party funding of arbitration, however, such impartiality and independence of arbitrators may be impaired if there is a relationship between an arbitrator and the third-party funder, particularly if the arbitrator has a direct financial interest in a third-party funder, and/or if the arbitrator receives repeat appointments from a party funded by the same funder.

Additionally, no one set of rules or laws governs international arbitration, as parties may agree to governing laws as well as procedural rules. The International Bar Association (IBA) was the first organization to formally address issues relating to third-party funding conflicts and implemented helpful Guidelines on Conflicts of Interest in International Arbitration (2014) for parties and arbitrators. The 2014 Guidelines have certain procedures that are relevant to potential conflicts of interests that may arise between arbitrators and third-party funders. For instance, according to the Explanation to General Standard 6(b), third-party funders have a direct economic interest in the arbitral award, and therefore, they may be considered as the equivalent to the party. Also, General Standard 7 imposes a duty on the parties to disclose any relationship "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" at the earliest opportunity. As such, according to the Guidelines, an arbitrator's direct relationship with a third-party funder will result in a conflict of

7) Every arbitrator must be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated. IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Standard 1.

interest that is not cured by the parties' waiver, as set forth on the "Non-Waivable Red List" of the IBA Guidelines.[8)]

Not only actual, but potential and even perceived conflicts of interests are significant and should be addressed at the outset of arbitral proceedings, most preferably prior to the constitution of an arbitral tribunal. As there is a conflict of interest verification between arbitrators and the parties, if any party to proceedings is funded by a third-party funder, any potential conflicts should be identified and addressed at the outset in order to eliminate the need for potential challenges to arbitrators and/or to the arbitral award based on arbitrator conflict of interest. Therefore, disclosure of potential conflicts is essential, in order to preserve the finality of arbitral awards as well as integrity of arbitral proceedings, and the issue of disclosure is examined more closely in the next subsection.[9)]

### (2) Conflicts of interest for lawyers in relation to professional duties to their clients

The existence of a third-party funder, who pays for legal fees and expenses, may also result in potential conflicts of interests for lawyers whose professional and fiduciary duties belong to the funded party and not the funder. The ICCA Task Force found that in practice, it is recommended to ensure the funded party obtain independent legal advice about the terms of the funding agreement and that the funded party and the third-party funder are the only parties to the funding agreement in order to avoid any potential attorney conflicts of interest in case there is any disagreement between the funded party and the funder on a material issue during arbitral proceedings.[10)]

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8) "The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration." Non-Waivable Red List, 1.3, 2014 IBA Guidelines.

9) On the other hand, there had been some arguments that third-party funding does not raise issues of conflicts of interest because third-party funding is just one of many possible ways of financial support for pursuing or defending a dispute. The argument was that the merits of a dispute are not relevant to source of dispute financing, so there is no reason to treat third-party funding differently than other ways of financially pursuing a claim, such as, corporate loans. The ICCA Report, *supra* note 2, p. 85.

10) The ICCA Report, *supra* note 2, p. 191.

## 2. Disclosure of third-party funding to involved parties of the arbitration

### (1) The need for disclosure of the existence of the third-party funder

In order to preclude the possibility of a conflict resulting in an unfortunate and costly challenging and removal of an arbitrator during the proceeding, or what may be worse, challenging of the arbitral award, it would be best for any third-party funding arrangement to be disclosed upfront so that everyone involved would be on notice of the fact not only that one of the parties is funded by a third party, but also by whom. If there is any potential conflict between any arbitrator and the third-party funder, it would be best to minimize the foreseeable cost and to address such conflict at the outset.[11] Therefore, there is general consensus that the existence of a third-party funding agreement and the identity of the funder should be disclosed.[12] As to the specific terms of the funding agreement, however, unless the funding agreement itself is a subject of the dispute, disclosure of the terms of the funding agreement would not be necessary to assess potential conflicts of interest.[13] Termination of the funding

11) In addition, an ICSID tribunal has stated that the relevant factors to justify an order for disclosure would be for the purposes of transparency and to *identify the true party to the case*, for the tribunal to fairly decide how costs should be allocated at the end of the arbitration, and if there is any application for security for costs. (emphasis added.) *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti v. Turkmenistan* (ICSID Case No. ARB/12/6), Decision on Jurisdiction (Feb. 13, 2015) para 50. The concept of "true party" here is consistent with the IBA Guidelines on Conflicts of Interest in that parties with direct economic interests in the arbitral award may be considered equivalent to the party in terms of assessing potential conflicts of interest.

12) For instance, the Hong Kong Arbitration Ordinance now requires that the existence of third-party funding and identity of the funder be disclosed.

13) *See EuroGas Inc. and Belmont Resources, Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Transcript of the First Session and Hearing on Provisional Measures (Mar. 17, 2015) p. 145 ("We think that the Claimants should disclose the identity of the third-party funder, and that third-party funder will have the normal obligations of confidentiality."). In this case, the claimant had previously voluntarily disclosed that it was funded by a Luxembourg-based funder but had not disclosed the identity of the funder until the tribunal ordered it to do so. Therefore, the ICCA Task Force's recommendation that if the terms of a third-party funding agreement are deemed relevant and therefore should be disclosed, then the arbitral tribunal should either order redaction or take other appropriate measures, such as to restrict disclosure to specified individuals or only to the arbitral tribunal, in order to protect privileged information in the funding agreement, is reasonable. The ICCA Report, *supra* note 2, p. 132. On the other hand, it should be noted that an English court made a clear distinction between privileged information in the funding agreement that should not be subject to disclosure, as opposed to sensitive information that may reveal a

agreement, if termination was not caused by the end of arbitration itself, should be disclosed in order to alert all involved parties to arbitration. It would also be beneficial to clearly set forth conditions for termination of the funding agreement and disclose such conditions at the time of initial disclosure of the existence of funding agreement.

Because third-party funders are not parties to the arbitration themselves, they cannot be held directly accountable for disclosure of their existence. Parties to the arbitration, on the other hand, would not only have direct knowledge of whether they are funded, but it would also be in their best interests to ensure the enforceability of their arbitral awards. While arbitrators are generally under a duty to make reasonable inquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his/her impartiality or independence,[14] the initial mandatory disclosure by the funded parties would be an efficient way of providing notice to all parties involved.

