THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Fourth Edition

Editor
Simon Latham

THE LAWREVIEWS

THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

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PREFACE

As a law graduate whose first steps in the legal profession were encumbered by the impact of the previous global financial crisis, I faced a fairly bleak outlook. By happenstance (sheer bloody-mindedness), I found myself at the doors of the London branch of a US plaintiffs' firm, little known on these shores at the time (I still recall the firm's name was spelled incorrectly by the court on most documents in those days). The firm's proactive, and innovative, culture naturally meant it was an early adopter of third party funding (TPF). As such, I had the great fortune to be inducted into the world of TPF from my very first day as a trainee solicitor. I witnessed, first-hand, how TPF catalysed both the firm's growth and its clients' paths to a healthier balance sheet, notwithstanding the burdens that the financial crisis had left in its wake. A spark was lit.

As an investment manager, now immersed within the TPF sector in the face of what has been described as the worst global economic crisis since the Great Depression, I face the challenge of translating my experience into reasons for optimism. Like many of my industry peers, I understand and appreciate the role that TPF plays in providing access to justice for those who could otherwise not afford to pursue their claims. Similarly, in a time when cash is king, TPF has a role to play in enabling corporates to resolve their disputes without depleting resources that could be invested profitably elsewhere within the business. With ever increasing funds under management both by members of the Association of Litigation Funders (ALF) and by the broader TPF fraternity, there are significant resources available for litigants and law firms to utilise. Yet despite the sector's expansion since the previous global financial crisis, TPF still remains a little-known, or little-understood, solution for businesses. Even among lawyers, there are few who are fully aware of the TPF options available to their own businesses, let alone to their clients.

So what exactly is there for law firms and litigants to know about TPF? Well, just as the list of legal remedies available to litigants varies between jurisdictions, so too does the menu of TPF options. The past year alone has seen both shifts in and endorsements of the various regulatory frameworks that underpin the sector across the globe. In Australia, the industry found itself on the receiving end of stringent new regulations, notably without industry consultation. Partly in response to those developments, a number of funders and finance firms have sought to create a global lobbying voice for the TPF sector, by establishing the International Legal Finance Association, chaired by my editorial predecessor, Leslie Perrin. By contrast, there have been notable judicial endorsements of TPF in other jurisdictions over the past 12 months. The English courts, for example, have endorsed not only TPF, but also the ALF itself.

With government support for businesses during the current crisis coming to an end and legal developments such as the forthcoming EU directive on representative actions on the horizon, could 2021 become a milestone year for TPF? I hope this publication provides a useful guide for litigants, lawyers and investors alike as we take on the challenges the new year brings.

Simon Latham
Augusta Ventures
London
November 2020

Chapter 15

SINGAPORE

Matthew Secomb, Adam Wallin and Gabriella Richmond[1]

I MARKET OVERVIEW

Singapore opened its doors to third party funding in early 2017, but only for international arbitration and related proceedings. Since then, funding has become a growing feature of Singapore's international arbitration landscape. Many funders have established a presence in the city state and new participants continue to join the market.

Singapore is one of the world's leading international arbitration jurisdictions.[2] The caseload of the Singapore International Arbitration Centre (SIAC) has increased considerably over the past decade. In 2019, SIAC received nearly 500 new cases involving parties from 59 jurisdictions and the aggregate sum in dispute for new cases filed in 2019 was S$10.9 billion.[3]

These trends look set to continue. SIAC's caseload has grown more than fivefold in the past decade and, since 2017, both the ICC International Court of Arbitration and the Permanent Court of Arbitration have established offices in Singapore to meet the growing demand for commercial and investor–state arbitration.[4]

A market for third party funding is also emerging. The first third party funding agreement under the new statutory framework was reported in July 2017 and international funders have a regular – and growing – presence in Singapore.[5] Several funders have already opened permanent offices.

Further changes may also be on the horizon. In May 2018, Singapore's Ministry of Law concluded a public consultation seeking feedback on the third party funding framework.[6]

While it is still early days, funding in Singapore benefits from a combination of light statutory regulation, a rich pool of disputes and serious interest from international funders. All this means that the future looks bright for third party funding in Singapore.

