Kluwer Arbitration Blog

LIDW 2024: Shifting Attitudes Towards Third Party Funding – Views From Across the Globe

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This post summarizes an event hosted by Stewarts LLP as part of the 2024 London International Disputes Week ("LIDW") on the topic of third-party funding ("TPF") regulation across various jurisdictions. Professor Rachael Mulheron (QMUL) covered England and Wales, Sanjeev Kapoor (Khaitan & Co) offered the Indian perspective, Dr Aseel Zimmo covered the Middle East and Christopher Lau SC (3 Verulam Buildings) provided the view on major Asian jurisdictions (in particular, Singapore). Brussels-based Erik Bomans (Deminor) discussed the European approach to funding. Harshiv Thakerar (Asertis) provided the UK funder's perspective. Julian Chamberlayine (Stewarts) chaired the distinguished panel.

In keeping with the ethos of LIDW, the discussion covered funding with respect to both arbitration and litigation. As such, it served as a useful reminder to arbitration practitioners that regulatory approaches in respect of one might well influence attitudes towards the other.

The panel discussion covered three topics: participants introduced their respective jurisdiction's stance on TPF, debated the merits of codifying current practices, and shared their views on how formal rules permitting TPF could impact a jurisdiction's popularity as a forum.

Current Positions on TPF Worldwide

Rachael Mulheron noted that the UK adopts a generally benevolent attitude towards the practice of champerty (a term used in common law to describe TPF). Funding is integral to the current dispute resolution regime and is utilized quite substantially in both litigation and arbitration. Champerty ceased to be a crime or a tort in England and Wales with the enactment of section 14(2) of the Criminal Law Act 1967. Regulations relating to damages-based agreements and conditional fee agreements can be considered "statutory islands of refuge in the sea of champerty". Additionally, the industry is self-regulated by the Association of Litigation Funders and its Code of Conduct.

In many other jurisdictions, TPF is impliedly permitted, *i.e.* not expressly prohibited but without specific regulations permitting it.

Aseel Zimmo noted that in the Middle East, TPF is generally permitted without explicit regulations, except in the Dubai International Financial Centre ("DIFC") and the Abu Dhabi Global Market ("ADGM"), which issued practice directions in 2017 and 2019 requiring specific

conditions for funding contracts (for instance, an obligation to notify the opponent). While litigation funding is not common in the Gulf Cooperation Council ("GCC") jurisdictions, when it comes to arbitration, these regions are committed to adopting best practices in TPF, to become more arbitration-friendly.

India is generally understood to permit litigation funding. Sanjeev Kapoor referred to case law dating back to 1852 in India which permitted champerty as a tool for promoting access to justice.

Covering Asia, Christopher Lau clarified that in Singapore, TPF is allowed in arbitration proceedings, whereas in China, TPF is growing in popularity with no explicit prohibition or specific legislation. CIETAC and the Shanghai Arbitration Commission have included specific rules for arbitration. By contrast, in Japan, funding is allowed for arbitration but not for domestic litigation. In Korea, legislation prohibiting profit sharing means that there is presently no appetite for TPF.

What Scope for Introducing Arbitral Procedural Rules in Relation to TPF?

In favor or against regulating percentage caps?

As part of the second topic, the panelists then discussed whether there should be percentage caps or limits on funder recoveries, and if so, whether distinctions should be drawn between different types of claimants (*i.e.* consumer groups and corporate entities).

An empirical study mentioned by Mulheron for England and Wales showcased some degree of opposition towards the imposition of percentage caps. Currently no legal provisions bar recovery of over 50% in England and Wales. Nevertheless, none of the funders had ever contracted fees of over 50%, for reasons of commercial realism. Finally, when asked, funders did not think that a cap ought to be applied, believing that the introduction of caps would lead to fewer funded cases.

