Third-party funding in arbitration:

5 perspectives on the ICCA-QMUL Task Force draft report

1. An arbitration lawyer: **Tim Hardy**
2. A funder: **Robert Rothkopf**
3. A shipping lawyer: **Simon Kverndal QC**
4. A costs insurance broker: **Steve Jones**
5. A view from Singapore: **Barry Stimpson**

Third-party funding in arbitration—an arbitration lawyer's view

06/10/2017

Arbitration analysis: Following the publication of the ICCA–Queen Mary Task Force 'Draft Report on Third-Party Funding in International Arbitration', Tim Hardy, head of the commercial litigation team at the London office of multinational law firm CMS Cameron McKenna Nabarro Olswang LLP, identifies the key issues to be addressed from the report, and explains why future guidance will be required whichever approach the Task Force ultimately takes.

Original news

Third-Party Funding draft report now available online for public comment, LNB News 04/09/2017 27

Third party funding remains in the spotlight in international arbitration and will come under renewed scrutiny following publication of the draft report of the Task Force established in 2013 jointly by ICCA and Queen Mary University of London. The report is available for public comment until 31 October 2017.

What is your experience of third-party funding in international arbitration?

I have taken one arbitration case through third-party funding as a party representative and I have attempted to get funding for another. The case that was funded fought all the way through to a two-week contested hearing and the other never got started.

I have also sat as an arbitrator in an arbitration between a litigant and its third-party funder over issues arising under the investment agreement pursuant to which the funder funded an international arbitration.

How do you see the market evolving?

The market is still relatively young and evolving. The success of some of the early entrants encouraged a large number of others to enter the market so, in addition to the 'household' names, there are a plethora of new players.

It seems to me that the more established funds are getting the lion's share of the bigger cases so the new players are funding smaller and riskier cases. Any law firm making a recommendation to a client wants to be sure they are making the right choice and that they will be able to work together well whatever crises the case throws up.

One of the critical aspects of a funding relationship between funder and law firm is trust built up over time working together on funded cases. The more established funds therefore have a major advantage as they have been around longer, which has enabled them to establish relationships with law firms and also their reputation in the market generally. In my opinion, over time, the likely outcome is that many of the smaller funds will disappear and/or get swallowed up, leaving the market leaders and a few small funders who specialise in niche areas.

Some funders are trying to attract business by offering 'portfolio' arrangements and, for that matter, some law firms are seeking these types of arrangements to assist with marketing their own practices. There are signif-icant attractions to both parties, but to be successful the firm needs a raft of suitable cases where the costs return ratio is sufficient to make it commercially viable for both the funder and the client.

Additionally, there may be advantages with lower after the event (ie ATE) premiums and lower funder returns. The law firms and funders are feeling their way through the issues, and as experience and confidence grows, this is likely to become more commonplace.

What comments do you have on the Task Force's draft report and on the 'principles' it proposes?

The Task Force is to be commended for producing the 'principles' which address the key practical issues that arbitrators and party representatives have to deal with when a party is funded by a third party. The way they have identified principles and guidance as to 'best practice' reflects the approach taken by the drafting committee at the Chartered Institute of Arbitrators (CIArb) responsible for its International Arbitration Practice Guidelines. As a member of the CIArb's drafting committee, I entirely agree with and endorse this approach.

To my mind there are two key issues the Task Force is seeking views on to determine what to put in the final version.

Duty to disclose or authority to request?

The first concerns whether or not there should be a duty to disclose the 'existence' of third-party funding and the identity of the funder. 'Alternative A' proposed by the Task Force puts an obligation on a funded party to disclose it 'of its own initiative', whereas 'Alternative B' gives arbitrators and institutions 'authority' to 'request' the disclosure of support from a third-party funder. Alternative A is preferable but is no more than an entreaty that a party 'should' make a disclosure. No guidance is given as to what should happen if a party fails to make such a disclosure. Alternative B is fraught with difficulties. What is meant by 'authority'? What are the criteria to determine whether such a request is appropriate? What should happen if a party refuses? Again, guidance is needed as to what should happen if a party fails to comply with a request.