As to when such disclosure should be made, the proposed amendments to the Investor-State Investment Arbitration (ICSID) Rules provide that the funded party "shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. . . . immediately upon registration . . . or upon concluding a third-party funding arrangement after registration." Such Rule leaves open the possibility of parties to enter into third-party funding agreements at any time during the course of their arbitral proceedings as long as it is disclosed immediately to the ICSID Secretariat, which would not only pose potential conflicts of interest issues with an arbitrator and the third-party funder, but could ultimately pose challenges to the integrity of the arbitral award.[15] Thus, it was suggested that disclosure of existence of third-party funding arrangement should be made prior to selection of arbitrators in order to facilitate the conflicts of interest assessment.[16] However, although it may be more common for claimants to obtain third-party funding, if all funding agreements must be entered into by the time of selection of arbitrators, this likely insufficient amount of time may impose an inadvertent disadvantage to respondents, who may be

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tactical advantage if disclosed, however not protected by privilege. *Re Edwardian Group* [2017] EWHC 2805.

14) IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard, 7(d).

15) Sarah E. Moseley, "Disclosing Third-party Funding in International Investment Arbitration," 97 Tex. L. Rev. 1181, 1199 (2019).

16) *Id.*, at 1200-01.

interested in seeking and obtaining third-party funding themselves. Moreover, because it is impractical to assume that all funding agreements may be completed prior to selection of arbitrators in practice, requiring disclosure be made before selection of arbitrators would be equivalent to prohibiting funding agreements after such point in time. Therefore, requiring disclosure "immediately" after conclusion of the funding agreement, or a specific number of days after conclusion of the funding agreement may be easier to enforce than "as soon as practicable" after conclusion of funding agreement, or other similar language to that effect.

### (2) Issues raised by disclosure of confidential and legally privileged information to third-party funders

Issues of confidentiality and legally privileged and/or protected information still arise as parties generally would need to disclose sensitive information to potential funders as well as actual funders in order to obtain and maintain funding throughout their arbitral proceedings. Such issues are relevant because third-party funders are not bound by professional ethical rules like legal practitioners are, and especially because there is no prevailing international standards or rules regarding privileges or taking of evidence in international arbitration. Therefore, it is generally up to arbitral tribunals who oversee proceedings before them in addition to what parties have agreed to pursuant to party autonomy.

Moreover, the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (2010) (hereinafter the "IBA Rules of Evidence") are non-binding rules that have been widely accepted by the international arbitration community for having established a balanced approach between the common law and civil law jurisdictions. In particular, Article 9 of the IBA Rules of Evidence deals with admissibility and assessment of the evidence, and with respect to issues of legal privilege, the Rules grant discretion to arbitral tribunals to take into consideration the need to protect confidentiality of a document created or stated or oral communication made in connection with and for the purpose of providing or obtaining legal advice or for the purpose of settlement negotiations, any possible waiver of applicable legal privileges due to reasons, such as, consent or prior disclosure, among others, as well as the need to maintain fairness and equality between parties, especially if they are

subject to different legal or ethical rules.[17] Arbitral institutional rules may have relevant provisions relating to evidence and production of such, but generally, they state that arbitral tribunals are the final decision-makers relating to admissibility of any evidence and therefore are less specific than the IBA Rules of Evidence.[18]

In addition, due to party autonomy, parties who may be familiar with extensive discovery procedures from common law jurisdictions – for instance, the U.S. – may opt for application of legal privileges, such as, attorney-client privilege and doctrine of work-product protection in their arbitral proceedings to safeguard information against disclosure and/or discovery. While the attorney-client privilege protects the client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney, work-product refers to tangible material or its intangible equivalent, whether written or not written, that was either prepared by or for a lawyer, or prepared for litigation. Work-product is generally exempt from discovery or other compelled disclosure pursuant to the Federal Rules of Civil Procedure Rule 26(b)(3).[19] Therefore, in the United States, if a third-party funder is currently funding a case, because a funder would most likely fall within one of the "consultant, surety, indemnitor, insurer, or agent," under the Federal Rule of Civil

17) The IBA Rules of Evidence, Art. 9.3 (2010).

18) For instance, Article 19 of the UNCITRAL Model Law on International Commercial Arbitration (2006) provides that while parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, absent such agreement, arbitral tribunals may conduct arbitral proceedings in such manner as they consider appropriate as to admissibility, relevance, materiality, and weight of any evidence. *See also,* The International Chamber of Commerce (ICC) Arbitration Rules (2017) Article 22: Conduct of the Arbitration. "2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. 3) Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."

19) Federal Rules of Civil Procedure, Rule 26(b)(3)(A) provides the following: "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent.) But subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Rule 26(b)(3)(B) provides that if the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Procedure 26(b)(3)(A), the documents or tangible things created by the funder in anticipation of litigation or for litigation purposes would be protected from disclosure. However, if a funder is not currently funding a case, then information that the funder has received from the party may not be protected by the work-product doctrine.[20]

On the other hand, in *Mondis Tech., Ltd. v. LG Elec., Inc.*, the court held that the documents prepared with the assistance of counsel and with the intent of coordinating potential investors to aid in future possible litigation were protected by the work-product doctrine: "Although the documents may not have been prepared in connection with ongoing litigation, the documents were at a minimum created for possible future litigation. . . . All of the documents were prepared, however, with the intention of coordinating potential investors to aid in future possible litigation." Therefore, although documents were disclosed to third parties, such disclosure did not waive any protection because they were subject to non-disclosure agreements and therefore "did not substantially increase the likelihood that an adversary would come into possession of the materials."[21] Additionally, the Court of Chancery of Delaware concluded that when a claim holder is trying to convince a third-party funder of the merits of its case, negotiations between the potential funder and the claim holder would most likely involve an attorney's mental impressions, theories, and strategies about the case, which would have been prepared in preparation of litigation. Moreover, the court held that the terms of the final funding agreement, including financing premium or acceptable settlement conditions, could also reflect an analysis of the merits of the case.[22]

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20) The ICCA Report, *supra* note 2, p. 129, n. 293.

