

# *Paying for Arbitration*

*15 November 2023*

*LLM Arbitration and Dispute Resolution Insights  
from the Dispute Resolution Community*

CAROLINE THOMAS,  
HUGILL & IP SOLICITORS

A large, textured pink brushstroke graphic that tapers to the right, serving as a background for the title.

# *Agenda*

1. Ways to pay for arbitration
2. Background – historic prohibitions & how 3<sup>rd</sup> party funding works
3. **Australia**
4. **Europe**
5. **UK**
6. **US**
7. Singapore
8. Hong Kong
9. ISDS
10. Some of the players
11. Summary and trends

# ***1. Ways to pay for arbitration***

## **Client's own funds**

- Corporations
- Individuals
- Souverain states
- **Law firms**

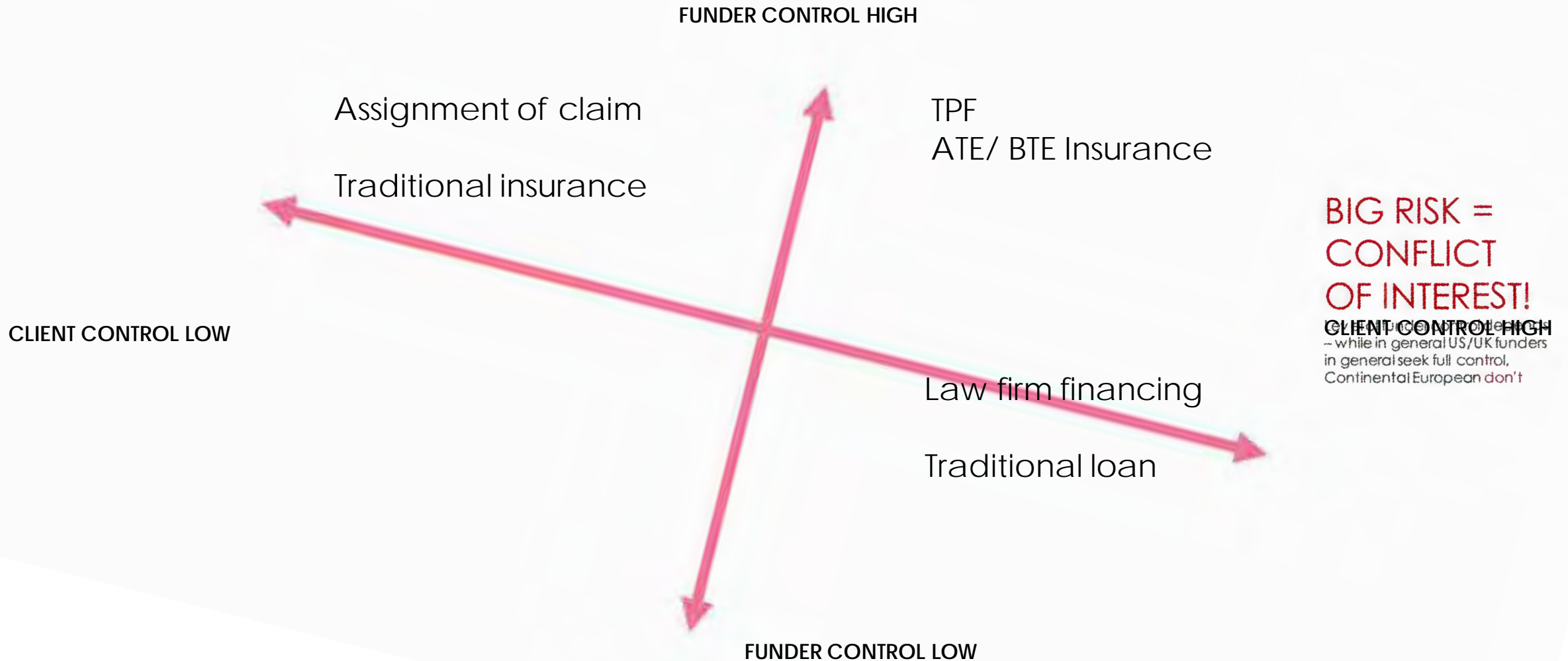
## **Lawyers**

- Pro bono
- **Conditional fee arrangement** (lawyer charges discounted fees but gets **uplift** in event of success)
- **Contingency fees** (lawyer fronts fees to be repaid if **success** - usually plus share of award)