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1 Matthew Secomb is a partner and Adam Wallin and Gabriella Richmond are associates at White & Case.

2 Queen Mary University of London and White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration', 9-10, https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf. All websites referenced in this chapter were last accessed on 27 August 2020.

3 SIAC Annual Report, 2019 (published 30 June 2020).

4 ICC press release, 'ICC Court case management team begins operations in Singapore' (23 April 2017), https://iccwbo.org/media-wall/news-speeches/icc-court-case-management-team-begins-operations-singapore/; PCA website, 'Singapore Office', https://pca-cpa.org/en/about/structure/singapore-office/.

5 KC.Vijayan, 'First third-party funding for S'pore arbitration case', The Straits Times (1 July 2017).

6 Ministry of Law, 'Public Consultation to Seek Feedback on the Third-Party Funding Framework', https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-third-party-funding.html.

II LEGAL AND REGULATORY FRAMEWORK

The legal and regulatory framework for third party funding in Singapore changed significantly on 1 March 2017. Singapore law now permits third party funding in international arbitration (and related proceedings) if the funder meets certain qualifying criteria. Outside the international arbitration context, however, funding is currently prohibited on public policy grounds. However, this is changing.[7] On 10 October 2019, Kasiviswanathan Shanmugan (Minister of Law and Home Affairs) announced that third party funding will be extended to domestic arbitration.[8]

The regulatory regime for funding in international arbitration has been designed with flexibility and party autonomy in mind.[9] Statutory regulation is relatively light and focuses on lawyers and law firms practising in Singapore. Softer regulation from relevant institutions is emerging, but it remains to be seen how this will be used in practice.

The framework allowing third party funding is made up of various instruments.

i The Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017

Before the recent reforms, almost all funding arrangements in Singapore were unenforceable on public policy grounds. The amended Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017 provide a new framework to allow funding in certain cases.

The Civil Law Act abolishes civil liability for the tort of maintenance and champerty.[10] However, funding agreements will still be unenforceable if they are contrary to public policy or are otherwise illegal.[11]

The Civil Law Act also creates a category of permitted funding agreements. These are contracts 'under which a qualifying third-party funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings'.[12] Under the new framework, 'Prescribed dispute resolution

7 Pre-reform case law suggested limited exceptions to this general prohibition, including the sale of a cause of action in the context of insolvency, or where the funding party has a legitimate interest in the claim (*Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597). The Singapore courts have recently confirmed third party funding in the context of insolvency litigation proceedings (*Solvadis Commodity Chemical Gmbh v. Affert Resources Pte Ltd* (2018) SGHC 210; Re Fan Kow Hin (2018) SGHC 257). These exceptions still appear to be available under the new framework, at least for funding agreements outside Section 5B of the Civil Law Act (see below).

8 Speech by Kasiviswanathan Shanmugam (Minister of Law and Home Affairs), 10 October 2019, https://www.mlaw.gov.sg/news/speeches/speech-by-minister-k-shanmugam-at-opening-ceremony-of-lawsoc-at-maxwell-chambers-suites.

9 Indranee Rajah SC (Senior Minister of State for Law at the time), Second Reading of the Civil Law (Amendment) Bill (10 January 2017) https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-senior-minister-of-state-for-law--indra3.

10 Civil Law Act Section 5A(1). This abolition of civil liability reflects earlier statements of the Singapore High Court that neither champerty nor maintenance is a tort or crime in Singapore: see *Jane Rebecca Ong v. Lim Lie Hoa* [1996] SGHC 140.

11 Civil Law Act, Section 5A(2).

12 Civil Law Act, Section 5B(2). Curiously, the remainder of the Civil Law Act provisions do not refer to this formulation. Rather, they refer to 'third-party funding contracts'. To fall under that definition, the funding must be given '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' (Civil Law Act, Section 5B(10)). This implies that permitted funding agreements must also meet this requirement.

proceedings' means:[13] international arbitration proceedings;[14] court proceedings arising from or out of or in any way connected with international arbitration proceedings; mediation proceedings arising out of or in any way connected with international arbitration proceedings; an application for a stay of an international arbitration agreement and any other application for the enforcement of an arbitration agreement; and proceedings for or in connection with the enforcement of a foreign award under the International Arbitration Act.