21) *Mondis Tech., Ltd. v. LG Elec., Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, at *3 (E.D. Tex. May 4, 2011). *See also, Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 731-38 (N.D. Ill. 2014)(the court concluded that the common interest exception to attorney-client privilege did not apply to communications with third-party litigation funder but that documents plaintiffs shared with funder were protected work product); *Devon IT, Inc. v. IBM Corp.*, No. 10-2899 (E.D. Pa. Sept. 27, 2012)(the court determined that communications with funders and funding agreement drafts were work product and were protected by the attorney-client privilege under the common interest doctrine because the third-party funder and the funded party shared a "common interest" in the successful outcome of litigation, which otherwise the funded party may not have been able to pursue without the financial assistance by the third-party funder in question); *but see Leader Technologies v. Facebook*, a Delaware court determined that a funder does not fall within the common interest exception as the interest between the party and the funder were purely commercial, and therefore, the party failed to prove that the interests shared with third-party funder was legal. 719 F. Supp. 2d 373 (D. Del. 2010).

Lastly, a party seeking funding should always ensure that a non-disclosure agreement is entered into before any substantive discussions with a potential funder are had, no matter how preliminary of the discussion stage may be, in order to safeguard confidential information about the party as well as the party's arbitration proceedings. While non-disclosure agreements and confidentiality agreements are not absolute barriers to disclosure, considering Article 9(2)(e) of the IBA Rules of Evidence, which grants authority to arbitral tribunals to decline production of documents "on grounds of commercial or technical confidentiality that the arbitral tribunal determines to be compelling," it seems that documents shared between the funded parties and funders subject to non-disclosure agreements would likely constitute commercial confidentiality, based on which the arbitral tribunals may decline to grant requests for production.[23]

## 3. Cost allocation and security for costs[24]

### (1) Cost allocation and security for costs in international arbitration

In international arbitration, arbitral tribunals generally have discretion to allocate liability for costs, unless otherwise agreed to by the parties, or the relevant arbitration rules or applicable laws provide otherwise.[25] Furthermore, with third-party funding,

22) *Carlyle Inv. Mgmt. LLC v. Moonmouth Co.*, C.A. No. 7841-VCP, at *9 (Feb. 24, 2015).

23) The ICCA Report, *supra* note 2, p. 121.

24) According to the proposed amendments to ICSID Arbitration Rules, Rule 53 governing Security for Costs, "[t]he existence of third-party funding may form part of such evidence but is not by itself sufficient to justify an order for security for costs." "In determining whether to order a party to provide security for costs, the arbitral tribunal shall consider all relevant circumstances, including: (a) that party's ability to comply with an adverse decision on costs; (b) that party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and (d) the conduct of the parties." Rule 53(3).

25) For instance, Section 61 of the English Arbitration Act (1996) provides: "(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties. (2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs." As to amounts of recoverable costs, Section 63 of the English Arbitration Act provides: "(3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit. If it does so, it shall specify (a) the basis on which it has acted, and (b) the items of recoverable costs and the amount referable to each. (4) If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice

arbitral tribunals are presented with questions as to whether the existence of third-party funding affects the recoverability of its legal costs by the successful claimant if the costs of funding should be recoverable, and whether the third-party funder should be ordered to contribute to the costs of the successful non-funded party, among others.

Of particular significance, in *Essar Oilfield Servs. Ltd. v. Norscot Rig Mgmt. Pvt Ltd.*, the arbitrator ordered Essar to pay costs that the claimant had paid to a third-party funder after concluding that "other costs" in the English Arbitration Act were not limited to legal costs but extended to any other reasonable costs incurred by parties, which in this case, included funding costs.[26] The arbitrator also noted a key finding that it was Essar that had "cripple[d] Norscot financially by resolutely refusing to make payment" among other unreasonable conduct, which left Norscot with no choice but to enter into the funding agreement.[27] After specifically noting that the arbitrator was entitled to take account the parties' conduct, the tribunal noted the fact that it had already condemned Essar of unreasonable conduct against Norscot and awarded costs.[28]

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to the other parties) which may (a) determine the recoverable costs of the arbitration on such basis as it thinks fit, or (b) order that they shall be determined by such means and upon such terms as it may specify. (5) Unless the tribunal or the court determines otherwise, (a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and (b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favor of the paying party." Also, the Hong Kong Arbitration Ordinance Section 74(2) grants arbitral tribunals with discretion to regard all relevant circumstances, including the fact that a written settlement offer is made, in their decisions to award costs by whom and in what manner to be paid.

As to arbitral institution rules regarding costs, the UNCITRAL Rules are representative: Article 40(1) provides that the arbitral tribunal shall fix the costs of arbitration in the final award, and if it deems appropriate, in another decision. Article 42 provides that the costs of the arbitration shall be borne by the unsuccessful party, but the arbitral tribunal may apportion each of such costs between the parties if the tribunal determines that apportionment is reasonable, taking into account the circumstances of the case.

26) The funding agreement entitled Norscot's funder, to a fee of 300 percent of the funding or 35 percent of the recovery, whichever was higher, and Norscot sought against Essar the total sum owed to its funder. Generally, "other costs" are costs that relate to arbitral proceedings, but this court found that when a party obtains funding to enable itself to enforce its legal rights, "it is very hard to see how that is excluded for all purposes" from 'other costs' especially that these costs were "something necessary to get the arbitration off the ground or on the road."

27) *Essar Oilfields Servs., Ltd. v. Norscot Rig Mgmt. Pvt Ltd.*, Queen's Bench Division (Commercial Court) Sept. 15, 2016 [2016] EWHC 2361 (Comm), paras. 21-22.

28) *Id.,* at para. 35. But, on the other hand, some arbitral tribunals in investor-State arbitrations have adopted the position that there is no principle that the existence of the funding agreement should

Moreover, in light of increasing costs involved in international arbitration, parties have sought security for costs in order to ensure their recoverability of costs. It is generally accepted that arbitrators have the authority to award orders for security for costs under provisions for interim measures.[29] Upon such applications for security, arbitral tribunals would order security for costs if a party shows that (i) it has a *prima facie* case of succeeding on the merits; and (ii) the other party lacks financial means and thus is not likely to be in a position to satisfy a future adverse costs award.[30] Particularly in arbitral proceedings with third-party funders, the non-funded party may have doubts as to the funded party's ability to pay adverse costs if the funded party's claims were unsuccessful. Some funding agreements include specific provisions as to the third-party funder's liability for adverse costs, and because arbitral tribunals lack authority to order third-party funders – who are not bound to the arbitration – to pay for adverse costs to the non-funded party, the non-funded party may be more insecure about its ability to recover reasonable costs even after it prevails.

