Regulating Third Party Funding In Arbitration After PACCAR.

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International law firm Pinsent Mason has recently published its review of the last 12 months in international arbitration. There are a range of issues, in multiple jurisdictions, to consider and review from their analysis. Some issues by the nature of such analysis are localised whereas others are of more general concern. One issue from the latter rather than the former group is the use of third-party funding (TPF).

Third-party funding arrangements vary enormously. The traditional notion of a third-party funding agreement involves a funder that is unrelated to a dispute providing financial assistance to a claimant in return for a share in the claim proceeds, where a claimant otherwise lacks the financial resources to pursue the claim. However, third-party funding can also be used as a risk management tool. In particular, the third-party funder might agree to indemnify the claimant against all adverse costs orders, even orders to pay the costs of the respondent. In such an arrangement, the third-party funder 'shares the pain of the funded party when it loses its case'. Some third-party funding agreements focus exclusively on insuring against the risk of adverse costs orders, others provide funding in the absence of such insurance. Others still address both concerns simultaneously. It is now also common for funding arrangements to cover the potential windfalls and losses of a portfolio of cases.

TPF has been a feature of the arbitral landscape since the early 1990s albeit due to the common law torts of maintenance and champerty it is unavailable in some jurisdictions and/ or has only relatively recently become available. The Criminal Law Act 1967 (UK) abolished both the offences and torts of maintenance and champerty. Hong Kong and Singapore have abolished TPF for arbitration but not for litigation. Part 10A of the Arbitration Ordinance (Cap 609) (was enacted on 23 June 2017 with the aim of simultaneously facilitating and regulating third-party funding of arbitration. Sections 98K and L of the Ordinance exclude the common law offences and torts of maintenance and champerty from applying to third-party funding of arbitration.

Section 5A of Singapore's *Civil Law Act* (Cap 43) has the effect of abolishing the tort of maintenance and champerty for international arbitrations and related court and mediation proceedings.

The majority of users of arbitration, in jurisdictions where TPF is available, support the use of this funding method. Third-party funding arguably enhances the efficiency of dispute resolution proceedings through the introduction of commercial considerations that aim to reduce costs. In some instances, the impartial opinion of the third-party funder may prove a sobering voice that prevents unmeritorious claims from being brought, to the benefit of both parties.

In certain arbitrations, such as references heard by the International Centre for Settlement of Investment Disputes (ICSID) a notable percentage of the cases are brought under funding agreements. The issue that is discussed below, flagged by the Pinsent Mason report, is the regulation of funding, such as *inter alia* the necessity to disclose the fact that there is a funding agreement, who is the funder and to consider any conflicts of interest that may arise. Whilst this is not a new issue it is suggested that the rules and regulations in place need further work.

Conflicts of Interest

There are a range of conflicts that can arise from the use of TPF Many arbitrators will also do counsel work. If there is an opaqueness over who is funding a case there is a risk that the same person sitting on a tribunal, where a funder is in the background, is (as counsel) advancing the interests of a different party in another arbitration who is the beneficiary of a funding agreement involving the exact same funder. Likewise, a 'hidden funding' agreement can mask the fact that a claimant is impecunious and therefore complicate the issue of whether the respondent needs to bring an application for security for costs. The funder itself will never be a party to the arbitration agreement and will not at the end of the reference be a 'mark' for any costs that may need to be recovered.

Institutional Rules on Funding

Over the last 5 years there has been amendments to multiple institutional rules that require that funding agreements are disclosed such as Rule 38 of the Singapore International Arbitration Centre. It is of course the case that not all arbitrations are conducted under the auspices of an institution.

PACCAR

At the end of 2025 the UK government announced that it would introduce legislation to reverse the July 2023 decision of the Supreme Court in 'PACCAR'. In that decision, *R (on the application of PACCAR Inc and others) v Competition Appeals Tribunal*[1] the court held that the funders in that case were providing claims management services as their fee, as a funder, was calculated by reference to a percentage of proceeds from the claim. This meant that litigation funding agreements providing for a funder to receive a share of the damages are unenforceable unless they comply with the strict regime imposed on 'claims management services' under ss 4(2) (b)_ and 4(3) of the *Compensation Act 2006* (UK). The enforceability of litigation funding agreements from prior to the date of PACCAR was therefore thrown in to question and in general created considerable uncertainty in the third-party funding market in England and Wales.

Conclusion

Third Party Funding (TPF) emerged in the early 1990s and took some time to develop critical mass. As explained above the traditional common law torts of maintenance and champerty has or had constrained its introduction/ use in certain countries such as Nigeria and the Republic of Ireland. A notable increase in TPF can be seen over the last twenty years or so but the necessary regulatory regime is not yet in finished form. The European Commission's

[1] [2023] USKC 28.

March 2025 mapping study recognised that while arbitration was increasingly funded by third parties, the European Union (EU) wide regulatory landscape remains fragmented. Whilst the necessity for increased transparency, mandatory disclosure and conflict checks is it is suggested uncontroversial EU-level arbitration-specific TPF legislation is yet to be introduced. But such legislation should be expected: the nature of implementing such a measure to cover a bloc of 27 countries with a population of 450 million people is complex and there can be a time lag. Steps as already mentioned above which were flagged by Minister of State, Sarah Sackman KC, on December 17, 2025, are also expected:

'. this government intends to take action to mitigate the impact of the 2023 Supreme Court judgment in PACCAR and implement proportionate regulation of third-party funding agreements.'

As the funding industry has been regulated in Hong Kong and Singapore since 2017 in relation to international arbitrations it is arguably time for England to introduce legislation as well. The industry provides an important service to users of arbitration and uncertainty about the enforceability of such agreements is unsatisfactory and provides a disservice to arbitration users. It is of surprise that the recent 'King's Speech' in May 2026 whereby the U.K government's legislative programme is outlined did not in fact include reference to pending legislation of the type foreshadowed by the U. K'sMinister of Justice Sarah Sackman K.C last December. The issue must surely be revisited. Increased certainty and use of TPF is in the interests of all users of Arbitration wherever they are.

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