A 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'.[15] Dispute resolution proceedings are defined broadly to include the 'entire process of resolving or attempting to resolve a dispute', including through 'any civil, mediation, conciliation, arbitration or insolvency proceedings'.[16]

To 'qualify' under the Civil Law Act, the third party funder must carry 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;[17] and have a paid-up share capital of not less than S$5 million or not less than S$5 million in managed assets.[18]

The effect of these provisions is that most commercial third party funders will now be able to fund international arbitration and related proceedings under Singapore law. However, the requirement to 'carry on the principal business' of funding and the apparent need to fund 'in return for a share or other interest in the proceeds or potential proceeds of the proceedings' seem to exclude respondent-side funding[19] and non-commercial funders (such as pro bono funders, most individual persons and businesses not principally engaged in funding).

Where a third party funder does not comply with the qualification requirements identified above, its rights under a funding agreement will not be enforceable.[20] The funder can, however, apply to the court or arbitration tribunal for relief. It may be granted relief if the disqualification or non-compliance was accidental, inadvertent or for other sufficient cause, or where it is otherwise just and equitable to grant the relief.[21] If the funder's rights

13 Regulations, Regulation 3. This chapter focuses on funding in international arbitration, rather than related court proceedings.

14 See Section 5 of the International Arbitration Act (to which Regulation 2 of the Civil Law (Third Party Funding) 2017 Regulations refers) for a full definition of 'international arbitration proceedings'. In summary, an arbitration is international if: at least one of the parties has its place of business outside Singapore when the contract containing the arbitration agreement is signed; the place of the arbitration under the arbitration agreement, the place most closely connected with the dispute or the place where a substantial part of the parties' obligations are to be performed is outside the state where the parties have their place of business; or the parties otherwise agree the arbitration agreement is international.

15 Civil Law Act, Section 5B(10).

16 Civil Law Act, Section 5B(10).

17 Regulations, Regulation 4(1)(a).

18 Regulations, Regulation 4(1)(b). 'Managed assets' are defined in Regulation 4(2). In each case, this can be satisfied by an equivalent foreign currency amount.

19 See also the Law Society Guidance Note (discussed below), which states that 'Third-party funding involves a commercial funder agreeing to pay some or all of the claimant's legal fees and expenses'. The definition of a 'third-party funding contract' would, however, appear to permit the funding of a counterclaiming respondent (Civil Law Act, Section 5B(10)).

20 Civil Law Act, Section 5B(4).

21 Civil Law Act, Section 5B(6).

become unenforceable, the rights of any other party under the funding agreement will not be affected.[22] In practice, however, funders will most likely seek to neutralise this provision by including this situation as a termination event in the funding agreement.

ii Legal Profession Act and Legal Profession (Professional Conduct) Rules 2015

The new framework also makes amendments to the Legal Profession Act and the Professional Conduct Rules applicable to legal practitioners and law firms in Singapore.[23] The amendments impose requirements to disclose the existence of third party funding (these are addressed further in Section IV). They also prohibit lawyers and law firms from holding financial interests in funders or from receiving commissions, fees or shares of proceeds from funders.[24]

These amendments are supplemented by a Guidance Note from the Law Society of Singapore.[25] Aspects of the Law Society Note are addressed in further detail below.

iii Other guidelines and practice notes

As anticipated when the Civil Law Act was passed,[26] various practitioner and institutional commentaries, guidelines and rules have emerged. The most significant to date are those produced by the Singapore Institute of Arbitrators (SIArb) and SIAC.

SIArb has produced Guidelines for Third Party Funders that aim to promote best practice for funders in Singapore-seated arbitration.[27] Although not mandatory, the SIArb Guidelines are the result of significant input from the Singapore arbitration community and carry considerable weight. The SIArb Guidelines identify matters to be addressed in funding agreements and suggest approaches to issues of confidentiality and privilege, conflicts of interest and control of proceedings, withdrawal of funding and disclosure.