## **Funding**

- ☐ Loans
- ☐ Assignment/ sale of claim
- Insurance
  - ☐ Liability insurance
  - ☐ Before the event insurance (BTE)
  - ☐ After the event insurance (ATE) (legal costs & legal costs orders, premium contingent on success)
- ☐ **3<sup>rd</sup> Party Funding**

# ***1. Ways to pay & who is then in control***





*...each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of **any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.***

## **ICC 2021 Arbitration Rules II(7)**

## ***2. Background – Historic Prohibitions***



- **Maintenance** = meddling by a disinterested party in a lawsuit with which they have no connection or valid interest without just cause.
- **Champerty** = aggravated maintenance where the stranger also has a financial interest in the outcome.
- **(Barratry** = continuing practice of maintenance or champerty)

Historically = Crimes/ Torts

e.g. in England, Hong Kong, Singapore, Canadian and US States...

## ***2. Background – Historic Prohibitions***

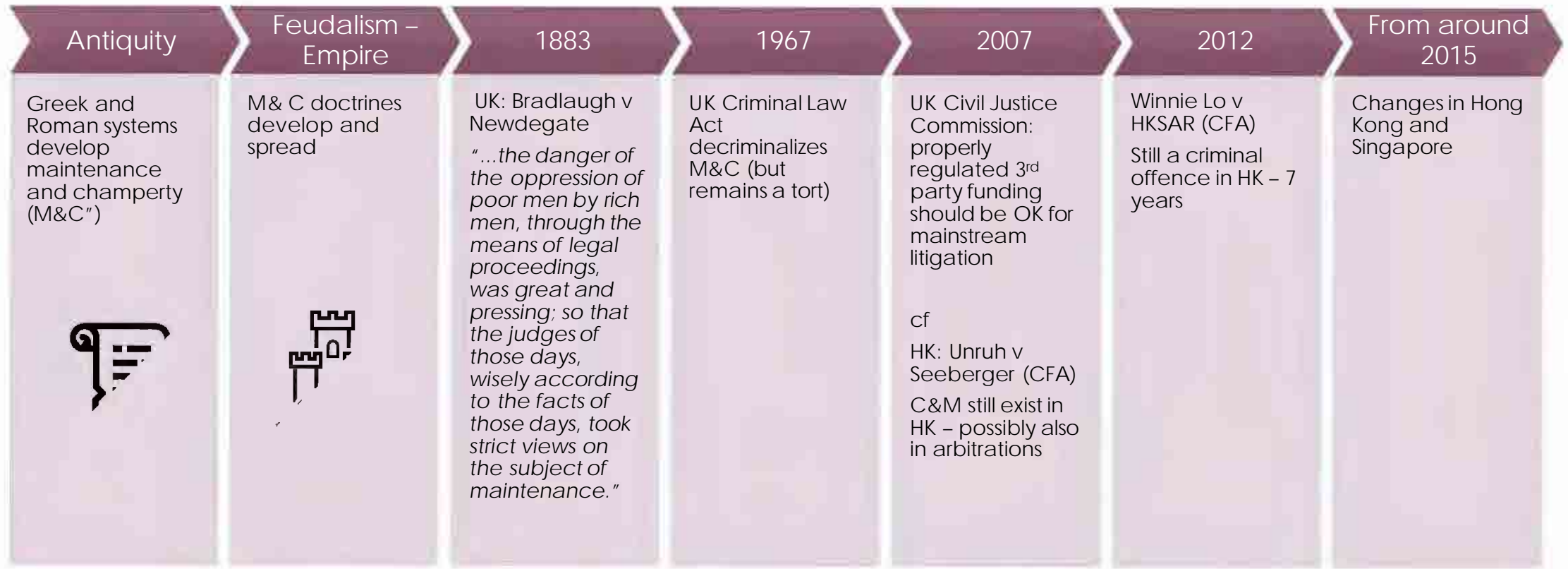


Contingency fee arrangements by lawyers traditionally thus have not been allowed.