Therefore, some justify the need for early disclosure of the existence of a third-party agreement for arbitral tribunals to assess the need for security for costs.[31] However, as aforementioned, not only the parties in financial distress seek and obtain third-party funding but also others with substantial financial resources. Consequently, the existence of the funding agreement alone may not be an accurate indicator as to the funded party's ability to pay for adverse costs.

### (2) Adverse costs ordered against third-party funders?

Generally, arbitral tribunals lack authority to order third-party funders, who are non-parties to arbitration to pay for adverse costs. On this point, there is a suggestion that arbitral tribunals should award costs against a third-party funder if the funding

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be taken into their consideration of determining the amount of recoverable costs. *Kardassopoulos and Fuchs v. Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award (Mar. 3, 2010); *RSM Prod. Corp. v. Grenada* (ICSID Case No. ARB/05/14), Annulment Proceeding, Order of the Committee Discontinuing the Proceeding and Decision on Costs (Apr. 28, 2011); and *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2), Annulment Proceeding, Order Taking Note of the Discontinuance of the Proceeding (Jul. 11, 2011).

29) Gary Born, *International Commercial Arbitration* (2009), pp. 2294-95.

30) *Id.* pp. 2003-05.

31) Maxi C. Scherer, "Third-party Funding in International Arbitration," Chap. 8, p. 97.

agreement for that arbitration contains an obligation to pay any adverse costs award, and the adverse costs order arises in relation to costs incurred in a period in which the arbitration was funded by the third-party funder in question, taking into account the fact that not all funders may contract for such obligation and also that not all proceedings are funded from the outset so it would be inequitable for costs to be ordered in respect of matters arising prior or after the actual period of funding.[32] From a policy point of view, there is also a suggestion that for a third-party funder whose investment might turn out to be very profitable in the event of a successful claim, it may be fair for that funder to be directly liable for adverse costs in case its investment turns out to be unsuccessful.[33] However, because the funders are neither parties to the arbitration nor typically agree to be bound by arbitration agreements, they should not be required to pay for any adverse costs award(s).[34]

## 4. Control by the third-party funder over arbitral proceedings

The amount of control that the funder may exert over the arbitral proceedings is another common concern for the parties as well as those in favor of regulation of third-party funding. The major concern is about whether the funder would exert control over whether or when the funded party should settle and at what amount. At the same time, from the funder's perspective, it is only natural to want to closely monitor its investment.[35]

This concern may be overcome or mitigated at the drafting stage of the funding agreement. In practice, the vast majority of these arrangements are structured to ensure that the funder does not have control over the case or the funded party.[36] However,

32) Oliver Gayner and Susanna Khouri, "Singapore and Hong Kong: International Arbitration Meets Third Party Funding," 40 Fordham Int'l L. J. 1033, 1045 (2017).

33) The ICCA Report, *supra* note 2, p. 162.

34) *Id.*

35) While the specifics vary depending on each funder, it should be assumed that at a minimum, the funder will require reports about the progress of the case, the right to monitor fees and/or approve expenditures, notification of any significant developments (for instance, settlement offers or new information that changes outlook on the case), as well as direct access to the funded party's legal team. In some cases, the funder may want to be as active as to attend client meetings and/or hearings, being copied on correspondence, and providing input on strategic issues. To this extent, some funded parties regard funder's active involvement as a 'value added' beyond the funder's provision of capital. The ICCA Report, *supra* note 2, p. 28.

because funding agreements most likely have provisions relating to protection of funder's investment, ongoing funding would be subject to merits of the case and terms of the funding agreement. Compliance with such terms by the funded party – particularly more so if the party is actually financially dependent and therefore is in need of funding – would operate as indirect control by the funder, even in the absence of any explicit terms granting extensive control by the third-party funder over conduct of arbitral proceedings.[37]

# Ⅳ. Recent Legislations Permitting Third-party Funding of Arbitration in Hong Kong and Singapore

## 1. The Amended Hong Kong Arbitration Ordinance (Cap. 609)

Hong Kong has held on to the common law doctrines of champerty and maintenance until June 14, 2017, when it approved third-party funding of arbitrations seated in Hong Kong by passing the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, with most parts of the legislation having come into force by June 23, 2017 and the remaining parts on February 1, 2019. This Part 10A of the Arbitration Ordinance (Cap. 609) (hereinafter the "Arbitration Ordinance") was added to ensure that third-party funding of arbitration[38] is not prohibited by common law doctrines and to provide for measures and safeguards in relation to third-party funding of arbitration.[39]

The Arbitration Ordinance requires that any third-party funding agreement be made

36) The ICCA Report, *supra* note 2, p. 28.

37) *Id.*

38) Third-party funding of arbitration is an "arbitration under a funding agreement to a funded party by a third party funder and in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement." The Hong Kong Arbitration Ordinance, Section 98G.

39) The Hong Kong legislation does not distinguish between international or domestic arbitration, so third-party funding would be permitted to international and domestic arbitrations seated in Hong Kong.

in writing, between a funded party[40] and a third-party funder, where a third-party funder means a person who is a party to a funding agreement for the provision of arbitration funding[41] for an arbitration to a funded party by the person and who does not have an interest recognized by law in the arbitration other than under the funding agreement.[42] The Arbitration Ordinance makes clear that Part 10A does not apply to lawyers acting for parties in arbitration, so lawyers cannot fund their own cases.[43] This is consistent with Hong Kong's prohibition of contingency fee arrangements pursuant to Principle 4.16 of the Solicitors' Guide to Professional Conduct and Section 64 of the Legal Practitioners Ordinance (Cap. 159). On the other hand, there is no provision prohibiting lawyers from being third-party funders themselves for cases that they are not acting as legal representatives.

The Arbitration Ordinance also authorizes issuance of the Code of Practice for Third Party Funding of Arbitration (hereinafter the "Code"), which came into force on June 23, 3017, to be read in conjunction with the Arbitration Ordinance. The Code provides the practices and standards that third-party funders are ordinarily expected to comply in carrying on activities in connection with third-party funding of arbitration in Hong Kong. The Code governs the funding agreement, capital adequacy requirements of the third-party funder, conflicts of interest, confidentiality and legal professional privilege, liability for costs, and grounds for termination, in addition to other procedural issues

40) A funded party is "a person who is a party to an arbitration and who is a party to a funding agreement for the provision of arbitration funding for the arbitration to the person by a third party funder." The Arbitration Ordinance, Section 98I (1). Here, a party to an arbitration is "a person who is likely to be a party to an arbitration that is yet to commence and a person who was a party to an arbitration that has ended." The Arbitration Ordinance, Section 98I (2).