SIAC has produced a Practice Note on Arbitrator Conduct in Cases Involving External Funding.[28] The Practice Note applies in SIAC arbitration involving a permitted 'external funder'.[29] It includes provisions on disclosure (including the disclosure of potential arbitrator conflicts) and costs.

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22 Civil Law Act, Section 5B(7).

23 This includes Singapore solicitors, certain registered foreign lawyers in Singapore, every Singapore law practice and law practices licensed under the Legal Profession Act: see Legal Profession (Professional Conduct) Rules 2015, Rule 3(8) and Legal Profession Act, Section 106A.

24 Legal Profession (Professional Conduct) Rules 2015, Rule 49B.

25 The Law Society of Singapore, Guidance Note 10.1.1 on Third-Party Funding (25 April 2017).

26 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 9.

27 SIArb Guidelines for Third Party Funders (18 May 2017) https://siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf. Under the SIArb Guidelines, a 'funder' is a 'third party . . . [that] provides financial support to enable a party (the Funded Party) to pursue or defend an arbitration or related court or mediation proceedings. Such financial support is provided in exchange for an economic interest in any favourable award or outcome that may ensue' (Paragraph 1.1). This scope of funding to which the SIArb Guidelines potentially apply is therefore broader than that possible under the definition of 'qualifying third-party funder' in the new statutory framework.

28 SIAC Practice Note PN – 01/17 on Arbitrator Conduct in Cases Involving External Funding (31 March 2017), https://www.mlaw.gov.sg/files/ThirdPartyFundingPracticeNote31March2017.pdf/.

29 An external funder is 'any person, either legal or natural, who has a Direct Economic Interest in the outcome of the arbitration proceedings' (SIAC Practice Note, Paragraph 3(c)). This definition is broader than the definition of a 'qualifying third-party funder' under the Civil Law Act. Further, the SIAC Practice Note is not limited to funding arrangements governed by the new statutory framework.

SIAC also recently published the SIAC Investment Arbitration Rules 2017, which include provisions on third party funding.[30]

Specific aspects of these materials are addressed further below.

III STRUCTURING THE AGREEMENT

The new statutory framework is silent as to the structure and terms of the funding agreement. The SIArb Guidelines, however, provide extensive guidance and have gained traction in the market. At the time of writing, 12 funds have publicly endorsed the Guidelines.[31] The Law Society Note also makes recommendations to legal practitioners when advising on funding negotiations.

The Law Society Note identifies five key themes outlined below, which overlap with the SIArb Guidelines.

i Confidentiality and privilege

The Law Society Note recommends that certain terms be included in an initial confidentiality or non-disclosure agreement. The terms are designed to protect confidentiality and privilege in documents disclosed to a funder before it decides to fund a claim.[32] The SIArb Guidelines echo the need for this protection.[33]

The Note also recommends that similar provisions be included in the funding agreement itself.[34] In addition, the SIArb Guidelines prohibit a funder from seeking disclosure of information from a funded party's legal practitioner that might amount to a breach of privilege or the practitioner's confidentiality obligations.[35]

ii Scope of funding

The funding agreement should specify the amount of funding (and how this may be varied) and the agreed investment return.[36] It should also state the type of costs that will be funded and in particular whether a funder is liable for adverse costs, insurance premiums, amounts ordered as security for costs or any other financial liability.[37] The Law Society Note also recommends terms on the priority and timing of payments to the funder.[38]

30 SIAC, *Investment Arbitration Rules* (1st Edition, 1 January 2017), https://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Rules%202017.pdf, Articles 24(1), 33.1 and 35.

31 SIArb, 'Third Party Funding', https://siarb.org.sg/index.php/resources/third-party-funding. The prospects of this are good, at least for funding agreements negotiated by Singapore legal practitioners. The Law Society Note (Paragraph 22) recommends that guidelines published by SIArb and SIAC should either be incorporated into the funding agreement or the funder should agree to comply with them.