Third-party funding is now firmly established as an acceptable way of funding arbitration, but distrust born out of the old law of champerty still lingers in some quarters. The mythical and/or much feared funder of spurious cases in the hope of a lucrative windfall would be less willing to fund if there was an obligation on the funded party to disclose both the existence and identity of the funder, with the attendant risk of adverse costs consequences. It seems to me that this would address concerns that funders would prefer to be anonymous so that they can fund cases in the hope of a windfall and avoid any adverse costs consequences if the case fails. Requiring transparency would disarm this criticism and make funding more respectable. To this end I also consider that the institutions should consider putting a requirement reflecting this into their arbitration rules.

Security for costs

The second key issue concerns the Task Force's draft principles regarding a tribunal's approach to applications for security for costs in respect of a funded party. I think it must be right that the mere fact that a party is funded is no good reason for requiring security.

As far as conflicts are concerned, do you agree with the Task Force's treatment of insurance as a form of third-party funding?

There has never been any obligation, and there is no good reason for, requiring disclosure of an insurer under a standard insurance policy. I therefore favour Alternative B which excludes agreements to provide, or persons who provide, insurance from the definition of 'third-party funder'.

Are there any issues which you think the Task Force has not addressed and which deserve to be examined?

As mentioned above, I think they have addressed the key issues, but they have not given any guidance as to what the consequences might be for a failure to comply with the best practice they are promulgating.

Tim deals with all types of corporate, financial and commercial disputes. As a Fellow of the CIArb and a member of the Centre for Effective Dispute Resolution's mediation panel, he regularly acts as an arbitrator or a mediator in disputes related to all aspects of commercial business. He is a member of LexisNexis' Dispute Resolution and Arbitration Consulting Editorial Boards.

Third-party funding in arbitration—a funder's view

10/10/2017

Arbitration analysis: Following the publication of the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London Task Force's 'Draft Report on Third-Party Funding in International Arbitration', Robert Rothkopf, managing partner and founder of Balance Legal Capital, outlines the issues surrounding third-party funding from a funder's perspective and explains why he believes the report to be a helpful review, albeit somewhat limited in scope.

Original news

Third-party funding draft report now available online for public comment, LNB News 04/09/2017 27

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What is Balance Legal Capital's experience of funding international arbitration cases?

Investment treaty arbitrations cross our desks more frequently than commercial arbitrations, but we're seeing increased demand for commercial arbitration funding and an exciting boost in Singapore and Hong Kong-seated arbitrations since those markets opened up this year. Most frequently we are asked to fund the fees of the arbitration, but occasionally a claimant may already have a law firm acting on a contingent fee and be seeking to further monetise their award.

We see some meritorious cases but occasionally, in our view, the damages figure claimed appears inflated and, once adjusted, makes the claim uneconomic. Another surprising hurdle in relation to investment treaty arbitration has been the reluctance by claimants to expressly warrant in the funding agreement that there was no corruption (by them or their agents) in relation to the procurement of their investment at the heart of the dispute. Sometimes even their law firm representatives are squeamish about us asking the question. Naturally, this is more than enough to make alarm bells ring and for us to walk away from the opportunity.

How is the funding market evolving?

Most law firms now accept that their knowledge of the funding market is a key part of their offering to clients, who want to know about their finance options when embarking on an expensive and uncertain arbitration. It is no longer restricted to boutique and mid-market law firms, but those at the top end, too.

There is some mystique at the moment around 'portfolio-funding' which simply describes dispute finance cross-collateralised in a number of cases held by the same claimant, or being conducted by a law firm on a damages-based or conditional fee basis. With risk spread across a portfolio, the pricing can be lower than single-case finance models. However, the reality is that most claimants and law firms do not have a ready-made portfolio of cases, and funders still require the ability to approve what goes in. Single case opportunities therefore remain the most common part of our deal flow.