41) "Arbitration funding" means money or any other financial assistance, in relation to any costs of the arbitration, and "costs" refer to costs and expenses of the arbitration, including pre-arbitration costs and expenses as well as the fees and expenses of the arbitration body. The Arbitration Ordinance, Section 98F.

42) The Arbitration Ordinance, Section 98J.

43) "This Part does not apply in relation to the provision of arbitration funding to a party by a lawyer who, in the course of the lawyer's legal practice, acts for any party in relation to the arbitration. If a lawyer works for, or is a member of, a legal practice (however described or structured), the references to "lawyer" include the legal practice and any other lawyer who works for, or is a member of, the legal practice." Arbitration Ordinance, Section 98O. A "lawyer" here includes not only persons who are enrolled on the barristers kept under section 29 of the Legal Practitioners Ordinance and on the roll of solicitors kept under section 5 of such ordinance but also a person who is qualified to practice the law of a jurisdiction other than Hong Kong, including a foreign lawyer. Arbitration Ordinance, Section 98O.

relating to disputes regarding the funding agreement. Non-compliance with the Code would be admissible in evidence in proceedings before any court or arbitral tribunal.[44] In this section, the recent legislative developments in Hong Kong will be examined by each of the four issues examined above.

### (1) Third-party funders

The Arbitration Ordinance broadly defines a third-party funder as "a person (a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b) who does not have an interest recognized by law in the arbitration other than under the funding agreement."[45] The Code provides further that funders need to "take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement before entering into it,"[46] maintain access to minimum capital of HK$20 million to "pay all debts when they become due and payable," and maintain capacity to "cover all of its aggregate funding liabilities under all of its funding agreements for a minimum period of 36 months."[47]

### (2) Conflicts of interest

The Arbitration Ordinance does not directly address the issue of conflicts of interest but ensures that the content of the Code to require third-party funders to ensure their funding agreements set out key features, risks, and terms, including having effective procedures for addressing "potential, actual or perceived conflicts of interest and the procedures" to enhance the protection of funded parties.[48] As a result, the Code charges the third-party funders with the responsibility to effectively manage any

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44) The Arbitration Ordinance, Section 98S. Compliance with the Code is to be overseen by an advisory body in Hong Kong to which each third-party funder must submit information regarding its financial position and annual returns regarding any complaints received.

45) The Arbitration Ordinance, Section 98J. Additionally, Section 98J (2) adds that "a person who does not have an interest in an arbitration includes (a) a person who does not have an interest in the matter about which an arbitration is yet to commence; and (b) a person who did not have an interest in an arbitration that has ended."

46) The Code, Section 2.3.

47) The Code, Section 2.5.

48) The Arbitration Ordinance, Section 98Q (1)(f).

conflicts of interest and maintain written procedures for duration of funding agreements.[49] Therefore, in Article 2.7(4), the Code provides a list of written procedures for third-party funders to implement and maintain to facilitate the conflicts assessment process.[50]

### (3) Disclosure

#### 1) Disclosure of information to potential third-party funders

While the Arbitration Ordinance allows communication of information relating to the arbitral proceedings under the arbitration agreement or an arbitral award made in arbitral proceedings by a party to a person for the purposes of having or seeking third-party funding of arbitration from that person, which is an exception to the confidentiality obligation under Section 18 of the Arbitration Ordinance, any further communication is not permitted unless for the specifically allowed reasons set forth under Section 98T (2) of the Arbitration Ordinance.[51] The Code reaffirms the duty for funders to observe the confidentiality of arbitration.[52]

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49) "The third-party funder must maintain, for the duration of the funding agreement, effective procedures for managing any conflict of interest that may arise in relation to activities undertaken by the third-party funder in relation to the funding agreement and to ensure to not take any steps that cause or may cause the funded party's legal representative to act in breach of its professional duties." The Code, Section 2.6.

50) The written procedures are the following: "(a) monitoring the third party funder's operations to identify and assess potential conflicting interests; (b) disclosing conflicts of interest to funded parties and potential funded parties; (c) managing situations in which interests may conflict; (d) protecting the interests of funded parties and potential funded parties; (e) dealing with situations in which a lawyer acts for both the third party funder, a lawyer and a funded party (or potential funded party); (g) reviewing the terms of a funding agreement to ensure the terms are consistent with Part 10A of Cap. 609 and this Code; and (h) marketing to potential funded parties." The Code, Section 2.7(4).

51) Section 98T (2) of the Arbitration Ordinance provides the following: "However, the person may not further communicate anything communicated under subsection (1), unless (a) the further communication is made (i) to protect or pursue a legal right or interest of the person, or (ii) to enforce or challenge an award made in the arbitration, in legal proceedings before a court or other judicial authority in or outside Hong Kong; (b) the further communication is made to any government body, regulatory body, court or tribunal and the person is obliged by law to make the communication; or (c) the further communication is made to a professional adviser of the person for the purpose of obtaining advice in connection with the third party funding of arbitration."

52) Section 2.8 provides the following regarding confidentiality and legal professional privilege: "A third party funder will observe the confidentiality and privilege of all information and documentation

2) Disclosure of the third-party funding agreement

The Arbitration Ordinance mandates disclosure of the funding agreement: the funded party must give written notice of the fact that a funding agreement has been made and the name of the third-party funder. The notice must be given for a funding agreement made on or before the commencement of the arbitration, on the commencement of the arbitration, or for a funding agreement made after the commencement of the arbitration within 15 days after the funding agreement is made. The notice must be given to each other party to the arbitration and the arbitration body.[53] Furthermore, in the event that the funding agreement ends for a reason other than the end of arbitration itself, the funded party must give written notice to each arbitral party and the arbitration body about the fact that the funding agreement has ended and the date of such termination, within 15 days after the funding agreement ends.[54] While any non-compliance with these measures and safeguards, alone, does not render anyone liable to any judicial or other proceedings, any compliance or failure to comply may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.[55]

According to the Code, the third-party funder must remind the funded party of its obligation to disclose information about the funding of arbitration, but the Code does not charge the funded party with any obligation to disclose details of the funding agreement, except as required by the funding agreement, or as ordered by the arbitration body in an arbitration, or as otherwise required by law.[56] The Code makes it abundantly clear that the terms of the funding agreement do not need to be revealed unless otherwise required either by relevant agreement, rules, and/or laws, precluding any concerns regarding confidential and material information being used adversely against the funded party if terms of the funding agreement were required to be disclosed.[57]

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relating to the arbitration and the subject of the funding agreement to the extent that Hong Kong law, or other applicable law, permits." In addition, Article 45 of the HKIAC Rules, which governs confidentiality of the arbitration under the arbitration agreement, there is a narrow category of exceptions where a party or party representative is not prevented from publication, disclosure, or communication of such information in Article 45.3.