32 Law Society Note, Paragraphs 25–29.

33 SIArb Guidelines, Paragraph 2.2.

34 Law Society Note, Paragraph 29; SIArb Guidelines, Paragraph 5.

35 SIArb Guidelines, Paragraph 5.2. The provision excludes situations where the funded party consents or the disclosure is made under a pre-agreed arrangement approved by the funded party.

36 Law Society Note, Paragraph 30(a-b); SIArb Guidelines, Paragraphs 3.1.2-3.1.3.

37 Law Society Note, Paragraphs 30(c) and 31; SIArb Guidelines, Paragraph 3.2.

38 Law Society Note, Paragraphs 33–34.

iii Managing conflicts of interest

The Law Society Note recommends terms designed to reduce the risk of conflicts between a funder and the funded party. These include the funder acknowledging that the lawyer's duties are owed to the client, not the funder; the lawyer only sharing written opinions with the funder if the funded party consents; and the funder not inducing the lawyer to breach his or her duties or cede control of the dispute to the funder.[39]

The SIArb Guidelines contain similar provisions, although they appear to allow slightly more leeway for funders to control a dispute if the funding agreement permits.[40] The SIArb Guidelines also require funders to be satisfied the funding will not give rise to conflicts of interest.[41] Where a funder funds more than one party in the same proceedings, it must notify the funded parties of any potential conflict that arises during the case.[42]

The related issue of disclosure between adverse parties and to the court or tribunal is addressed further in Section IV. The SIArb Guidelines envisage the funding agreement authorising the funded party to disclose the funder's identity and address, and the existence of the funding, to the other parties, legal practitioners and court or arbitral tribunal.[43] The guidelines also require funders to cooperate with any further disclosure about the funding required by the court or tribunal or under any applicable rules.[44]

iv Funder's level of involvement in decision-making and dispute resolution

The Law Society Note recommends that a funding agreement specify the nature and scope of the funder's role and gives examples of what this might look like in practice.[45] Outside the context of settlement, the SIArb Guidelines do not specifically envisage a term outlining the funder's role, although the Guidelines favour clarity where possible.[46]

Both the Law Society Note and the SIArb Guidelines advocate including a dispute resolution provision for managing conflicts between the funder and funded party.[47] The Law Society Note gives two examples of possible procedures: referral of disputes to an independent arbitrator for an expedited and binding decision; or giving the funded party the final say, but reserving the funder's right to claim against the funded party if it acts in bad faith.[48] By contrast, the SIArb Guidelines suggest a 'fair, transparent and independent dispute resolution mechanism'.[49]

39 Law Society Note, Paragraph 37(a-e).

40 SIArb Guidelines, Paragraphs 6.1 and 6.2.

41 SIArb Guidelines, Paragraph 2.1.3.

42 SIArb Guidelines, Paragraph 6.1.5.

43 SIArb Guidelines, Paragraph 3.1.5.

44 SIArb Guidelines, Paragraphs 3.1.6 and 8.1.

45 Law Society Note, Paragraph 41. The examples include assisting with choice of solicitors, arbitrators and mediators; assisting with strategic or tactical decisions; considering advice and providing instructions; managing expenses; and providing input on settlement.

46 SIArb Guidelines, Paragraph 7.1.1 (funder's role in settlement).

47 Law Society Note, Paragraph 42; SIArb Guidelines, Paragraphs 3.1.7 and 6.2.3.

48 Law Society Note, Paragraphs 42(a-b).

49 SIArb Guidelines, Paragraph 3.1.7.

v Termination of the funding agreement

The funding agreement should identify the situations in which it may be terminated by the funder.[50] The Law Society Note recommends that funders should generally not have a discretionary right to terminate a funding agreement.[51] The funding agreement may also provide for termination by the funded party.[52]

Termination provisions should clarify the extent to which a funder remains liable for accrued obligations.[53] The Law Society Note suggests the funding agreement should also require the funder to pay costs caused by the funder's termination.[54]