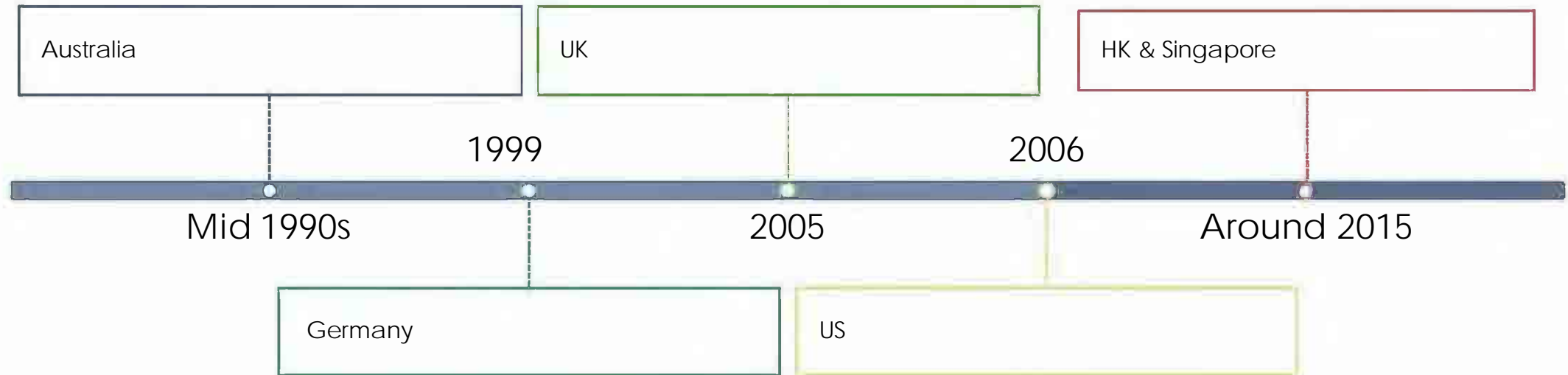
There are also laws against **usury** in most jurisdictions (i.e. lending at higher rates of interest than the law allows).

## 2. Timeline – Historical Prohibitions





## ***2. Timeline- specialized funders start in***



## ***2. How TPF Works***

### ***Alternative Options for Claimant***

#### **Costs**

- Funder to pay all litigant's own costs; or
- Funder agrees to pay some of litigant's own costs, remainder being on a **CFA**;  
or
- Funder agrees to pay some of litigant's own costs, remainder being paid by **ATE**

#### **Adverse Costs**

- Funder agrees to fully pay adverse costs;  
or
- Funder agrees to pay adverse costs in part; or
- Adverse costs paid by **ATE**

**In exchange funder typically receives:**

1. Commitment \$ times multiplier; or
2. Cash \$ outlay time multiplier; or
3. Percentage of damages

## ***2. How TPF Works -for Defendant***

### **Funder pays:**

- Defendant's costs
- Adverse costs if Claimant's wins
- Damages if Claimant wins

### **In exchange funder typically receives:**

- Reimbursement of costs if Claimant fails
- % of damages if Claimant fails

*(i.e. the better the outcome, the more the Defendant must repay)*

## ***2. How TPF Works***

1. **Single case** funding – individual matters
2. **Portfolio financing** – nonrecourse capital secured by a pool of existing or ongoing matters, pricing lower due to diversification, interplay with DBAs and ORFSA.
3. **Monetization** – finance for working capital against outcome of claim (s)
4. **Assignment** – purchase of disputes through assignment of underlying cause of action

## ***2. Types of claims that are funded***

- Insolvency
- **Investor-state arbitration (ISDS)**
- Class actions
  - Investor claims (e.g. under securities litigation)
  - Torts
- Competition law
- **Big corporates**