53) The Arbitration Ordinance, Section 98U.

54) The Arbitration Ordinance, Section 98V.

55) The Arbitration Ordinance, Section 98W.

56) The Code, Sections 2.10-2.11.

57) "To avoid any doubt, the funded party to an arbitration does not have any obligation to disclose

Additionally, the HKIAC Arbitration Rules Article 44 requires the existence of the funding agreement and identity of third-party funder in HKIAC administered arbitrations be disclosed in a mandatory written disclosure. If the funding agreement is made before or upon commencement of the arbitration, such mandatory disclosure must be made in the Notice of Arbitration, Answer to the Notice of Arbitrator application, or Request for joinder/answer to request for joinder, and as soon as practicable after the funding agreement is made, if it is made after commencement of arbitration.[58)]

While there is a general consensus that the existence of a third-party funding agreement and identity of the third-party funder should be disclosed in order to avoid potential conflicts of interest, to promote transparency of the proceedings, and for overall integrity of the arbitration proceedings, timing of such disclosure is much debated.[59)] Article 44 of the HKIAC Arbitration Rules allows disclosure of the funding agreement made after commencement of arbitration "as soon as practicable," while the Arbitration Ordinance allows 15 days after the funding agreement is entered into for disclosure, if such funding agreement is made after the arbitral proceedings have commenced. These timelines may pose problems of potential conflicts of interest with the arbitral tribunal, if the tribunal has been constituted at the time of the disclosure. Belated disclosure may hinder efficient conduct of proceedings if there is, in fact, a conflict, and a challenge against an arbitrator is made.[60)] However, setting a specific

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details of the funding agreement except as required by the funding agreement, or as ordered by the arbitration body in an arbitration, or as otherwise required by law." The Code, Section 2.11.

58) The 2018 HKIAC Administered Arbitration Rules, Art. 44.

59) The proposed amendments to the ICSID Arbitration Rules for third-party funding are the following: "Rule 14 Notice of Third-party Funding: (1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). (2) A non-party referred to in paragraph (1) does not include a representative of a party. (3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice. (4) The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b). (5) The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3) if it deems it necessary at any stage of the proceeding." (emphasis added.) ICSID Working Paper #4, Proposals for Amendment of the ICSID Rules, Vol. 1, February 2020.

deadline, such as, within 15 days of entering into the funding agreement, rather than leaving open by language such as "as soon as practicable," may be more effective for enforcement, as aforementioned.

### (4) Cost allocation and security for costs

Section 98Q of the Arbitration Ordinance provides that the Code require third-party funders to ensure whether and to what extent third party funders will be liable to funded parties for adverse costs, insurance premiums, security for costs, and other financial liabilities in the funding agreements.[61] Thus, the Code directs funders to state in funding agreements whether the funder agrees to be liable for adverse costs, insurance premiums, or any other financial liability, and whether it will provide security for costs if such security is ordered.[62]

### (5) Control over conduct of arbitral proceedings by third-party funders

The Arbitration Ordinance does not directly address the degree of control by the third-party funders over the conduct of arbitral proceedings. However, the Ordinance directs the Code to ensure that third-party funders have funding agreements setting out

60) There is some concern about the proposed amendments to the ICSID Arbitration Rules, where "immediately upon registration . . . or upon concluding a third-party funding arrangement after registration" in that parties to arbitration may enter into a funding agreement at any time during the course of the proceedings, as long as it was immediately disclosed to the ICSID Secretariat. Once arbitral proceedings have commenced, disclosure, no matter how "immediately" disclosure is made after the funding agreement has been entered into, the Secretariat would need to take the time to consider possible conflicts of interest, thereby hindering the procedures. Thus, it was suggested that the funded party should disclose its funding to the opposing party and arbitral institution prior to the appointment of arbitrators. Sarah E. Moseley, "Disclosing Third-party Funding in International Investment Arbitration," 97 Tex. L. Rev. 1181, 1199-1201 (2019).

61) The Arbitration Ordinance, Section 98Q (1)(b)(ii).

62) The Code, Section 2.12. In addition, Article 34 of the HKIAC Arbitration Rules governs costs of the arbitration, which include the arbitral tribunal fees, reasonable travel and other expenses incurred by the arbitral tribunal, the reasonable costs of expert advice and of other assistance required by the arbitral tribunal, including fees and expenses of tribunal secretary, the reasonable costs for legal representation and other assistance, if such costs were claimed during the arbitration, and the registration fee and administrative fees payable to HKIAC as well as expenses payable to HKIAC. Under the HKIAC Rules, arbitral tribunals are granted the discretion to take into account the circumstances of the case, including any third-party funding arrangement in determining all or part of the costs of arbitration. Articles 34.1 and 34.4 of the HKIAC Arbitration Rules.

key features, risks, and terms, one of which is the degree of control that third party funders will have in relation to an arbitration.[63] According to the Code, the third-party funder "will not seek to influence the funded party or the funded party's legal representative to give control or conduct of the arbitration to the third party funder, except to the extent permitted by law."[64] Despite the level of control explicitly stated in the terms of the funding agreement, however, the funded party would not be completely free from the funder especially if the party is relying on the funder's financial assistance in order to proceed with arbitral proceedings, as aforementioned.

## 2. Singapore – Civil Law Act Chapter 43 (2017)

By amending the Civil Law Act, Singapore abolished the tort of champerty and maintenance only for arbitration[65] and related proceedings[66] and also amended the

63) The Arbitration Ordinance, Section 98Q.

64) The funding agreement must set out clearly (1) that the third-party funder will not seek to influence the funded party or the funded party's legal representative to give control or conduct of the arbitration to the third-party funder except to the extent permitted by law, (2) that the funder will not take any steps that cause or are likely to cause the funded party's legal representative to act in breach of professional duties, and (3) that the funder will not seek to influence the arbitration body and any arbitral institution involved. The Code, Section 2.9.