IV DISCLOSURE

Disclosure of funding arrangements to adverse parties and the court or arbitral tribunal is a central tenet of Singapore's new funding framework.[55] The disclosure rules are designed to address issues that can arise from a lack of transparency and conflicts of interest in funded proceedings, while avoiding prescriptive regulation that limits party autonomy and flexibility.[56]

i Disclosure of basic funding information

Amendments to the Legal Profession (Professional Conduct) Rules 2015 require legal practitioners in Singapore to disclose certain information to the court or tribunal and every other party to funded proceedings, namely the existence of the funding agreement and the identity and address of the third party funder.[57]

Disclosure must be made either on the date the proceedings are commenced or, if no funding is in place at that date, as soon as practicable after that.[58]

The Law Society Note also recommends that any termination of a funding agreement or change of funder should also be disclosed.[59]

The rationale for these obligations was to give the disclosure requirements 'practical and real effect', instead of attempting to regulate funders or funded parties, which are often located outside the jurisdiction.[60] Two important consequences flow from this.

First, although the disclosure requirement on legal professionals themselves are relatively limited, it is unclear whether legal practitioners subject to the Professional Conduct Rules

50 Law Society Note, Paragraph 43; SIArb Guidelines, Paragraph 7.1.2.
51 Law Society Note, Paragraph 43.
52 Law Society Note, Paragraph 45.
53 Law Society Note, Paragraph 44(a); SIArb Guidelines, Paragraph 7.1.3.
54 Law Society Note, Paragraph 44(b).
55 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 9.
56 ibid.
57 Legal Profession (Professional Conduct) Rules 2015, Rule 49A(1).
58 Legal Profession (Professional Conduct) Rules 2015, Rule 49A(2).
59 Law Society Note, Paragraph 52.
60 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 9.

must disclose funding arrangements in proceedings outside Singapore.[61] If they must disclose in those circumstances, this may create inequalities in the disclosure obligations applicable to the parties' respective legal teams in some situations.[62]

Second, as the Professional Conduct Rules only bind Singapore legal practitioners, legal teams outside Singapore will not need to comply. This may create inequalities in the ethical rules applicable to legal practitioners even in Singapore-seated arbitration.

In practice, the risk of inconsistent or unequal treatment may be limited, because tribunals or courts may take an active role in requesting the disclosure of funding arrangements (as is now possible under the SIAC Rules and SIAC Investment Arbitration Rules).[63] They may use this power to deal with inequality (e.g., where one party's lawyers are obliged to disclose, but the other side's lawyers are not).

ii Disclosure of more detailed funding information in SIAC arbitration

Unless the parties have agreed otherwise, a tribunal in a SIAC arbitration may conduct 'such enquiries as may appear to the Tribunal to be necessary or expedient'.[64] This may include ordering the disclosure of the existence of funding, the funder's identity and, where appropriate, details of the external funder's interest in the proceedings and whether the funder has committed to undertake adverse costs liability.[65]

iii Arbitrator disclosure under the SIAC Rules

The SIAC Practice Note requires arbitrator candidates to disclose to the SIAC Registrar and the parties any direct or indirect relationship with a funder involved in the arbitration.[66] The disclosure must be made as soon as reasonably practicable and in any event before the candidate is appointed.[67] In addition, an arbitrator must disclose any such relationship that is discovered or arises during the arbitration proceedings.[68]

61 The analysis turns on the definition of 'dispute resolution proceedings' and 'third-party funding contract' under the professional conduct rules and the Civil Law Act. Neither of these terms are expressly limited to Singapore proceedings. However, the Civil Law Act's definitions of those terms are limited to 'prescribed dispute resolution proceedings', which are in turn (indirectly) limited to proceedings in Singapore (see Regulations 2 and 3, the International Arbitration Act, Section 5 and the Model Law at Schedule 1 of the International Arbitration Act, Article 1(2)).

62 This issue is not unique to third party funding or the Singapore framework. Differences in ethical rules frequently arise in various contexts in international arbitration and the issue is sometimes referred to as the 'inequality-of-arms problem' (see, e.g., the discussion in Catherine A Rogers, *Ethics in International Arbitration* (OUP 2014) at Paragraphs 3.21–3.22).