RISK DURING DUE  
DILLIGENCE =  
WAIVER OF PRIVILEGE

### ***3. Australia***

- Maintenance and champerty abolished as crimes and torts in some States (e.g. **NSW, Victoria, SA and the ACT**). **Recently 2022 Queensland**; <https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2020/12/09/queensland-supreme-court-decision-recognises-public-benefit-of-funded-class-actions>
- In the mid 1990s legislation was brought in to allow financing of insolvency litigation.
- In 1992 the Federal Government introduced reforms including class action procedure and other measures intended to increase level of litigation including a limited form of conditional fee agreements with limited uplift – 25% (=unattractive). Contingency fees still not allowed.
- Litigation funders step in.
- Campbells Cash and Carry Pty Limited v **Fostif** Pty Ltd [2006] HCA 41
- June 2020 section 33ZDA of the Supreme Court Act 1986 (Vic) – it becomes possible with court approval for lawyers representing a lead plaintiff in a class action to recover a contingency fee (Group Costs Order or GCO).

### ***3. Australia***

- Since Fostif in 2006 - 2020, the funding industry grew with few obstacles, and no specific regulation or licensing requirements. To the contrary funders, exempt from regulatory requirements on policy grounds (e.g. access to justice in class actions).
- Scandal: Banksia Securities - class action – allege inflated/fake fees/invoices/ blocked settlement.
- Big change in 2020: legislation introduced requiring funders to hold an Australian Financial Services Licence and for their funding schemes to comply with the requirements for managed investments schemes (“MIS”).
- Further legislative reform proposed, e.g. rebuttable presumption that class action outcomes that do not return 70% of any recovery to class members are not 'fair and reasonable' and therefore should not be approved by the court.
- Reversal: December 2022, federal government expressly reversed the effect of the 2020 regulations with the enactment of the Corporations Amendment (Litigation Funding) Regulations 2022 (no longer MIS).

## ***4. Europe***

- Except for Ireland – most EU jurisdictions are civil law.
- Few EU member states expressly prohibit TPF: Greece and Ireland (where the prohibition is currently under review, more to come in 2024). In most other EU countries there is no legal framework to regulate TPF.
- In Switzerland there have been cases in 2000s.
- Some countries seem to consider TPF as a “regulated activity” subject to license/authorization: Norway and Italy.
- Some forms of TPF may be subject to regulation.
- Lots of TPF funded cases in **Germany**.



## ***4. Europe – EU Regulation Coming?***

- **Pre-Covid 19** a German MEP started to look into TPF (and Australian issues).
- **In late 2020** Parliament issued a directive on collective redress = Directive (EU) 2020/1828 = new framework for EU class actions
- **September 2022** Resolution of the EU Parliament calling for action from the EU Commission with a proposed **directive**
- Formal reply of the Commission does not give the impression it is a priority
- No EU legislation expected in the short term
- But: lobbying against LF is still very active at EU and national level

## ***5. England & Wales***

- **1990** British Courts and Legal Services Act
- **1999** Access to Justice Act (amends above)
- **2009 Coroners and Justice Act** inserted section 58AA into the Courts and Legal Services Act 1990 ("CLSA 1990"). Section 58AA(1) and (2) provide that a DBA will be unenforceable unless certain conditions are complied with
- **2012** Legal, Aid Sentencing and Punishment of Offenders Act – abolishes recoverability of ATE premium and conditional fees
- **2013** Damages-Based Agreements Regulations - prescribe the requirements with which a damages-based agreement ("DBA") must comply in order to be enforceable under section 58AA of the Courts and Legal Services Act 1990

## ***5. England & Wales***

- **2007** Civil Justice Commission – Alternative Financing Structures
- **2010** Jackson Review of Civil Litigation Costs
- **2011** Code of Conduct for Litigation Funders by Association of Litigation Funders (ALF)(updated in 2018)
  - Membership of ALF
  - Min GBP 2 m capital
  - Audit by recognized firm
  - Complaints procedure
- **2016** Report of the ICCA Queen Mary Taskforce on TPF in International Arbitration Subcommittee on **Security for Costs**
- **2018** Report of the ICCA-QMUL Taskforce on TPF in International Arbitration