What comments do you have on the task force's draft report and on the 'principles' which it proposes?

For the most part, we regard the task force's draft report to be a pragmatic and helpful review of the issues, real or perceived, that arise in the context of arbitration funding.

In relation to the principles, we have the following comments:

Principles regarding disclosure and conflicts of interest

The last thing we want as funders of arbitration is a challenge to the arbitral award due to actual or potential arbitrator bias. We agree that this has to be the overriding interest and acknowledge that as part of an arbitrator's duty to investigate conflicts, the question of whether a party has third-party funding is relevant. This is an inevitable feature of the arbitration system. However, two issues with this principle arise.

Firstly, it is almost impossible to agree on an appropriate definition of 'third-party funder'. The task force noted definitional difficulty considering the artificial functional or economic distinctions made as to the interests in arbitration claims that insurers, debt or equity holders, related companies, and contingent fee law firms may have. The report makes no mention of funding brokers in this context, who usually retain a right to a share of the funder's contingent premium. It would be unfair to single out one group that has an interest in the outcome of a claim based on these artificial distinctions, but then again, it is in no one's interests for the net to be cast too wide.

Secondly, more disclosure tends to lead to more opportunity for expensive delay as tenuous links can be used as a basis to challenge arbitrator impartiality, or form the basis for security for costs applications or other fishing expeditions. More expense and delay does not serve the interests of justice. We would like to see arbitral institutions develop rules and practices to minimise costs and delay in this regard.

Principles regarding privilege

The task force rooted its principle regarding privilege in the approach espoused by the International Bar Association's Rules on Taking of Evidence which we believe provides a sensible and widely accepted framework. We agree that tribunals and courts must respect the legitimate expectations of parties who, in approaching funders, do so in order to recruit support and investment for their dispute and do not consent to waive their privileged information as against the whole world when furnishing information to a funder, but merely provide a limited waiver to the funder. We ensure all information is exchanged pursuant to a non-disclosure agreement containing a common interest privilege agreement, and a limited waiver agreement. Any tribunal or court decision that seeks to undermine the limited waiver approach would hamper the interests of justice and chill the funding market, so we are pleased to see that the task force seeks to uphold this standard.

Principles regarding costs and security for costs

Often the justification for making a funder liable for adverse costs is premised on the idea that if funders stand to gain in the financial upside of a successful claim, they should also take the downside risk of adverse costs. This idea implies a degree of equality between the funder and the funded party that is not real. The funder is not in the shoes of the funded party—it does not have the same knowledge of the facts or the documents that will determine the dispute, despite the funder's best efforts through due diligence, it does not have the same degree of control over the conduct of the dispute. In investment treaty arbitration, only the claimant will know whether its mistreated investment was procured through corruption, and yet a funder is expected to shoulder the risk which could have a binary and devastating impact on the success of the case (see, for example, *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) and *Spentex Netherlands, B.V. v Republic of Uzbekistan* (ICSID Case No ARB/13/26)).

Nor is a funder 'off risk' when a funded claimant wins, in *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* (ICSID Case No ARB/05/15), for example, Siag attempted to avoid the success fee due to King & Spalding by cutting a side-deal with Egypt. Luckily Siag had property in the EU against which King & Spalding could obtain redress. Shifting the risk of adverse costs entirely onto the funder should therefore be tempered.

In regard to security for costs, we're pleased to see that the task force's report provides a thorough and pragmatic examination of the issues in this area, upholding the high bar that should prevail in security for costs applications, and noting that the mere use of third-party funding does not indicate bad faith or abuse and that the existence of a funding agreement is not sufficient to satisfy a security for costs application. Indeed, the presence of a funder can indicate strength in the merits of the claimant's case. It is also a useful reminder for practitioners as to the different standards that have emerged in investment treaty arbitration and commercial arbitration, where there is a tendency in some discussions on the conference circuit to conflate the two. The 'material change of circumstances' test in commercial arbitration cannot be met merely by a claimant taking on third-party funding.