63 See SIAC Practice Note, Paragraphs 5, 7 and 8; SIAC Investment Arbitration Rules, Article 24(l).

64 SIAC Practice Note, Paragraph 5; SIAC Investment Arbitration Rules, Article 24(c).

65 SIAC Practice Note, Paragraph 5; SIAC Investment Arbitration Rules, Article 24(l).

66 The SIAC Practice Note uses the term 'external funder', which is defined as 'any person, either legal or natural, who has a Direct Economic Interest in the outcome of the arbitration proceedings' (SIAC Practice Note, Paragraph 3(c)).

67 SIAC Practice Note, Paragraph 4.

68 SIAC Practice Note, Paragraph 6.

V COSTS

Two broad categories of costs issues arise: costs recovery by the funded party and costs recovery by an adverse party. Although the new statutory framework is silent on these issues, SIAC has produced guidance that will inform party expectations, at least in SIAC arbitration proceedings.

i Costs recovery by the funded party

The SIAC Practice Note provides that 'The Tribunal may take into account the existence of any external funder in apportioning the costs of the arbitration';[69] and 'The Tribunal may take into account the involvement of an external funder in ordering . . . that all or a part of the legal or other costs of a Disputant Party be paid by another Disputant Party.'[70] These provisions confirm that the tribunal may take into account funding arrangements when apportioning costs of the arbitration and awarding costs to a funded party.

Different tribunals will approach the issue of costs in funded cases differently. For example, SIAC's formulation above may be wide enough to permit the recovery of a party's funding costs (i.e., in addition to the legal costs).[71] At the other end of the spectrum, in some situations tribunals may decide a funded party should not be awarded any of the legal costs paid by the funder at all.[72] These examples represent the extremes and most tribunals will reach a solution somewhere in between.

ii Costs recovery by the adverse party

A party in opposition to a funded party will wish to ensure it can recover its costs if it is successful in the proceedings.

A party will often do this by seeking security for its costs. In the funding context, the question is whether the existence of a funding agreement amounts to evidence that the funded party would be unlikely or unable to pay costs if ordered to do so. The SIAC Practice Note addresses this as follows: 'The involvement of an External Funder alone shall not be taken as an indication of the financial status of a Disputant Party. The Tribunal may take into account factors other than the involvement of an External Funder in an order for security for legal or other costs.'[73]

Tribunals may also see an increase in applications for disclosure of the terms (if any) on which a funder has agreed to undertake adverse costs liability.[74] Such applications may be used to assess prospects of recovering costs from a funded party or as a precursor to a security application.

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69 SIAC Practice Note, Paragraph 10. See also the SIAC Investment Arbitration Rules, Paragraph 33.1.

70 SIAC Practice Note, Paragraph 11. See also the SIAC Investment Arbitration Rules, Paragraph 35.

71 The English High Court, in *Essar Oilfield Services Ltd v. Norscot Rig Management PVT Ltd* [2017] Bus LR 227, held that such costs would fall within the meaning of 'other costs' under the United Kingdom's Arbitration Act 1996.

72 For example, where a funding agreement becomes unenforceable by the funder under the Civil Law Act, the funded party would have no liability to the funder (Civil Law Act, Sections 5B(4)–(7)). In that situation, a tribunal might consider that allowing the funded party to recover legal costs paid by the funder would amount to a windfall for the funded party.

73 SIAC Practice Note, Paragraph 9.

74 See the tribunal's powers under SIAC Practice Note, Paragraph 5 and SIAC Investment Arbitration Rules, Rule 24(l).

VI THE YEAR IN REVIEW

Singapore's new funding framework reflects a trend towards third party funding in arbitration in other leading international arbitration jurisdictions.[75] The framework adopts a light-touch approach to regulation and places disclosure at its heart to promote greater transparency and fewer conflicts of interest.[76]

The framework also leaves space for industry norms to establish and grow. Some organisations, notably the Singapore Law Society, SIAC and SIArb, have led the way by issuing guidance and new institutional rules. Twelve funds have already signed up to the SIArb Guidelines.[77]