## ***5. England & Wales***

- **Paccar Inc v Road Haulage Association Ltd** [2023] UKSC 28.
- **26 July 2023: Supreme Court** held TPF agreements with 3<sup>rd</sup> parties who play no part in the conduct of litigation, but are paid a share of any damages recovered by the claimant, are “damages-based agreements” (or DBAs) within the meaning of the relevant legislation.
- Must comply with the relevant regulatory regime and, if not, are **unenforceable**.
- **Therium Litigation Funding A IC v Bugsby Property LLC** [2023] EWHC 2627 (Comm) - High Court has held that there is a “serious issue to be tried” that the element of a litigation funding agreement which provides for the funder to receive a multiple of funding remains enforceable, even though the aspect which provides for a percentage of damages is unenforceable in light of Paccar.

## 6. *United States*

- States that either do not recognise **champerty or maintenance**, or expressly permit litigation funding by statute or exception, include Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Ohio and Texas.
- Litigation funding has been challenged as **usury** (in New York).
- Rule 5.4(a) of the Model Rules of Professional Conduct (which every state has adopted in some form) requires that “[a] lawyer or law firm shall not share legal fees with a nonlawyer.” Cases and push to modify.
- Problems also with privilege and waiver. “*Common interest privilege*” may work – best to execute agreement establishing nature of relationship, common legal cause and litigation that may ensue (it may be helpful if litigation initiated before exchange of information).
- Wisconsin was the first state requiring litigation funding disclosure in commercial litigation, pursuant to a law passed in March 2018.

# *Singapore*

- **2017:** The Civil Law Act was amended and Civil Law (Third-Party Funding) Regulations 2017 enacted to allow TPF in international arbitration and related court and mediation proceedings
- **June 2021:** Litigation funding also allowed in:
  - domestic arbitration and related court proceedings;
  - proceedings in the Singapore International Commercial Court (SICC)
    - SICC has jurisdiction to hear an action if (1) the claim is of a international and commercial nature, (2) the parties have submitted to the SICC's jurisdiction under a written agreement; and (3) the parties do not seek prerogative relief (including mandatory order, prohibiting order etc.)
- Litigation funding of insolvency proceedings allowed pursuant to case law since 2015 and the Insolvency, Resolution and Dissolution Act 2018 (entered into force in July 2020)
- Funder must have paid up share capital of min S\$5 m
- Counsel must disclose existence and ID and address of TPFer

## ***7. Singapore***

- **Rule 24 (l)** of the **SIAC Investment Arbitration Rules** (2017, 1<sup>st</sup> ed) expressly gives the tribunal the power to order disclosure of the existence of the TPF arrangement and/or the identity of the TPF, and, where appropriate, details of the TPF's interest in the outcome of the proceedings, and/or whether the TPF has agreed to be liable for adverse costs.

# 7. *Singapore*

SIAC Rules (7th Edition) (consultation draft open until November 2023)

## 38. Third-Party Funding

- 38.1 **A party shall disclose the existence of any third-party funding agreement and the identity of the third-party funder in its Notice or Response or immediately upon concluding a third-party funding agreement.**
- 38.2 The funded party shall immediately **notify** the Tribunal, the parties and the Registrar of **any changes** to the third-party funding agreement in respect of which disclosures had previously been made.
- 38.3 The Tribunal may order the disclosure of the information referred to in Rule 38.1 **and, after considering the views of the parties, details of the third-party funder's interest in the outcome of the proceedings, and whether the third-party funder has committed to undertake adverse costs liability.**
- 38.4 After the constitution of the Tribunal, a party shall not enter into a third-party funding agreement which may give rise to a conflict of interest with any member of the Tribunal