We would also add that because such a practice is becoming increasingly mainstream, it should fall well within the scope of commercial foreseeability at the time the arbitration agreement was executed. We are pleased to see that the task force calls out the transparency of respondents in using funding to justify an 'impecuniousness assumption' which merely increases delay and costs, and does not bear scrutiny given that well-capitalised claimants are also users of third-party funding. We welcome the reminder that an after the event policy should be adequate security for costs, and the principle that the costs of posting security by a funded party should be borne by a respondent if the claimant prevails on the merits.

We think that para 1 of the security for costs principles should first reiterate that applications for security for costs should be determined according to the usual principles that do not concern impecuniousness of a party and recognise the high hurdle for such applications. By focussing the problem on the impecuniousness of the claimant, it risks giving the impression that this is the only valid consideration.

Are there any issues which you think the task force has not addressed and which deserve to be examined?

The task force has done a good job but has inevitably had to limit its scope. Some nuances which arise in practice have been missed.

The report naturally focuses on third-party funders, but seems to demote the important roles of the lawyers, the claimants and the brokers. There was no scrutiny of broker pricing or how their involvement can influence the dynamic. There are some brokers out there who we think serve the market well, and others who are an active hindrance to the claimant and lawyers' interests, adding delay, expense and Chinese whispers to the process. We have also seen instances where law firms are keen to back cases where we see no merit at all, merely to build a credential. It should be recalled that it takes many parties to bring a frivolous case and that it is likely that funders are in fact the most on guard to prevent this.

Robert was formerly a disputes lawyer in the international dispute resolution and arbitration group at Herbert Smith Freehills LLP where he advised multi-national companies on commercial and investment disputes. He founded Balance Legal Capital in mid-2015.

Third-party funding in arbitration—a shipping lawyer's view

17/10/2017

Arbitration analysis: The ICCA-Queen Mary task force has published its draft report on third-party funding (TPF) in international arbitration. Simon Kverndal QC of Quadrant Chambers, considers how third-party funding fits into the shipping industry given the obvious overlaps with insurance and says he is strongly in favour of the carve out for TPF in maritime arbitrations but warns difficult issues may arise with regard to conflicts of interest which apply particularly to investment arbitration.

Original news

Third-Party Funding draft report now available online for public comment, LNB News 04/09/2017 27

Third party funding (TPF) remains in the spotlight in international arbitration and will come under renewed scrutiny following publication of the draft report of the task force established in 2013 jointly by the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London. The report is available for public comment until 31 October 2017.

How does TPF compare to freight demurrage and defence (FD&D) cover in the shipping industry?

I am not an FD&D specialist but I would say that although there are apparent generic similarities, the funding models are quite different, the starting point being that:

- the clubs are not-for-profit organisations run for the benefit of all their members
- the 13 leading clubs (covering 90% of world tonnage) form the International Group which promulgates policies and principles that are followed by its members meaning that it is well and effectively self-regulated
- FD&D/protection & indemnity (P&I) insurance is the established, tried and tested norm for maritime arbitration funding

What comments do you have on the task force's proposed carve out for funding in maritime arbitrations and the rationale for it?

I am strongly in favour of the task force's proposed carve out for TPF in maritime arbitrations and fully agree with the rationale for it. The difficulty plainly arises in the overlap areas (particularly offshore and ship construction). It may therefore be necessary to define 'maritime arbitration', while recognising that precise definition is impossible and that particular difficulties arise where maritime cases are heard under institutional arbitration rules (notably in Singapore and Hong Kong).

I think that 'cargo trade charterparties, carriage of goods by sea and the management, sale and purchase of ships' covers it (while most ship construction contracts have LMAA arbitration clauses I do not think that shipbuilding should be regarded as 'maritime arbitration', at least for present purposes).

Do you agree with the Task Force that costs insurance should be brought within definitions of TPF and do you agree that its definitions achieve that?

With regard to after the event (ATE) insurance, this can cover such a range of products that I question the extent to which it can be brought within workable definitions of TPF for regulatory purposes.