The Singapore government is also keen to ensure the framework is working well and to identify areas for further improvement and innovation. Between April and May 2018, Singapore's Ministry of Law carried out a public consultation. The consultation sought feedback on the operation of the current third party funding framework and suggestions for improvement and extension beyond international arbitration.[78] The results of the consultation are expected in due course. Preliminary observations in March 2019 from Edwin Tong SC (Senior Minister of State for Law), suggests the feedback has been positive, with funders seeing an upturn in their requests for funding in Singapore.[79] Announcements at the end of 2019 also indicated that the third party funding framework would be extended to domestic arbitration proceedings and certain prescribed proceedings in the Singapore International Commercial Court.[80] The implementation and practical effect of this announcement remains to be seen.

VII CONCLUSIONS AND OUTLOOK

The third party funding framework has been a welcome development for international arbitration in Singapore. It provides parties with greater risk management opportunities and access to justice, and funders with a new pool of potential investments. Since the framework was introduced in early 2017, Singapore has seen an influx of funders and the market is growing. In keeping with other aspects of the dispute resolution environment in Singapore, the Ministry of Law has sought views from users to catalyse further innovation. The recent public consultation on third party funding may thus lead to further refinements and improvements to the framework.

Outside the international arbitration context, there are signs that third party funding may be extended to other categories of proceedings in the future (including domestic

75 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 9.

76 ibid.

77 SIArb, 'Third Party Funding', https://siarb.org.sg/index.php/resources/third-party-funding.

78 Ministry of Law, footnote 6.

79 Ministry of Law speech, https://www.mlaw.gov.sg/news/parliamentary-speeches/response-speech-sms-edwin-tong-cos-2019, at paragraph 48.

80 https://www.mlaw.gov.sg/news/press-releases/public-consultation-open-or-feedback-on-conditional-fee-agreements-in-singapore, paragraph 8 (August 2019). See also the speech by Kasiviswanathan Shanmugam (Minister of Law and Home Affairs), 10 October 2019, https://www.mlaw.gov.sg/news/speeches/speech-by-minister-k-shanmugam-at-opening-ceremony-of-lawsoc-at-maxwell-chambers-suites.

arbitration and litigation).[81] In October 2019, the Ministry of Law announced that it has decided to extend third party funding to domestic arbitration and is seriously considering the introduction of conditional fee arrangements for domestic and international arbitration.[82] Parties, funders and practitioners alike will be watching market developments with interest.

81 Indranee Rajah SC (Senior Minister of State for Law at the time), footnote 6: 'we want to have the framework tested in a limited sphere, where those involved are typically well advised, commercially sophisticated and better able to bear the reduction in damages. If the framework works well, as and when appropriate, the prescribed categories of proceedings may be expanded. The Ministry will consult closely with the profession and stakeholders on this, as we have been doing.' Developments in this sphere are still occurring, particularly in light of the announcement in August 2019 by the Senior Minister for Law regarding the extended application of third party funding, https://www.mlaw.gov.sg/news/press-releases/public-consultation-open-or-feedback-on-conditional-fee-agreements-in-singapore.

82 Speech by Kasiviswanathan Shanmugam (Minister of Law and Home Affairs), 10 October 2019, https://www.mlaw.gov.sg/news/speeches/speech-by-minister-k-shanmugam-at-opening-ceremony-of-lawsoc-at-maxwell-chambers-suites.

Appendix 1

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Matthew Secomb is a partner in White & Case's international arbitration practice. His practice concentrates on international commercial arbitration with a focus on energy-related and construction disputes. He has been involved in arbitration proceedings under most of the major institutional rules, as well as in ad hoc arbitration. He is admitted to practise in Australia and England and Wales, and is an *avocat* at the Paris Bar. He also acts regularly as arbitrator, having chaired or sat as sole arbitrator and co-arbitrator in arbitrations conducted under various rules.

Matthew spent nearly 10 years in White & Case's Paris office before moving to Singapore in 2015. Prior to joining White & Case, Matthew was counsel to the ICC International Court of Arbitration. He also teaches regularly at various universities, including as an adjunct associate professor in energy arbitration at the National University of Singapore, Faculty of Law.

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