# 8. *Hong Kong*

- OLD: TPF allowed in insolvency proceeding (case law).
- NEW: Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017 (the Amendment Ordinance)
  - Clarifies that TPF of **arbitration and mediation NOT prohibited by M&C**
  - Funded party must disclose existence of funding agreement within 15 days.
  - (Commencement of new Mediation Ordinance provisions deferred (there will be further consultation):  
[https://www.legco.gov.hk/yr18-19/english/subleg/brief/2018ln260\\_brf.pdf](https://www.legco.gov.hk/yr18-19/english/subleg/brief/2018ln260_brf.pdf).)
- **Code of Practice of Third Party Funding of Arbitration 2019**
  - Promotional **materials may not be misleading**, must take reasonable steps to ensure that the funded party is made aware of the right to seek **independent legal advice** before entering into the funding agreement.
  - **Funder may not influence** the funded party / legal representative to give **control or conduct** of the arbitration or mediation to the third party funder except to the extent permitted by law; nor take any steps that cause or are likely to **cause the funded party's legal representative to act in breach of professional duties**,
  - Funders effectively **manage conflicts of interest**.
  - Funder must submit annual returns to advisory body and maintain capital adequacy requirements (1) to pay all debts when they become due and payable; and (2) to cover aggregate funding liabilities under all its funding agreements for a minimum period of 36 months and (3) maintain access to a minimum of HK\$20 million of capital.

# ***Hong Kong***

- HKIAC Administered Arbitration Rules in 2018:
  - **Disclosure** of TPF.
  - **Impact on Costs** - permit an arbitral tribunal to consider any third party funding arrangement in fixing and apportioning the costs of arbitration - require a funded party to **disclose promptly the existence of a funding agreement, the identity of the funder** and any subsequent changes to this information.
  - **Confidentiality** -funded party allowed to disclose arbitration-related information to its existing and potential funders

# 8. Hong Kong ORFSA – since 2022

## 1. CFA (Conditional Fee Agreement)

- “no win, no fee” - success fee: payable only in the event of a successful outcome where “successful outcome” = as agreed to between the client and lawyer of the client – can include any financial benefit obtained by the client
- “no win, low fee” - client may additionally pay fees during the life of the matter, typically at a discounted rate

## 2. DBA (Damages Based Agreement)

- No fee during life of arbitration (“no win, no fee”)
- DBA payment payable only upon client obtaining financial benefit and calculated by reference to financial benefit
- DBA may be a percentage of money awarded to client or settlement sum but can include any other form of financial benefit: physical asset, crypto currency, debt or reduction in a sum claimed against the client

## 3. Hybrid DBA

- Lawyer charges some fees (typically discounted) during the life of the matter, **plus** a DBA payment

## **8. Hong Kong ORFSA – since 2022**

Cap. 609D

**General conditions of all ORFSA**

Must state:

- the matter to which the agreement relates (the arbitration or any part of it)
- in what circumstances the lawyer's fees and expenses (or any part) are payable
- client informed of right to seek independent legal advice before entering into the agreement
- a cooling off period of at least 7 days, during which the client can terminate the agreement without liability
- whether disbursements, including barristers' fees to be paid by the client irrespective of the outcome
- grounds on which the agreement may be terminated before the conclusion
- alternative basis on which the lawyer is to be paid by the client in the event of termination of the agreement before conclusion of the matter

## 8. Hong Kong ORFSA – since 2022

CFA	DBA	Hybrid DBA
Success fee must be expressed as a percentage of the benchmark fee.	DBA payment must (i) be calculated by reference to the financial benefit obtained, (ii) <b>not exceed 50% of the financial benefit obtained</b> and (iii) be payable in addition to any recoverable lawyer's costs.	All conditions of DBA.
<b>Uplift must not exceed 100% of the benchmark fee.</b>		State (i) the fee to be paid in any event during the course of the matter, and (ii) the benchmark fee.
Must state (i) what constitute a successful outcome, (ii) basis for calculating the success fee and (iii) when it becomes payable.	Must state: (i) the “financial benefit” to which the agreement relates, (ii) basis for calculating the DBA payment, (iii) when the DBA payment becomes payable, and (iv) whether barrister's fees are included in or are in addition to the DBA payment.	Provide for (i) a “ <b>capped amount</b> ” <b>which is payable if no financial benefit is obtained, and which shall be no more than 50% of the irrecoverable costs.</b>  (ii) if a financial benefit is obtained, but the DBA payment is less than the capped amount, the lawyer may elect to retain the capped amount instead of the DBA payment.