I agree with the task force's use of narrower definitions for TPF (as discussed on p 42). Within the field of maritime arbitration I see ATE insurance making a positive and expanding contribution in the future, particularly with regard to security for costs. As with FD&P/P&I funding (and, I assume, TPF), tensions are likely to arise between insurer and assured with regard to settlement (particularly acute, in my experience, in the course of mediations), but that is a necessary price to pay for the greater benefit of enabling a litigant to pursue a meritorious claim which it would otherwise have been unable or unwilling to fund.

I think that ATE security for costs insurance should provide considerable benefits to litigants and the arbitral process by:

- limiting and softening litigation risks
- removing the threat of an application for security for costs from the armoury of a disruptive/disrupting respondent
- removing the (somewhat unsatisfactory) defence to an application for security for costs that such an order would stifle a the claim

I therefore do not agree that costs insurance should be brought within the definitions of TPF.

What comments do you have on the task force's treatment of conflicts of interest?

Difficult issues arise with regard to conflicts of interest which apply particularly to investment arbitration, less so to insurance/engineering arbitrations and very much less so with regard to maritime arbitration.

Repeated appointments of full-time arbitrators by particular clubs gives rise to occasional comment and very occasional expressions of concern or complaint—the three-person panel system safeguards against any such failings in impartiality even if there were (and there is not) any demonstrated substance in such expressions. In other words, the task force's comments on conflicts of interest do not apply to maritime arbitration.

Simon specialises in all aspects of maritime litigation and arbitration, with particular expertise in maritime commercial arbitrations (particularly LMAA). He is a leading specialist in marine casualty claims, under charterparties (unsafe port, fire, cargo damage), LOF salvage and collision actions.

Third-party funding in arbitration: a costs insurance broker's view

03/11/2017

Arbitration analysis: Steve Jones, a director in the dispute resolution practice in the London office of Arthur J. Gallagher Insurance Brokers Ltd (Gallagher), considers the International Council for Commercial Arbitration (ICCA)–Queen Mary Task Force 'Draft Report on Third-Party Funding in International Arbitration' from a costs insurance broker's view, and takes issue with the task force's broad definition of third-party funding.

Original news

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Third party funding remains in the spotlight in international arbitration and has come under renewed scrutiny following publication of the draft report of the Task Force established in 2013 jointly by ICCA and Queen Mary University of London.

What types of insurance does Gallagher offer to parties involved in international arbitration?

Gallagher offers a range of insurance solutions designed to hedge many of the contingent liabilities that associate themselves with high-stakes disputes. In addition to after-the-event (ATE) legal expenses insurance, which is predominantly used to cover costs risks for the losing party, there are a number of novel solutions we have developed in recent years. The most notable of these is arbitration proceedings award default insurance which can be available to insure the arbitration award if a sovereign respondent fails to honour an award made in the plaintiff's favour. In addition, we have placed damages-based agreement (DBA) insurance for law firms, security-for-costs policies, cross-undertakings as to damages policies, judgment enforcement insurance and many forms of key personal cover. We like to believe that our range of solutions is market-leading.

Do you perceive there to be an increased number of ethical tensions as the funding and costs insurance market evolves?

Before we put the various forms of third-party funding under the ethical microscope, I think it's important to understand that ethical tensions inevitably exist and always have existed in disputes, in what we would regard as 'normal' circumstances.

For example, it could be argued that a law firm billing on an hourly rate has an inherent incentive to prolong a dispute, while its client has the opposite incentive. Likewise, a law firm on a fixed fee, or perhaps a precarious contingency arrangement, is incentivised to resolve a dispute as quickly as possible, while its client may feel he can prolong the dispute with impunity.

Of course, the existence of ethical tension is not the same as being influenced by it. We rely on regulation, reputation and integrity to overcome these things. It is important therefore that we understand that, whatever view we take on third-party funding, ethical tensions have always existed in disputes. The question, therefore, is not how third-party funding introduces ethical conflicts, but more about if or how it affects existing ones.