65) Section 5A of the Civil Law Act 2017. "Abolition of tort of maintenance and champerty 5A. (1) It is declared that no person is, under the law of Singapore, liable in tort for any conduct on account of its being maintenance or champerty as known to the common law. (2) Subject to Section 5B [Validity of certain contracts for funding of claims], the abolition of civil liability under the law of Singapore for maintenance and champerty does not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal." A third-party funding contract means "a contract or agreement by a party or potential party to dispute resolution proceedings with a third-party funder for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled." The Singapore Civil Law Act 2017 Section 5B.

66) The following classes of proceedings are prescribed dispute resolution proceedings: (a) international arbitration proceedings; (b) court proceedings arising from or out of or in any way connected with international arbitration proceedings; (c) mediation proceedings arising out of or in any way connected with international arbitration proceedings; (d) application for a stay of proceedings referred to in section 6 of the International Arbitration Act (Cap. 143A) and any other application for the enforcement of an arbitration agreement; (e) proceedings for or in connection with the enforcement of an award or a foreign award under the International Arbitration Act. In October 2019, the Law Ministry of Singapore announced that third-party funding can be used in "domestic arbitration, certain proceedings in the Singapore International Commercial Court and mediations connected with these proceedings." Quentin Pak, "*Singapore Expands the Permissibility of*

Legal Profession Act (Cap. 161)[67] and the Legal Profession (Professional Conduct) Rules, imposing new duties for legal practitioners to disclose of the existence of any third-party funding contract related to the costs of those proceedings and the identity and address of any third-party funder involved.[68] The Civil Law (Third-Party Funding) Regulations 2017 came into force on March 1, 2017, pursuant to powers conferred by Section 5(B)(8) of the Civil Law Act, to prescribe the qualifications and other requirements of third-party funders, to prescribe a class of dispute resolution proceedings to which third-party funding would be permitted, and to regulate the manner of third-party funding including the requirements that the third-party funders and funded parties must comply with.[69] Below, the same four issues are examined in light of the Singapore legislative developments.

### (1) Third-party funders

The Civil Law Act makes clear that a contract under which a qualifying third-party funder[70] provides funds to any party for the purpose of funding all or part of the costs of that party is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty.[71] Under the Singapore Civil Law Act, a

*Third-Party Legal Finance*," Burford Cap. (Oct. 11, 2019), available at https://www.burfordcapital.com/blog/singapore-expands-the-permissibility-of-third-party-legal-finance/. (Last accessed on Aug. 15, 2020).

67) Section 107 of the Legal Profession Act was amended by inserting subsections 3A and 3B which read as follows: "(3A) To avoid doubt, this section does not prevent a solicitor from (a) introducing or referring a third-party funder to the solicitor's client, so long as the solicitor does not receive any direct financial benefit from the introduction or referral; (b) advising on or drafting a third-party funding contract for the solicitor's client or negotiating the contract on behalf of the client; and (c) acting on behalf of the solicitor's client in any dispute arising out of the third-party funding contract. (3B) In subsection (3A) 'direct financial benefit' does not include any fee, disbursement or expense payable by the solicitor's client for the provision of legal services by the solicitor to the client; 'third-party funder' and 'third-party funding contract' have the same meanings as in section 5B of the Civil Law Act (Cap. 43)."

68) Rule 49A of Singapore Legal Profession (Professional Conduct) (Amendment) Rules (2017).

69) Section 5B(8) of the Civil Law Act.

70) The qualifications and other requirements that a qualifying third-party funder must satisfy and continue to satisfy are the following: (a) the third-party funder carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the third-party funder is not a party; (b) the third-party funder has a paid-up share capital of not less than $5 million or the equivalent amount in foreign currency or not less than $5 million or the equivalent amount in foreign currency in managed assets. Singapore Civil Law (Third-party funding) Regulations (2017), para. 4.

"third-party funder" is a person who carries on the business of funding all or part of the costs of dispute resolution proceedings to which the person is not a party.[72] Such definition is narrower than that of the Hong Kong Arbitration Ordinance because a third-party funder has to be in the business of funding in Singapore whereas there is no such requirement in Hong Kong.

### (2) Conflicts of Interest

There are no specific provisions in the Civil Law Act or the Regulations dealing with the issue of conflicts of interest. However, the Singapore International Arbitration Centre (SIAC) has produced Practice Note on Arbitrator Conduct in Cases Involving External Funding in 2017, which requires any potential arbitrator disclose to the Registrar and the disputing parties any circumstances that may give rise to justifiable doubts as to his/her impartiality or independence, including any relationships whether direct or indirect, with an "external funder" as soon as reasonably practicable and in any event before appointment as arbitrator.[73] Here, an "external funder" is any person, legal or natural, who has a direct economic interest[74] in the outcome of the arbitration proceedings.

Also, the Singapore Institute of Arbitrators (SIArb) Guidelines provide that third-party funders should not engage in any conduct to induce, cause, or likely to cause the funded party's legal practitioner to act in breach of their professional duties to their clients, among others.[75] Additionally, as to another aspect of potential conflict of interest that may arise due to the existence of third-party funding arrangement, the Guidelines provide that third-party funders should not fund or continue to fund other

71) Section 5B of the Civil Law Act.

72) Section 5B (10) of the Civil Law Act.

73) An arbitrator must immediately disclose to the arbitral parties, to the other arbitrators, and to the SIAC Registrar any circumstances that may give rise to justifiable doubts as to his/her impartiality or independence, including any relationship whether direct or indirect, with an external funder, that may be discovered or arise during the arbitration proceedings. The SIAC Practice Note, para. 6.

74) "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. The SIAC Practice Note, para. 3.