## 8. Hong Kong ORFSA – since 2022

- S.98ZP – **confidential information** (s.18) may be communicated by client to lawyer for the purpose of ORFS agreement or seeking to enter into such.
- S.98ZQ, 98ZR – **lawyer must give notice to other parties** of the arbitration and the arbitration body the fact that an ORFS agreement was made and the name of the client, or that it has ended and the dated the agreement ended (as the case may be).
- S. 98ZS – non-compliance of the above does not render any person liable to any judicial or other proceedings; but any compliance or non-compliance may be taken into account by any court or arbitral tribunal if relevant to a question being decided by the court or arbitral tribunal.
- **S.98ZU - save in exceptional circumstances, an arbitrator cannot order a losing party to pay the costs of its successful opponent that exceed the amount it would have incurred had the successful party not entered an outcome related fee agreement with its lawyers.**

## ***9. Investor- State Arbitration (ISDS)***

- “*Possible reform of investor-State dispute settlement (ISDS) Draft provisions on third-party funding*” which is downloadable from the WG III website was open **for comments until 15 September 2021.**
- “*Disclosure is required generally for addressing the risk of conflicts of interest or the lack of transparency and a number of existing investment treaties and arbitration rules include rules on disclosure of third-party funding. ICSID is also considering requiring disclosure of third-party funding in its Rules and Regulations Amendment Process to address the potential risk of conflicts of interest.*” (para 36)
- Discussion of kind of model to adopt – e.g. a prohibition model or some kind of restriction mode.
- Suggestion that like in Hong Kong, there might be a Code of Conduct for Third Party Funders.
- “Allocation of costs” = proposed clarifications that the costs of third party funders should not be added to the costs of the proceedings.
- Paragraph 59 need consider whether litigation financiers ought not only finance litigation, but also take the consequences if the party they backed loses.

# ***9. Investor- State Arbitration (ISDS)***

- **ICSID Arbitration Rules 2022**
- **Rule 14: Notice of Third-Party Funding**
- (1) A party shall file a written notice **disclosing the name and address of any non-party** from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding (“third-party funding”). If the non-party providing funding is a juridical person, the notice **shall include the names of the persons and entities that own and control that juridical person.**
- (2) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any **changes to the information in the notice.**
- (3) The Secretary-General **shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration** required by Rule 19(3)(b).
- (4) The Tribunal **may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3).**
- **Rule 36: Evidence: General Principles**
- (3) The Tribunal may call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.





# *Summary & Trends*

1. Convergence of rules internationally?
2. Disclosure of the existence of funding and identity of the funder is increasingly required (at a minimum to allow conflict check). The bigger question is what else?
3. Converging codes of conduct/ regulation?
4. Privilege/ confidentiality – still different rules.
5. Whether funding costs are recoverable depends on applicable national laws or procedural rules, early disclosure and reasonableness.
6. If there is nothing in applicable national laws or procedural rules, tribunal lacks jurisdiction to order costs against funder.
7. Security for costs applications should be determined on basis of applicable test. Funding arrangement including ATE may be relevant to showing party could meet adverse costs award.
8. Interest rates going up – funding drying up.

# ***II. Some of the players***

## **Funders eg**

- Burford Capital, Curiam Capital, **Deminor**, DE Shaw Group, Fortress Investment Group, Gerchen Keller Capital LLC, GLS Capital, **Harbour Litigation Funding, Litigation Capital Management (LCM)**, Longford Capital Management, Nivalion AG, **Omni Bridgeway**, 9 Parabellum Capital, Tenor Capital Management, Therium Capital Management, Validity Finance and Woodsford Litigation Funding.

## **Associations**

- International Legal Finance Association (ILFA), Washington
- Association of Litigation Funders (ALF), England

## **(Soft) Law**

- Parliament/ Courts
- Legal regulators
  - E.g. ABA White Paper 2011
- Arbitral institutions
  - E.g. HKIAC, SIAC, ICSID, ICC