What comments do you have on the way the task force's draft report deals with 'before-the-event' (BTE) and ATE insurance?

As the report identifies, BTE insurance is purchased mainly by future defendants and claimants without prior knowledge or assessment of the claim and indemnifies the insured from the point at which the dispute arises, not only in terms of costs but potentially damages also.

ATE insurance is generally only available for plaintiffs with strong cases and is offered after extensive underwriting and, on larger cases typically will cover only adverse costs and at the point at which the case concludes. The premiums for ATE are much larger and in many cases linked intrinsically to the outcome of the dispute with part of the premium payable contingent on a successful outcome.

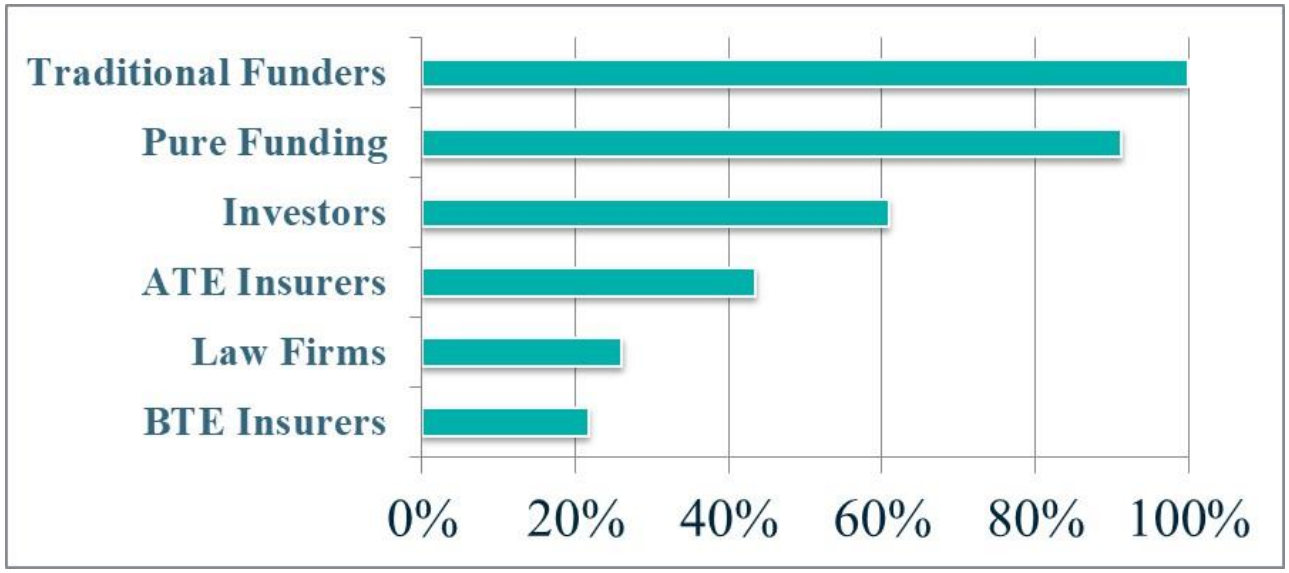
It is not difficult to see, therefore, that a BTE insurer might wish to have a very high degree of control and see the case run as cheaply as possible, whereas an ATE insurer will predicate part of their underwriting on the quality and cost of the law firm acting and will get a warm feeling when the claimant has instructed reassuringly expensive counsel.

Is it correct that BTE insurance provides funding in return for reimbursement?

It is correct that BTE insurance will provide day-to-day funding for a case, and remuneration for the same is by way of a premium which is paid before any potential case is initiated. BTE insurance is also mainly a defendant product whereby the 'funding' is to try and defeat a claim and avoid an order for damages. To this extent the motivations are clearly very different from those of a traditional funder who is looking to identify meritorious plaintiff cases and profit from the successful outcome via a share of the proceeds. A BTE insurer has no ability to predict if a claim will come and what the outcome may be. Their premium will be a small fraction of the sum of their liability and while they may eventually recover some or all of their expenditure if the case is successful, they certainly do not make profit via this means as they do not receive any share of the proceeds of the dispute.

