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Third Party Funding – Maintenance and Champerty – Where is it Thriving?

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Third party funding probably has its longest history in Australia, followed by the United Kingdom. The irony is that both of these are common law jurisdictions in which the legal principles of maintenance and champerty exist. Indeed, they originated in the United Kingdom. What are maintenance and champerty exactly and do they exist today? More importantly, should they?

Maintenance refers to the funding or providing of financial assistance to a holder of a claim, which allows the claim to be legally pursued, when the funder or provider of financial assistance holds no connection or valid interest in the claim itself. Champerty takes it one step further by adding that this funder or financial provider has a direct financial interest in the outcome of the claim. Here the funder provides the money in exchange for a portion of the damages should the claim prevail. The reasons surrounding why these acts were considered morally and ethically against public policy such as to make them illegal can best be described by the following quotes.

In 1843, Jeremy Bentham was quoted when describing the circumstances surrounding the origination of maintenance and champerty. He stated, *"A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his feet, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands."*

This description of the doctrine's birth circumstances was later echoed in 1908 in the case of *British Cash and Parcel Conveyors v Lamson Store Service Co*, *"The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. These notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete."* The final sentence in *British Cash* reveals already the changing landscape of this public policy, reflecting the more modern perspective.

Therefore, it is quite clear that very distinct circumstances arising out of times past led to the public

policy doctrine of maintenance and champerty. This doctrine resulted in both civil and criminal penalties. However, in modern times the courts grew more relaxed towards this doctrine (as noted in the final sentence quoted above from *British Cash*).

The next logical question to ask is, does this principle of maintenance and champerty extend to arbitration. With respect to the United Kingdom, the answer appears to be yes.

In arbitration, even though it is a private dispute resolution mechanism which allows parties to avoid some of the constraints encountered when appearing before the courts, there are also several similarities. Arbitrators do consider and decide disputes similar to judges in the national courts. Arbitration, and in particular international arbitration, can involve large amounts of damages, such as is commonly involved before the courts and judges. Moreover, arbitral awards are just as binding as court judgments and have less ability to appeal (at least in the United Kingdom and arguably most other jurisdictions which are parties to the New York Convention of 1958). Despite these evident similarities, the concept of maintenance and champerty and its relationship to arbitration was not clearly decided until 1998.

In the case of *Bevan Ashford v Geoff Yeandle*, the Vice Chancellor Sir Richard Scott stated prohibition on contingency fees does extend to arbitration, when he said

> "Arbitration proceedings are a form of litigation. The lis prosecuted in an arbitration will be a lis that could, had the parties preferred, have been prosecuted in court. The law of champerty has its origins in, and must still be based upon, perceptions of the requirements of public policy. I find it quite impossible to discern any difference between court proceedings in the one hand and arbitration proceedings on the other that would cause contingency fee agreements to offend public policy in the former case but not in the latter. In principle and on authority, the law of champerty ought to apply, in my judgment, to arbitration proceedings as it applies to proceedings in court. If it is contrary to public policy to traffic in causes of action without a sufficient interest to sustain the transaction, what does it matter if the cause of action is to be prosecuted in court or in an arbitration? If it is contrary to public policy for a lawyer engaged to prosecute a cause of action to agree that if the claim fails he will be paid nothing but that if the claim succeeds he will receive higher fee than normal, what difference can it make whether the claim is prosecuted in court or in an arbitration?"

Although the tort and criminal laws pertaining to champerty and maintenance have been abolished in the originating jurisdiction, the principles of common law champerty and maintenance applying to funding agreements remain. They also extend to private dispute resolution methods, such as arbitration. Many other jurisdictions, though, either do not follow these principles of maintenance and champerty or do not consider a private dispute resolution mechanism subject to principles which bind parties in a court setting.

In discussing this very situation with representatives of countries in Latin America, including Brazil, I received mixed reports. First, they had not encountered a market for third party funding in their respective jurisdictions and guessed that it would be unlikely that one would thrive due to the instability of the region. Another pointed out, though, that with respect to international arbitration,

it would not be a problem as this is completely private. However, at least one other attorney felt contrary. The attitude seemed to be – if it is not specifically allowed per law, assume it is not allowed.

In contrast, in the United States there is variation amongst all the fifty states, with some still clinging to maintenance and champerty and others not in varying degrees. Some argue that third party funding should not thrive in the United States and others openly welcome it, within certain constraints…I would be interested in hearing from the readers how their respective jurisdictions would view third party funding in litigation or international arbitration. Is there a distinction between the public dispute resolution mechanism (ie the court systems) and the private (ie international arbitration)?

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