From the funders' perspective, Harshiv Thakerar stated that in principle, funders do not attempt to recover more than 50%. Nevertheless, he confirmed that having a 50% non-negotiable cap at the beginning is going to decrease the attractiveness of funding the case in question. In practice, recovery will exceed 50% in certain situations where the multiple will be higher than the overall percentage. This occurs where costs have escalated, or the complexity of the case has increased.

By comparison, according to Eric Bomans, funding agreements in the EU usually include recovery rates in the region of 20%-30%. In commercial litigation cases, the multiple of capital element in the remuneration structure had led to a recoverability of more than 50%. From a regulatory point of view, he distinguished between commercial litigation, arbitration, and collective actions. In the Netherlands for instance, caps at 25% have so far been imposed in class action claims. A recent case against TikTok held that funders should not be paid on a multiple higher than 5x. At the EU level, a recommendation by the European Parliament provides for a 40% cap on recovery, and that funders should not receive a preferential type of return.

In the Middle East, the ADGM Regulations provide that the recovered amount must not exceed such percentage of the anticipated expenditure as may be prescribed by the Chief Justice. Dr Zimmo opined that judges in GCC jurisdictions are also likely to exercise judicial discretion if the TPF percentage were deemed excessive.

Hong Kong and Singapore do not impose recovery caps on TPF. Neither does India. Sanjeev Kapoor argued that having rules on capping could provide clarity and incentivize funders, as the alternative would involve years of litigating whether the terms of the funding arrangement had been against public policy.

Are TPF costs recoverable?

Dr. Zimmo stated that courts in the Middle East demonstrate reluctance towards generally awarding costs to the prevailing party, especially in international arbitration, sometimes despite clear language in the Rules providing a legal basis for the recoverability of costs. Therefore, TPF costs are highly likely to be successfully challenged in courts.

Christopher Lau referred to a case in Singapore in which the tribunal recognized under the SIAC Rules that it had the power to award TPF costs, but refused to do so, holding that the claimant had not shown that they were impecunious, had failed to inform the respondents of the scope of the risk they faced, and its conduct in the arbitration did not militate in favor of awarding TPF costs.

By contrast, in India, the Delhi High Court delivered a judgment in June 2023 which, whilst not expressly prohibiting litigation funding, did not allow the costs to be recovered by the litigation fund as the latter was not a party to the arbitration.

In England and Wales, recovery is not permitted in litigation but is permitted in arbitration. Recoverability from a class actions fund is controversial, not least for issues of preferability, *i.e.* whether the success fee comes ahead of the class members.

Adding the EU funder's perspective on this issue, Eric Bomans noted that funders have a certain reluctance to claim back the costs, as this would entail lengthy arguments regarding the reasonableness of funders' fees and disclosure of the LFA.

Mr Thakerar was of the opinion that costs should be recoverable and deplored a 2013 legislative change in the UK whereby success fees are no longer recoverable.

Advantages to providing safeguards to funded parties

The speakers were in agreement that the interest of the funded client must remain at the forefront of any funding arrangement, and as such, regulation surrounding issues of disclosure, conflicts of interest, and ethical actions of funders in relation to settlements, were of paramount importance.

In the Middle East, the DIFC and other institutions are in the process of adding provisions in their respective rules relating to TPF, on issues relating to impartiality and independence of arbitrators or disclosure of certain elements of funding arrangements, the precise contents of which remain to be determined over time.

The Impact of Introducing Formal Rules Permitting the Use of TPF on the Perception of a Jurisdiction

The speakers concurred that depending on the content of such regulations, formal rules would improve the reputation of any jurisdiction as a choice of forum and would add clarity, inasmuch as they would reflect the current practice to which funders adhere to. Mulheron emphasized the importance of including both financial and prudential aspects in such a regulatory regime.

In this respect, Singapore is looked to globally as leading the field. Christopher Lau confirmed that the introduction of express provisions in the SIAC Rules has seen a dramatic rise in arbitrations.

Julian Chamberlayine aptly concluded with a reminder of what is at stake: given that in the UK alone, the Law Society estimates legal services to be worth £60 billion and that half relate to commercial matters, the importance of the issue is undeniable.

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