Do you agree with the task force's broad definition of third-party funding?

The 'broad v narrow' debate is at the very heart of the report, and contrary to the task force's findings, we make the argument for narrow. To reach this conclusion, Gallagher conducted some informal market research and asked leading arbitration professionals which of six definitions they felt accurately described third-party funding in international arbitration. Interestingly, while the research returned a very clear picture of what individuals thought definitely did constitute third-party funding, it is equally clear that there is a high degree of ambiguity attached to many of the definitions.



If one applies the ‘duck test’ to the definition provided in the report then the above results may seem strange as they should all be coming out at 100%. By ‘duck test’, we essentially mean inductive reasoning—if it looks like funding, acts like funding, operates like funding, then it must be funding.

ATE insurance would most certainly qualify on this criteria as there will always be an agreement in place, being the insurance policy—the insurance company will not be a direct party to the dispute. They will provide material support and will be remunerated for the same—often with part of their remuneration linked to outcome.

However, 66% of our respondents (including the author of this piece) disagree. To understand why these differences of opinion arise, we need to consider ATE insurance in a little more detail. As previously explained, ATE insurance certainly matches the broad characteristics of third-party funding outlined in the ICCA report and may be considered to have functional similarities. Both products recognise high-quality cases as a commercial asset and in many instances facilitate access to justice. Third-party funding and ATE insurance are both ways to transfer financial risk and allow more cases to proceed on a fully-resourced basis.

However, perhaps the most significant issue here is the motivation of the plaintiff. Put simply, funding may well be something they need while insurance is something they hope they never will. The ATE insurer does not provide day-to-day financing, but instead will pay out on an indemnity basis if the insured event occurs at the conclusion of the proceedings. Furthermore, the insurance premium is typically much lower than the return sought by a third-party funder.

Insurance is also already heavily regulated with clear best practice guidelines and a raft of procedures in place to mitigate issues such as a conflict of interest which, rightly so, is a hot topic in the report. Indeed, insurance companies have always been parties to legal disputes—they have their own regulations as well as legal precedents to comply with, the boundaries of involvement are clearly drawn, and debates on ethical tensions are well rehearsed as insurance has played its part in disputes for centuries. Insurance, one might say, is an established way of life—why would a plaintiff not protect their litigation asset in the same way they protect their tangible assets such as factories and ships?

Insurance is also far broader in scope—numerous risks can be insured beyond the actual cost of a dispute, which remains the sole focus of funding. For example, the risk of sovereign non-payment is an insurable event where arguably a positive outcome for the plaintiff could be viewed as a negative outcome for the insurer as it brings the risk of a claim into view.

So, in conclusion, there is no doubt insurance shares many of the characteristics of other forms of third-party funding. However, the more we look at this, the more we wonder if there really are too many unique factors to all forms of funding to group them all as one, and if we achieve anything in trying to do so.

Steve is a director in the dispute resolution practice whose primary role involves working with law firms and litigation funders to achieve insurance solutions for their clients’ varied requirements in complex litigation and international arbitration.

Gallagher’s major risks division incorporates a specialist client-focused food and drink practice with a dedicated team working in areas such as food product recall and food contamination. Other areas of expertise include contractual agreements, single site exposures, capital expenditure, fire protection, complex claims and human risk. Its parent company, Arthur J Gallagher & Co, is an international insurance brokerage and risk management services firm headquartered in Itasca, Illinois. It has operations in 33 countries and offers client service capabilities in more than 150 countries around the world through a network of correspondent brokers and consultants.

Third-party funding in arbitration—a view from Singapore

19/10/2017

Arbitration analysis: Barry Stimpson, managing partner of Reed Smith's Singapore office, considers the ICCA–Queen Mary Task Force 'Draft report on third-party funding in international arbitration', and finds that although the principles the report proposes are to be welcomed, there seems little rationale behind the proposed carve-out for funding in maritime arbitrations.