75) The Singapore Institute of Arbitrators (SIArb) Guidelines to Third Party Funders, para. 6.1.1. The SIArb has produced non-binding guidelines for third-party funders to promote best practice for third-party funders in Singapore-seated arbitrations.

parties to the same arbitral proceedings causing a conflict of interests between or among the funded parties.[76]

(3) Disclosure

1) Disclosure of information to third-party funders

While there is no specific provision in the Civil Law Act or Regulations regarding sharing of information with potential third-party funders and applicable privileges to protect confidentiality of information, the SIArb Guidelines for Third Party Funders provide that a third-party funder must observe the confidentiality and/or privileged nature of all information and documentation relating to the funded party's dispute to the extent provided by law, and subject to the terms of any confidentiality or non-disclosure agreement entered into between the funder and the funded party. In addition, the funder should not seek disclosure of information from the funded party's legal practitioner that might amount to a breach of privilege or the confidentiality obligations of the funded party's legal practitioner unless such information is sought with the funded party's consent or pursuant to a pre-agreed arrangement approved by the funded party.[77]

2) Disclosure of the funding agreement to other parties in arbitration

Rather than imposing the duty of disclosure to funded parties, as the Hong Kong Arbitration Ordinance has done, the Singapore Legal Profession Rules (amended) require disclosure of the funding agreement to be made at the date of commencement of the dispute resolution proceedings where the funding contract is entered into before the date of commencement of those proceedings, or as soon as practicable after the third-party funding contract is entered into if the third-party funding contract is entered into on or after the date of commencement of the dispute resolution proceedings.[78] While a legal practitioner or a law practice may introduce or refer to a client so long as there is no financial benefit for the introduction/referral, the Legal Profession Rules prohibit any legal practitioner or law practice to hold any share or other ownership

76) The SIArb Guidelines to Third Party Funders, para. 6.1.5.
77) The SIArb Guidelines for Third Party Funders, para. 5.
78) The Legal Profession (Professional Conduct) (Amendment) Rules, Rule 49A (2).

interest in a third-party funder, or receive any commission, fee, or share of the proceedings from the third-party funder.[79]

However, such Profession Rules only govern legal practitioners who are registered to practice in Singapore and not foreign counsel representing parties in arbitrations seated in Singapore, who may not be registered to practice in Singapore. Taking into account the high volume of Singapore-seated arbitrations with foreign legal counsel who are not registered to practice in Singapore and therefore may not be strictly bound by the Singapore Legal Profession Rules, and also in light of the authority and discretion of arbitral tribunals to order further disclosures to funded parties, if necessary, imposing funded parties with the duty of disclosure may be more easily enforceable. Particularly in the context of arbitration where arbitral tribunals generally lack the authority to sanction legal representatives, holding funded parties directly responsible for the duty of disclosure may be more effective in the event of a failure to comply with the duty because then the arbitral tribunal may exercise its discretion and draw adverse inferences against the party, rather than to fault the party for a failure of the party's legal representative to comply with such duty of disclosure.

Also, with the timing of disclosure, the Singapore Legal Profession Rules allow disclosure be made "as soon as practicable" after the third-party funding contract is entered into. As aforementioned, it may be more effective to set a specific deadline, such as, within a particular number of days after the funding agreement has been entered into, for more strict enforceability.

In addition, the Singapore Civil Law Act or the Regulations do not require any notice of termination of the funding agreement, in the event that the funding agreement ends for reasons other than ending of arbitration itself. However, if there is any changes to the existence of the funding agreement and/or identity of the funder, all involved parties should be notified, particularly more so, due to cost allocation and security for costs decisions to be made by the arbitral tribunal. Moreover, the SIAC Practice Note also provides that the arbitral tribunal shall inform the parties of their continuing obligation to inform the tribunal and the Registrar, at the earliest opportunity, of the involvement of an external funder in the arbitration proceedings or any withdrawal or change of external funder.[80] Also, in SIAC arbitrations, arbitral tribunals have the

79) The Legal Profession Rule 49B (1)-(2).

power to conduct inquiries as they deem necessary, including ordering the disclosure of existence of any funding relationship with an external funder and/or the identity, as well as, details of the external funder's interest in the outcome of the proceedings, and/or whether or not the external funder has committed to undertake adverse costs liability.[81)]

### (4) Cost allocation and security for costs

The SIAC Practice Note provides that while the existence of a third-party funding agreement alone should not be taken as an indication of the financial status of the funded party, arbitral tribunals may take into account the existence of the third-party funder in apportioning costs of the arbitration in an order for security, as well as in its cost awards.[82)] In addition, the SIArb Guidelines provide that the funding agreement "shall" state whether the third-party funder is liable to the funded party for any liability for adverse costs, pay any premium to obtain costs insurance, security for costs, and any other financial liability.[83)]

### (5) Control by third-party funders

Of particular importance, the SIArb recommended that the level of the third-party funder's input on proceedings be clearly stated in the funding agreement, as to input on the funded party's decisions with respect to settlements and how the funder's input should be taken into account, as well as, the funder should terminate the funding agreement in the event of clearly prescribed conditions, and to what extent the funder should remain liable for accrued obligations notwithstanding termination of the funding agreement.[84)] In addition, the Guidelines further provide that third-party funders should

80) The SIAC Practice Note, paras. 7-8.

81) The SIAC Practice Note, para. 5. The SIAC Investment Arbitration Rules, Art. 24(l) also provides that an arbitral tribunal has the power to order disclosure of the existence of a party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability.

82) The SIAC Practice Note, paras. 9-11. The SIAC Investment Arbitration Rules also allow arbitral tribunals to take into account any third-party funding arrangements in apportioning the costs of arbitration. SIAC Investment Arbitration Rules, Art. 33.1 (Jan. 1, 2017).

83) The SIArb Guidelines, para. 3.2.

84) The SIArb Guidelines, para. 7.

not seek to influence the funded party's lawyer to obtain control or conduct of the dispute except where and to the extent permitted by the funding agreement.[85]

## Ⅴ. Concluding remarks

While third-party funding has been prevalent in litigation and investment arbitration for some time, it has recently and increasingly become an emerging topic in international commercial arbitration. Therefore, the important relevant issues, such as conflicts of interest, need of disclosure, privileged information, cost awards, and control by third-party funders, that arise and should be discussed were examined in this article. Furthermore, these issues were examined with respect to the recent legislations in Hong Kong and Singapore, which were adopted to specifically permit third-party funding arrangements for international arbitration (and related proceedings).

Although time will reveal the effectiveness of such legislative developments implemented in each jurisdiction, with the appropriate code of conduct and guidelines for arbitrators as well as for parties to arbitration, such developments will certainly further promote Singapore and Hong Kong as leading arbitral seats, as they will be attracting more arbitral parties who may be seeking third-party funding of their claims. Such proactive legislative developments and established practice would also provide helpful guidance to other seats of arbitration globally, as third-party funding arrangements become increasingly more prevalent in international commercial arbitration.

85) The SIArb Guidelines, para. 6.1.4.

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