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What is your experience of funding in arbitrations, whether by the new funders or by insurers?

I have experience of both insurers and new funders, although much less of the latter because they are not generally involved in arbitrations in the sectors in which I practise.

How has the new third-party funding legislation in Singapore affected the sectors in which your clients operate, and what do you think the prospects are for third-party funding in those sectors?

They have not been particularly affected by the legislation. The legislation is fairly restrictive in its scope and in what type of third-party funding agreement is permitted and who can provide funding, so there is less scope for third-party funding than in some other jurisdictions. The sectors in which I do most work are commodities and shipping. Although arbitration is the preferred and almost universal choice for dispute resolution in those sectors, there are probably limited prospects for third-party funders for a number of reasons.

In the case of shipping, most of the funding is by insurers and this was the case before the new legislation was introduced. There are some types of disputes, and also some parties which are not usually covered by the insurers (for example shipbuilding disputes) which are sufficiently high value to be attractive to third-party funders.

In the case of commodities, the parties are generally not only very experienced in arbitration but are also so sufficiently well-funded that third-party funding is not required. A number of these parties have raised the possibility of using third-party funders as a means of laying-off some risk and it is possible that they will use partial funding from third-party funders as a risk management tool or as a hedge.

What are your views on the task force's draft report and on the 'principles' which it proposes?

I think it is an excellent and very thorough report. The principles seek to address the key issues relating to third-party funding and propose a standardised and sensible approach.

How do the principles fit with the regulatory steps taken in Singapore, eg by the Singapore International Arbitration Centre (SIAC) and the Singapore Institute of Arbitrators?

They appear to be consistent with the Singapore approach, although the Singapore regulations are more restrictive in some areas, most notably in terms of what funding is permitted and who can provide funding.

What comments do you have on the task force's treatment of insurance, including for conflicts assessment purposes?

I am in favour of their approach. In order to ensure the integrity of arbitration proceedings it is very important that there is transparency about potential conflicts. That is certainly the position and approach that has been taken in Singapore.

What comments do you have on the task force's proposed carve-out for funding in maritime arbitrations and the rationale for it?

It is disappointing that they have chosen to carve it out and I am not convinced that the rationale for doing so stands up to any scrutiny. In particular:

- although the protection and indemnity (P&I) and freight, demurrage and defence (FDD) insurers do provide funding for a large percentage of maritime disputes, they do not cover all types of maritime disputes and there are also a substantial number of maritime-related arbitrations where one or more of the parties do not have insurance cover, either because the type of dispute falls outside the P&I and FDD insurance cover or the parties have decided not to take out insurance. There are also sectors other than maritime where the task force recognises that insurers provide funding, but these have not been carved out
- the task force's reasoning that there are specialist arbitral institutions for maritime matters is equally true in the case of the commodities sector (eg the Grain and Feed Trade Association and the Federation of Oils, Seeds and Fats Associations) or the IP sector (eg the World Intellectual Property Organization), but they have not been carved out. In many cases the parties choose not to use one of the specialist institutions and either provide in the contract for ad hoc arbitration or choose a non-specialist institution like SIAC or the Hong Kong International Arbitration Centre
- the issues that arise in arbitrations in the maritime sector are usually no different from those in any other sector, including the issues of conflicts, privilege and costs, which the task force has identified in its principles

Barry has more than 20 years' experience handling shipping, international trade, offshore energy and construction matters. He has been based in the Far East since 1999 and has worked in London, Hong Kong, Singapore and Sydney. He was a founding partner of Reed Smith's Singapore office when it was established in 2012, and became the Office Managing Partner in 2016. He is a fellow of the Chartered Institute of Arbitrators (FCIArb), a Fellow and Panel Arbitrator of the Australian Centre for International Commercial Arbitration (ACICA) and he regularly sits as an arbitrator in Singapore arbitrations.

Interviewed by Jenny Rayner. The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.